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Building Safety Bill (Bill 139 of 2021-22)

Contents

Summary

The Building Safety Bill contains a series of reforms to building safety and is the most substantial legislative response to the Grenfell Tower fire in 2017. Second reading of the Bill is expected on Wednesday 21 July 2021.

The Government established the Building Safety Programme and the Independent Review of Building Regulations and Fire Safety (Hackitt Report) in response to the fire. The Building Safety Programme has meant remediation work has been required across thousands of high-rise residential buildings. The Independent Review concluded that a new system of regulation is required for the design, construction and occupation of high-rise residential buildings.

This Bill would make changes to building regulation, management and law, taking forward the Government's plans to implement the review as well as other building-related measures.

The Bill was first published in draft in July 2020. It was subject to pre-legislative scrutiny and the Housing, Communities and Local Government Committee reported in November 2020. The Government responded to that report when it published the Bill on 5 July 2020.

A Building Safety Regulator

The Bill establishes the Building Safety Regulator within the Health and Safety Executive (HSE), which is a government agency. The Regulator will have three main functions:

- To implement a new regulatory regime for higher-risk buildings, and to be the building control authority for these buildings;
- To oversee the safety and performance of all buildings, including the performance of other building control bodies and understanding and advising on building standards and safety risks;
- To support the competence of those working in the built environment industry (anything that is built), and to manage the system of registered building inspectors.

The Bill requires the Regulator to establish three committees to support its work, including a Residents' Panel.

Reforming building control and building regulations

The Bill proposes amendments to the Building Act 1984, that forms the current basis for building regulations and the building control process.

The Building Safety Regulator would be responsible for managing building control for higher-risk buildings. If enacted, the Bill will introduce a three stage 'gateway' process for the construction of higher risk buildings.

Changes to the time limits on building control approval and enforcement procedures are also proposed. The Bill also allows building regulations to set levels of competence for the building process.

The Bill would create a reformed regulatory structure for building control with new roles in the process.

High rise residential buildings during occupation

The Bill's new regime for the management of higher-risk buildings in occupation (those over 18m or 7 storeys or more with 2 more residential units). It creates roles for the management of occupied buildings (the Accountable Person and the Building Safety Manager). A higher-risk building that is occupied will need to have a Building Assessment Certificate from the Regulator. The Accountable Person will have an ongoing duty to manage the safety of the building and maintain a Safety Case Report.

The Bill also requires the Accountable Person to produce a Resident Engagement Strategy and for residents to be able to request specific information. The Accountable Person must put a complaints process in place, including with the potential for escalation to the Building Safety Regulator. The Bill also sets statutory duties for residents.

The Bill would implement an enforcement regime for the occupation of higher risk buildings.

The cost of the new regime for leaseholders

During scrutiny of the draft Building Safety Bill the proposed Building Safety Charge was controversial. The Committee said: "Nothing aroused nearly so much anger or upset in the evidence to our inquiry." There were concerns it could be used to make leaseholders pay for historical remediation works.

The Government has clarified the Building Safety Charge "will only cover the ongoing costs of the new regime." A requirement to pay the new charge will be implied into "relevant leases" of higher-risk buildings.

This clarification has been welcomed but there are ongoing concerns over the potential cost of the new regime. The estimate of £16 per month in the Bill's Impact Assessment has been met with scepticism.

Will the Bill help with fire safety costs?

The Bill doesn't relieve long leaseholders of a potential liability to pay for fire safety works if their lease agreements provide for recovery of these costs. Measures in the Bill are aimed at giving leaseholders in this position additional protection:

- Landlords will be required to take reasonable steps to recover costs through other avenues before passing on costs to leaseholders (clause 124). For example, through insurance claims and guarantees. If reasonable steps are exhausted, the costs may still be recoverable from leaseholders.
- The Defective Premises Act 1972 will be extended so compensation may be claimed for any work which renders a dwelling not "fit for human habitation" (clause 125). Refurbishment work is not currently covered by the 1972 Act. The new provision will not apply retrospectively.
- The period for a claim to be made under the 1972 Act and section 38 of the Building Safety Act 1984 (for breach of a duty related to building regulations) will be extended from six to fifteen years (clause 126). This raises the possibility of claims against developers for new dwellings provided since 2007 if the Bill receives Royal Assent in 2022. The fifteen-year claim period will not apply retrospectively to works not involving the provision of a dwelling, e.g. for refurbishment work.

Leaseholder groups are disappointed that the Bill does not prohibit the recovery of fire safety related costs. The extension of the 1972 Act and the limitation period changes are welcomed, but the ability of leaseholders to mount legal challenges is questioned. For example, many developers are no longer operating. Lucy Powell, the Shadow Secretary of State, has said legal protections need to ensure cladding remediation costs are not passed on "to innocent homeowners and tenants."

The Bill as currently drafted does not make provision for the long term low-interest loan scheme announced on 10 February 2021 for blocks between 11 and 18 metres in height with combustible cladding.

The New Homes Ombudsman (NHO)

The Bill fulfils a commitment made on 1 October 2018 to create a New Homes Ombudsman to "champion homebuyers, protect their interests and hold developers to account."

Owners of new build homes will, within the first two years of buying from a developer, be able to escalate complaints against members of the NHO scheme and have them investigated and determined by an independent individual.

The Bill also contains measures to:

- Amend the system of Construction Products Regulation.
- Amend the Regulatory Reform (Fire Safety) Order 2005.
- Amendments to the Architects Act 1997.

Where does the Bill apply?

Building regulation is generally a devolved matter. Most of the Bill applies to England only.

Changes to the building regulation system which amend the Building Act 1984 also apply to Wales and there are some measures specific to Wales at the request of the Welsh Government.

Clauses regarding the Defective Premises Act, the limitation period for causes of action and the changes to the Regulatory Reform (Fire Safety) Order 2005 apply to England and Wales.

Changes relating to construction product regulation and the Architects Act 1997 apply to the whole of the UK.

1 Why is this Bill needed? A background on building safety

Following the Grenfell Tower fire in June 2017, building safety, both in high-rise residential buildings and across buildings generally has been high profile. This Bill is one of the main outcomes from the Government's reform programme for fire and building safety.

1.1 Grenfell fire

On 14 June 2017 a fire broke out at Grenfell Tower, a 24-storey residential housing block in North Kensington, London. 72 people died as a result.

The tower, which provided social housing, contained 129 flats. The block was owned by the Royal Borough of Kensington and Chelsea, but management of the block was the responsibility of the Kensington and Chelsea Tenant Management Organisation.

The fire appeared to spread rapidly up the building; the current public inquiry has reported that:

> "there was compelling evidence that the external walls of the building failed to comply with Requirement B4(1) of Schedule 1 to the Building Regulations 2010, in that they did not adequately resist the spread of fire having regard to the height, use and position of the building".[1]

Further information on the Government response to the fire, including the ongoing public inquiry and recovery taskforce is in the Library briefing: Grenfell Tower Fire: Background.

1.2 Building Safety Programme

Following the Grenfell Tower fire, the Government set up a Building Safety Programme under the then Department for Communities and Local Government, now the Ministry of Housing, Communities and Local Government (MHCLG).

[1] Grenfell Tower Inquiry: Phase 1 Report Overview, 30 October 2019, para 2.16

As part of the programme the Government appointed an expert panel, chaired by Sir Ken Knight (a former Chief Fire and Rescue Adviser to the Government), to advise the Government on immediate measures needed to ensure building safety and to help identify buildings of concern.

On the issue of cladding, the expert panel advised the Government to screen residential buildings over 18 metres tall to identify the type of aluminium composite material (ACM) used in external wall cladding. The Buildings Research Establishment (BRE) carried out the testing.

The Government published consolidated advice for building owners in January 2020, using and updating the advice notes published by the expert panel since 2017.[2] The new guidance covers issues such as the general approach building owners should take to fire risk (including for buildings under 18m), as well as specific advice on ACM cladding, High Pressure Laminate (HPL) panels, balconies and fire doors.

As a result of the guidance and previous advice notes, remediation work is required on hundreds of high-rise residential buildings with combustible cladding. Progress and funding is a high profile issue and is covered in the Library briefing: Leasehold high-rise flats: who pays for fire safety work?.

The National Audit Office's (NAO) Investigation into remediating dangerous cladding on high-rise buildings in June 2020 includes a timeline of work on building safety up to early 2020.

1.3 The Independent Review of Building Regulations and Fire Safety

Following the Grenfell Tower fire, the Government asked Dame Judith Hackitt, a former Chair of the UK Health and Safety Executive, to lead a review of building regulations and fire safety. This made recommendations intended to ensure a robust regulatory regime in the future and make residents feel safe in their homes. The Library briefing, Building Regulations and Safety: Review and Reforms, provides an overview of proposals and changes to the end of 2019, including the interim and final Hackitt report and the Government's implementation plan.

The interim Hackitt Report, published in December 2017, highlighted concerns around the complexity of relevant regulations, roles and responsibilities, and enforcement.[3] A summary of the report is available on Gov.UK.[4]

[2] Building safety advice for building owners, including fire doors [accessed 27 April 2020]

[3] For more information see Independent Review of Building Regulations and Fire Safety: interim report, 18 December 2017

[4] Summary Section of the Independent Review of Building Regulations and Fire Safety: interim report

The final report of the review, published in May 2018, did not seek to repeat the interim report, but set out a new regulatory framework initially focussed on multi-occupancy higher risk residential buildings (HRRBs) of 10 storeys or more in height (although the review makes clear where the recommendations should be applied more widely).[5] The Government welcomed the proposals and committed to bringing forward future legislation on a new regulatory system.[6]

Findings of the interim report

The interim report found: that the current regulatory system was "not fit for purpose in relation to high-rise and complex buildings".[7]

The report made the following points (taken from sections 1.8 to 1.52 of its summary):

- Current regulation and guidance are unclear – the Building Regulations 2010 are 'clear' but concerns are raised with the 'Approved Documents'.
- Roles and responsibilities in the system are unclear.
- Ways of assessing and ensuring appropriate levels of competence throughout the system are unclear and inadequate – this relates to the building process and fire risk assessments.
- Enforcement and sanction measures are poor and do not provide adequate assurance of compliance, deterrence or redress for non-compliance. This includes monitoring changes through the building process, changes in regulations during the life of a building, compliance issues with building control and information flows for fire safety information.
- A clear way for residents to raise concerns over fire safety, and for these to be addressed, are lacking.
- Current methods for testing, certification and marketing of construction products and systems are not clear.
- There are lessons to be learned from other international regulatory regimes and there could be greater alignment between building and fire regulatory systems and other regimes.[8]

The report also made interim recommendations around building regulations and fire safety (taken from pp25-6 of the interim report):

- The Government should consider how the suite of Approved Documents could be structured and ordered "to provide a more streamlined, holistic

[5] Independent Review of Building Regulations and Fire Safety: final report, 17 May 2018, p12
[6] HC Deb 17 May 2018 c457-8
[7] Independent Review of Building Regulations and Fire Safety Interim Report, 18 December 2017, Para 1.6 (summary)
[8] Ibid, paras 1.8-1.52

view while retaining the right level of relevant technical detail." It asked the Government to consider changes to the document's presentation as an interim measure.

- The related professional and accreditation bodies should work together to come up with a system to ensure those working on the design, construction, inspection and maintenance of complex and high-risk buildings are suitably qualified.
- Consultation by building control bodies and by those commissioning or designing buildings should take place early in the process, and fire and rescue service advice should be fully considered. It said that although consultation with fire and rescue services is required on building plans covered by the Regulatory Reform (Fire Safety) Order 2005,[9] it did not work as intended.
- It is currently the case under the 2005 Fire Safety Order that fire risk assessments for high-rise residential buildings must be carried out 'regularly'. It was recommended that the responsible person ensures these took place at least annually and when any significant alterations are made to the building. These risk assessments should be shared in an accessible way with the residents who live within that building and notified to the fire and rescue service.
- The Government should significantly restrict the use of desktop studies (a way of assessing building materials) to approve changes to cladding and other systems to ensure that they are only used where appropriate and with sufficient, relevant test evidence. Those undertaking desktop studies must be able to demonstrate suitable competence.

There were further recommendations on the phased handover of buildings by building developers, and the transfer of fire safety information from builders to the responsible person.

The final report – a new regulatory system

The summary of the final report set out a new regulatory system and that it must address the weaknesses shown in the interim report " if there is to be a stronger focus on creating and maintaining safe buildings":

> The framework will be based around a series of interdependent, mutually reinforcing changes where one new measure drives another. In doing so it reflects the reality of most high-rise buildings which operate as a complex inter-locking system. Only this genuine system transformation will ensure that people living in high rise

[9] The Regulatory Reform (Fire Safety) Order 2005 is the principal legislation governing fire safety in non-domestic premises

buildings are safe and have confidence in the safety of their building, both now and in the future. [10]

It recommended:[11]

- A new Joint Competency Authority (JCA) made up of Local Authority Building Standards, Fire Authorities and the Health and Safety Executive (HSW) to better manage safety over a building life cycle (including during occupation);
- A mandatory incident reporting mechanism for dutyholders around the safety of a HRRB;
- A set of dutyholder roles and responsibilities;
- Gateway points (required stages with stop/go points) to strengthen oversight of building construction;
- A stronger process to improve record keeping;
- The JCA oversees building standards, using only Local Authority Building Standards (currently Building Control);
- A greater range of enforcement powers;
- A 'clear and identifiable' dutyholder responsible for building safety of the whole building in occupation; with requirements to regularly present information on risk management to the JCA;
- Clearer rights and obligations for residents, and providing opportunities for residents to have more information, be involved in and escalate issues;
- An overarching body to oversee competence requirements;
- There should be a long term aim that guidance on how to meet building regulations is owned by industry, while oversight and the requirements are set out by the Government (with the Government having the right to create guidance if industry is not able to produce suitable guidance);
- Taking forward recommendations from the Expert Group (see section 1.2) on the presentation of Approved Documents;
- A "more robust and transparent" regime for construction products through clearer and more transparent specification and testing; clear statements on what systems products can and can't be used for. Alongside this, changes to the testing regime and there should be a more effective enforcement, complaint investigation and market surveillance regime at a national level for construction products;
- Creating an electronic 'golden thread' record of information about the design, construction and occupation of new HRRBs;
- Changes to procurement practices for HRRBs around safety requirements, and consider extending this to other buildings;

[10] Independent Review of Building Regulations and Fire Safety: final report, 17 May 2018, p12

[11] Taken from Executive Summary of the final report

- A recommendation that the Government should re-join the Inter-Jurisdictional Regulatory Collaboration Committee (IRCC).

1.4 Implementing the Hackitt Report

On 6 June 2019, the Government launched a consultation on proposals to reform the building safety system: Building a safer future: proposals for reform of the building safety regulatory system.[12] This consultation ran until 31 July 2019.

On 5 September 2019, the Secretary of State for Housing, Communities and Local Government, Robert Jenrick updated the House of Common son the new Government's approach to building safety. In the statement, he said he was consulting on changes to fire safety regulations for new-build blocks of flats, that he intended to respond to the building a safer future consultation by the end of the year and legislate "at the earliest opportunity". He also announced the establishment of "a new protection board" to increase fire protection inspections ahead of the new safety regime coming into force.[13]

On 28 October 2019 it was announced that Dame Judith Hackitt would provide independent advice to the Government on how best to establish the new Building Safety Regulator.

On 20 January 2020, Robert Jenrick, made an oral statement to the House[14] on building safety, and provides updates on recent developments:

- the intention to immediately establish a new building safety regulator within the HSE (ahead of legislation),
- the intention to change sprinkler requirements in the future,
- a consultation starting on lowering the level for banning combustible material on external walls,
- the publication of updated and consolidated advice for building owners, including updated advice on ACM panels and fire doors.

On 2 April 2020, the Government published a response to the Building a Safety future consultation, and a wider update on building safety issues. The consultation response outlined the intended changes, which are now set out in the Bill.

[12] MHCLG, A reformed building safety regulatory system: government response to the Building a Safer Future consultation, 2 April 2020

[13] HC Deb 5 September 2019, c372-381

[14] HC Deb 20 January 2020, c23-36

1.5 The draft Building Safety Bill

A Building Safety Bill featured in the December 2019 Queen's Speech but was delayed by pre-legislative scrutiny, ongoing issues regarding the cost of cladding remediation and other changes to the Bill.

The draft Bill was published on 20 July 2020. The Government also published a summary of the draft Bill. The Housing, Communities and Local Government Committee completed pre-legislative scrutiny of the Bill with its report published on 24 November 2020. The Committee's comments on the Bill are built into the sections below on relevant clauses. On 19 January 2021 the Secretary of State provided an update on Building Safety in general,[15] and indicated the Bill would be introduced in the Spring.

1.6 Fire Safety reforms

Fire Safety is the responsibility of the Home Office.

Fire Safety Act 2021

The Fire Safety Act 2021 was introduced in Parliament in March 2020 and received Royal Assent in April 2021. It amended the Regulatory Reform (Fire Safety) Order 2005.

The Act clarifies that the Order, which is the main part of fire safety law applying to any building with two or more sets of domestic premises , applies to the building's structure and external walls and any common parts, including the front doors of residential areas. It also clarifies that references to external walls in the Order include "doors or windows in those walls" and "anything attached to the exterior of those walls (including balconies)."

These amendments to the Order aim to increase enforcement action in these areas, particularly where remediation of aluminium composite material (ACM) cladding is not taking place. Further detail is given in the Library's briefing on the Fire Safety Bill 2019-2021.

While the Bill was passed at the end of April, it requires secondary legislation to come into force. This will happen at the same time as risk-based guidance on buildings is issued by the Secretary of State. This has not yet happened.

There was considerable debate during the progress of the Bill on the cost of remediation and leaseholder liability but, in the end, no provisions for this were included.

[15] HCWS722 19 January 2021

Consultation on the Fire Safety Order

On 20 July 2020, a consultation on changes to the Fire Safety Order was launched. This is separate to the Fire Safety Bill, but part of the Government's overall changes to building safety.

The consultation closed on 12 October 2020. A Government response was published on 17 March 2021 and noted the changes would come in three ways:

- legislating through the Building Safety Bill to strengthen the Fire Safety Order in a number of areas.
- delivering new regulations through Article 24 of the Fire Safety Order in response to the Grenfell Tower Inquiry Phase 1 Report recommendations.
- implementing changes to improve engagement between building control bodies and fire and rescue services.

The Building Safety Bill implements some of these changes to the Fire Safety Order.

1.7 The situation in Wales, Scotland and Northern Ireland

Wales

Building safety and building regulations are a devolved matter for Wales. However, England and Wales share broadly the same legislative basis for current requirements as the Building Act 1984 and the 2010 Building Regulations; powers regarding building regulations were devolved in 2012.

A general overview of the Welsh Government's plans is set out in its Building Safety - Position Statement (last updated 3 September 2020). This covers progress in removing ACM cladding from high-rise buildings in Wales and outlines plans to reform regulations and fire safety in high-rise buildings. The Welsh Government estimate there are around 148 high rise residential buildings in Wales.

The Welsh Government published its plans for Building Safety in a consultation on 12 January 2021. A response to the consultation is expected in Autumn 2021.

The consultation indicates the Welsh Government intends to implement a similar system of building safety for high-rise residential buildings. Its plans take account of the Hackitt Report, includes gateways in the design and construction of buildings, a revised system of building control and a safety regime during occupation. The Welsh Government has asked the UK

Government to legislate in the Building Safety Bill for Wales where it supports its intentions:[16]

> Some proposals, particularly those relating to the occupation phase, will need primary legislation to be taken through the Senedd. The changes we propose in this area are detailed in sections 7 & 8. However, the publication of the draft Building Safety Bill by the UK Government, has presented an opportunity to take earlier action in our efforts to respond to the need to modernise both the building control system and the way the construction industry discharges its responsibilities. Therefore we have made the decision to ask the UK Government to make a number of changes to the Building Act 1984 on our behalf. These are in relation to dutyholders during design and construction, powers to allow the introduction of Gateways for residential buildings 18m or more in height or more than 6 storeys; and resolving conflicts of interest, for example where a Local Authority are developing a Category 1 building in their area, but are also acting as the building control body, more information can be found at section 4.2.

Scotland

Building safety and building regulation are a devolved matter for Scotland.

An overview of how the system works is given in the 2017 Scottish Parliament Information Centre briefing: Scottish Building Standards and Safety: A brief overview.

Further information on building safety reform in Scotland is available from the webpage of the Building and Fire Safety: Ministerial Working Group.

Northern Ireland

Building regulations and safety are a devolved matter for Northern Ireland.

A webpage sets out the background to building regulations in Northern Ireland. Recent written questions in the Northern Ireland Assembly suggest the administration is considering a building safety programme.[17]

[16] Welsh Government, Safer Buildings in Wales: A Consultation, 12 January 2021, pp6-7

[17] AQW 14999/17-22, 2 March 2021

2 What does the Bill cover?

The Building Safety Bill was published on 5 July 2021 and introduced on the same day.

The key changes in the Bill are:

- To establish the Building Safety Regulator within the Health and Safety Executive (HSE) with responsibility for regulating higher risk buildings, overseeing the safety and performance of all buildings and supporting competence among the built environment industry.
- Amend the Building Act 1984 to reform Building Regulations and Building Control, particularly for higher-risk buildings.
- Create new roles for the management of higher risk buildings, setting out how these buildings should be managed over their life cycle, particularly once occupation commences.
- Introduce provision for Building Safety Charges in leasehold properties.
- Regulation for construction products.
- Amendments to the Regulatory Reform (Fire Safety) Order 2005.
- Measures relating to architect's registration.

A range of information relating to the Bill has been published:

- Building Safety Bill – Bill 139 2021-22 (as introduced)
- Building Safety Bill – Explanatory Notes, 5 July 2021
- Draft regulations relating to higher risk buildings and dutyholders
- An Outline Transition Plan for the Building Safety Bill
- The Full Impact Assessment (5 July 2021)
- The Delegated Powers Memorandum
- A series of factsheets on:
  - Dutyholders
  - Industry competence
  - Buildings included in the new more stringent regulatory regime
  - Impact Assessment

On publication of the Bill the Government said:

> The [Bill is the] next step in ground-breaking reforms to give residents and homeowners more rights, powers and protections – making homes across the country safer.

This will overhaul regulations, creating lasting generational change, setting out a clear pathway on how residential buildings should be constructed, maintained and made safe.

It also sets out the framework to improve compliance, with tougher penalties for those who break the rules and mandates developers to belong to a New Homes Ombudsman scheme.

What this means for residents and homeowners

Residents in high-rise buildings will have more say in the management of their building.

They will be able to raise building safety concerns directly to the owners and managers of buildings, who will have a duty to listen to them.

And if residents feel concerns are being ignored, they can raise them with the Building Safety Regulator.

All homeowners will also have more than twice the amount of time, from 6 to 15 years, to claim compensation for sub-standard construction work.

This will apply retrospectively – meaning that, properties built up to 15 years prior to this change coming into effect will be able to bring a claim for compensation for defective work.

What this means for building owners

Building owners will be required to manage safety risks, with clear lines of responsibility for safety during design, construction, completion and occupation of high-rise buildings.

We will also require a golden thread of information, with safety considered at every stage of a building's lifetime – including during the earliest stage of the planning process.

Building owners will need to demonstrate that they have effective, proportionate measures in place to manage safety risks.

Those who don't meet their obligations may face criminal charges.

What does this mean for the built environment industry?

The Bill will create a clear, proportionate framework for the design, construction and management of safer, high-quality homes in the years to come.

It will strengthen the construction products regulatory regime, with new requirements to make sure more products are safe, while paving

> the way for a National Regulator for Construction Products to oversee and enforce the rules.
>
> A new developer tax, and a levy on developers are also being introduced to ensure that the industry makes a contribution to setting things right.[18]

2.1 General comment and reaction to the Bill

The Bill was welcomed by industry and professional groups, but concerns were raised with specific elements.

Several groups, such as the Royal Institution of Chartered Surveyors (RICS), raised concerns that the system of higher-risk buildings raised the potential for a "2-tier system of regulation especially when low rise buildings can create risk depending on the nature of occupancy."[19] The Fire Protection Association similarly argued that the classification of, and concentration on higher-risk buildings meant fire safety in other buildings remaining a risk:

> We are sympathetic to the Government's argument that they must focus where the risk is highest, but as a result, vast swathes of buildings below this height are ignored and their risks unquantified.[20]

The Chartered Institute of Housing welcomed publication of the Bill, a number of the changes since the draft Bill and the further information provided, such as the transition plan, which it said would "help ensure future dutyholders can start preparing and implementing changes for the new regime immediately". However, it cautioned:

> ...Questions remain about whether there will be enough qualified individuals to perform the new roles outlined in the Bill, how they will be recruited and trained, and whether or not they will be able to access insurance. The satisfactory consideration of these questions will be crucial to the practical implementation of the bill.[21]

The Royal Institute of British Architects (RIBA) President, Alan Jones, said they would work with the new Building Safety Regulator to implement the changes but raised concerns over how the Bill would work in practice, giving the example that:

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[18] MHCLG, Building Safety Bill, 5 July 2021

[19] "RICS response to the publication of the Building Safety Bill", 7 July 2021

[20] " "Not listening to the experts", the FPA responds to the Building Safety Bill", Fire Protection Association, 8 July 2021

[21] "CIOB's initial analysis of the Building Safety Bill", 6 July 2021

> ...we remain concerned that the proposed system does not fully address the fractured nature of current construction, procurement and contractual arrangements, which lack continuity of expertise.[22]

The End of Cladding Scandal (EOCS) Group "very cautiously" welcomed the Bill and said it would be "carefully scrutinising" it. However, it suggested the extended time to take action on building defects would still be a "David and Goliath battle":

> One of the most headline-grabbing initiatives has been that leaseholders will get extra time to take legal action against developers over safety defects. If only it were that simple. The truth – as the Government well knows – is that this is a David and Goliath battle. It pits leaseholders, already struggling with waking watch bills, exorbitant insurance hikes and enormous remediation costs, against well-funded, powerful and often aggressive developers who know the system is stacked in their favour. Many will simply argue that they cannot be sued because the Government retrospectively changed legislation, then walked away from the mess it created. Even where there are clear breaches of building regulations, leaseholders, already exhausted, will face years of demoralising and costly legal fights with little certainty of success.[23]

Writing in Politics Home, The Lord Bishop of St Albans, who supported cladding related amendments to the Fire Safety Bill during its progress, welcomed the measures to manage the construction of new buildings, but questioned whether the measures to pursue historical building defects were sufficient, questioning whether fifteen years was sufficient, and the practicality of residents pursuing developers.[24] The LGA argued that more funding had to be made available to support remediation work and to address the "chronic shortage of fire engineers and other competent professionals in the UK today."[25]

Lucy Powell, Shadow Housing Secretary, said that the legislation was "badly needed" but that leaseholders needed legal protection from cladding remediation costs:

> Four years after the Grenfell tragedy, stronger building safety regulation is badly needed. Whilst this Bill makes important changes to regulation into the future, we needed urgent action and leadership to protect the hundreds of thousands of people already trapped, facing huge bills to fix historic failures.
>
> Rather than yet another betrayal of their promises to leaseholders, we need legal protections to ensure that millions of pounds of

[22] "RIBA responds to Building Safety Bill", 6 July 2021

[23] "EOCS Response to the Building Safety Bill", 7 July 2021

[24] "More action is needed to afford leaseholders protection in the Building Safety Bill", The House, 8 July 2021

[25] "LGA responds to Building Safety Bill", 5 July 2021

> cladding remediation costs are not passed on to innocent homeowners and tenants.
>
> This is what the Government promised, and Labour will work cross-party to fight for protections to be included in the Building Safety Bill.[26]

2.2 Overall cost of new regime

The Government's impact assessment factsheet set out the costs and benefits of the new regime. The full impact assessment is also available.

The Bill imposes costs on industry and regulators. The total annual recurring cost of the new Building Safety Regime is £426.8m:

> 24. From the £426.8m, we estimate that £411.2m will arise directly from the Bill. Of that, we estimate that:
>
> - £283.7m will fall on industry (see below for discussion of the building safety charge).
> - Regulators will incur £127.5m (before cost recovery – see below for discussion of cost recovery by the Building Safety Regulator).
> - We expect £15.6m will come from other requirements including; the New Homes Ombudsman, Mandating Plan Certificates and the Fire Safety Order.

The developer levy is treated is note detailed as cost or benefit in the assessment but as a financial transfer to support the cost of historical remediation work. One-off transitional costs for the first two years of the system will be £812m; with around £731m falling on industry and £81m on regulators.

The impact assessment breaks the annual £426.8m into the areas of change:

> - Building Safety Regulation - £342.3m. We expect the main drivers of cost from the new regime to be from:
>
> – Safety Cases (existing and new buildings) - £91.8m, safety cases are a requirement of the accountable person/s to verify they have identified and assessed the building safety risks relating to the building, and taken reasonable and practicable steps to prevent a building safety risk materialising. The majority of

[26] Labour Party, "Lucy Powell responds to publication of Building Safety Bill", 5 July 2021

costs will arise from producing and maintaining a Safety Case Report (a document that explains how the building safety risks in a building are being effectively managed on an ongoing basis, with an explanation and justification of the approach being taken to manage risks, the compilation of which might require contracting a team of technical experts). We expect that the costs of the safety case will be higher in the first two years of the new regime as a result of transitional costs.

- Gateways (new builds only) - £54.4m, Gateways will act as hard stops throughout the design and construction phase of a new building to ensure the dutyholder possesses the required documentation for each new building in scope and that the building meets the prescribed standards. The Gateways will require developers to demonstrate compliance by providing key documents (e.g. golden thread) at various gateway points. The level of completeness of each component will be dependent on the gateway in which they are checked. The regulator also has the right to inspect any development.
- Other costs - £196.1m. The other costs are made up of: dutyholder responsibilities, wider dutyholder activities, registrations, mandatory occurrence reporting, residents engagement strategy, residents complaints handling and escalation, refurbishments, sanctions, oversight, high rise residential building management, ensuring industry competence and training costs.

- Construction Products Regulation - £69.0m
- New Homes Ombudsman - £1.6m
- Mandating Plan Certificates - £2.9m
- Fire Safety Order Amendments - £11.0m

The new regulatory regime is also expected to bring financial and non-financial benefits. The overall aim is to reduce the risk of major fire and structural incidents in in-scope buildings, in turn leading to reduced fatalities and casualties, property damage and other associated costs. Overall financial benefits are expected to be between £159m and £635m per year.

2.3 Timing

On 5 July 2021 the Government published an Outline Transition Plan for the Building Safety Bill. For each part of the bill it sets out when the measures are expected to be implemented. The plan expects the Parliamentary process to take no less than nine months because it is a large and complex bill.

The plan outlined that the following measures are expected to come in to force within 12 months of Royal Assent:

- Establishing the Residents' Panel within the Building Safety Regulator.
- Extending the limitation period of the Defective Premises Act 1972 retrospectively - and applying this Act to refurbishments prospectively.
- Additional powers for the regulation of construction products, including paving the way for a national regulator for construction products, which is being established within the Office of Product Safety and Standards (OPSS).
- Changes to the Regulatory Reform (Fire Safety) Order 2005.
- Strengthening the powers of the Architects Registration Board to monitor the competence of architects.
- Provision for social housing residents to access the Ombudsman directly.

The plan expects the 'bulk of the new provisions' to come into force within 12 to 18 months of Royal Assent.

2.4 Statistics on high-rise buildings

MHCLG publishes estimates of the number of high-rise residential buildings in England, and the number of homes in those buildings, as part of its monthly Building Safety Programme statistical release. The most recent estimates at time of writing are summarised in the table below. [27]

MHCLG estimates that there are **12,500** residential buildings in England that are either 18 metres or more in height, or more than six storeys tall. These buildings were estimated to contain **691,000 homes** (an average of 58 per building) and **1.31 million residents**.[28] Around half of these buildings are estimated to be in the social rented sector, and around half in the private sector.

[27] MHCLG, Building Safety Programme: monthly data release – June 2021

[28] MHCLG's methodology means that these estimates relate to different time periods. The figure for the number of buildings is as at April 2020, while the figure for the number of homes is as at November 2020 and the figure for the number of residents is as at February 2021.

The number of buildings that are 11-18 metres in height has also been estimated by MHCLG. MHCLG estimates that there are 76,000 such buildings, containing 1.42 million homes and 2.56 million residents.

Estimates of high-rise residential buildings in England, 2020/21

Height	Buildings	Homes	Residents
18 metres and up*	**12,500**	**691,000**	**1,310,000**
11-18 metres	**76,000**	**1,420,000**	**2,560,000**
11-13 metres	57,000	882,000	..
14-16 metres	16,000	417,000	..
17-18 metres	3,000	101,000	..
Total 11 metres and up	**88,500**	**2,110,000**	**3,870,000**

* Or over 6 storeys

Source: MHCLG, Building Safety Programme: monthly data release – June 2021

The Building Safety Bill also makes reference to hospitals and Crown buildings.

MHCLG estimates that **274 hospital buildings are over 18 metres in height** (5% of all hospital buildings). It estimates that a further 440 hospital buildings are 11-18 metres in height (8% of all hospital buildings). These figures are likely to be an over-estimate, as not all buildings on hospital sites will have in-patient beds; MHCLG also notes that these estimates are prototypes and are likely to have some data quality issues. [29]

MHCLG also estimates that there are a maximum of 10 care homes that are over 18 metres in height, with 98% of care homes being under 11 metres in height. [30]

The statistical release also reports that the Crown Estates estimate that there are approximately **70 Crown buildings that are over 18 metres**, of which at least two are residential. [31]

MHCLG's estimates are for England only. The Welsh Government said in a position statement in September 2020 that "there are 147 high rise residential buildings in Wales with around 4 or 5 additional high rise buildings being built each year".[32] This figure refers to buildings that are 18 metres or more in height, or over six storeys.

[29] MHCLG, Building Safety Programme: monthly data release – June 2021, pp. 13-14

[30] Ibid.

[31] Ibid., p.9

[32] Welsh Government, Building safety: position statement, 3 September 2020

2.5 Territorial Extent

In general, building safety and regulation is devolved and the measures apply in England only. However, the Welsh Government have asked the UK Government to extend some of the building safety measures to Wales for use in their planned system. Some specific measures, around construction products and architect regulation, relate to the whole of the UK.

The Bill extends to England and Wales only except:

- Amendments to the Health and Safety at Work etc Act 1974 to take account of the new Regulator in England (extends to Scotland).
- Changes relating to construction product regulation which extend to the whole of the UK.
- Changes to the regulation of Architects which extend to the whole of the UK
- General clauses 139, 140, 142, 144-7 which extend to the whole of the UK.

The Bill applies to England only except:

- The overview in clause 1 (but has not practical effect)
- Clauses 21 and 22, and schedule 2, on investigatory powers for authorised officers (for the regulator) apply in England and Wales.
- Changes relating to construction product regulation apply to the whole of the UK. (clause 133 and schedule 9)
- Clauses 135 and 136 which amends the Architects Act 1997 applies to the whole of the UK
- General clauses 139, 140, 142, 144-7 which apply to the whole of the UK.
- Schedule 1 (and clause 2(2) which introduces it) applies to England and Wales and Scotland (with some exceptions).
- The Part 3 provisions and Schedules 4, 5 and 6, which amend the Building Act 1984, mostly also apply to Wales, and a very limited number of these provisions apply only to Wales.
- Clause 125, which amends the Defective Premises Act to allow for compensation where defective work in relation to refurbishments has rendered a dwelling unfit for habitation applies in England and Wales.
- Clause 126, which deals with changes to the limitation periods for the causes of action applies in England and Wales.
- Clause 134, which amends the Regulatory Reform (Fire Safety) Order 2005 applies in England and Wales.
- Clauses 138 (liability of officers of body corporate etc) and 142 (Crown application) apply to England and Wales.

- Clause 143, which gives Welsh Ministers the power to make consequential provision applies to Wales only.

A Legislative Consent Motion is being sought from Senedd Cymru in relation to the changes above the relate to Wales.

A Legislative Consent Motion is not being sought from the Northern Ireland Assembly in relation to clauses 135 and 136 which make changes to the regulation of the architectural profession. This is because it relates to a UK-wide regulator and Northern Ireland has not legislated on this. The explanatory notes states that informal consent has been sought.

3 A Building Safety Regulator (clauses 2-29)

Part 2 of the Bill establishes the Building Safety Regulator within the Health and Safety Executive (HSE).

3.1 What will the regulator do?

The explanatory notes set out the key functions of the Regulator (direct quote):[33]

- Implementing the new, more stringent regulatory regime for higher-risk buildings. This means being the building control authority in England in respect of building work on higher-risk buildings and overseeing and enforcing the new regime in occupation for higher-risk buildings. The Building Safety Regulator will work closely with, and take advice from, other regulators and relevant experts in making key decisions throughout the lifecycle of a building. It will have powers necessary to bring together teams including Fire and Rescue Services, and local authority expertise (notably Local Authority Building Control teams) to assist it in making regulatory decisions.
- Overseeing the safety and performance of all buildings. This has two key aspects:
    - Overseeing the performance of the building control sector. This will involve developing key performance indicators (KPIs) related to building control work, data collection and powers to impose sanctions for poor performance.
    - Understanding and advising on existing and emerging building standards and safety risks including advising on changes to regulations, changes to the scope of the regime and commissioning advice on risks in and standards of buildings.
- Assisting and encouraging competence among the built environment industry and registered building inspectors. This has two key workstreams:
    - Assisting and encouraging improvement in competence of the built environment sector through several functions, including

[33] Bill 139 EN 2021-22, p10

establishing and setting 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 as a building control professional that will be common across both public sector (local authorities) and private sector (registered building control approvers, currently known as Approved Inspectors).

The Regulator is an organisation and will be led by the Chief Inspector of Buildings. The organisation exists in shadow form, and Peter Baker was appointed to the Chief Inspector role in February 2021.[34]

A key role for the Regulator will be around higher risk buildings where it will be responsible for all regulatory decisions for design, construction, occupation and refurbishment. This role is a clear outcome from Grenfell and the Hackitt Report and will result in substantial changes for this sector. Sections 4.3 and 5.1 provide further detail on what qualifies as a higher risk building.

The Building Safety Regulator will also have the power to establish and maintain Committees to support and advise its work. The Bill requires it to establish and maintain three specific Committees:

- The Building Advisory Committee, which will replace the Building Regulations Advisory Committee for England (BRAC), and will give advice and information to the regulator related to most of its building functions.
- Committee on Industry Competence, which will advise the regulator and those in the built environment industry about industry competence, and provide oversight of competence generally and sector-specific competence frameworks.
- A Residents' Panel made up of higher-risk building residents and other relevant persons. The Regulator will consult this committee on certain matters of particular interest and importance for residents of higher-risk buildings.

The Regulator is given a range of enforcement powers in this part of the Bill.

In pre-legislative scrutiny the Housing, Communities and Local Government Committee supported the establishment of the Building Safety Regulator in the HSE.[35]

[34] HSE, HSE announces new Chief Inspector of Buildings, 16 February 2021

[35] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466

3.2 Cost of the Regulator

The Impact Assessment provides estimates of the cost of the new Regulator where the central estimate of gross costs is £85.8 million, excluding cost recovery. This is broken down as follows:

- Building Safety Regulator, £60.1m
- Local building control bodies, £9.6m
- Local Fire and Rescue Authorities, £13.2m
- Local Environmental Health Officers, £2.9m

These costs will be partially offset by fees and charges raised from regulated parties (see 2.2 and 3.3). The Building Safety Regulator will be responsible for compensating local regulators and/or enforcement bodies for the resource it draws upon. The net costs, including an optimism bias, are expected to be £46.6 million. The impact assessment also provides details on the potential number of additional staff required – potentially 250-455 FTEs (full-time equivalents) for the Building Safety Regulator; there is a central estimate of a total of 100 additional FTEs for Local Authorities, 120 for Fire and Rescue authorities and 33 for Environmental Health Officers.[36]

In pre-legislative scrutiny, the HCLG Committee welcomed the mix of charging and cost recovery, noting that it also welcomed "the Minister's partial commitment to ringfenced funding for those functions of the regulator that cannot easily be financed by the market, although we would welcome a firmer commitment from the Government in that regard." The Committee recommended the Government publish the details of the charging regime of the regulator in full with the Bill and commit to ringfenced central funding where cost recovery was not practical.[37]

The Government response to the Committee welcomed the comments and noted that funding to HSE for building regulation would be ringfenced. It promised further information on the cost recovery regime in summer 2021:[38]

> 64. The Government is working closely with the Health and Safety Executive to develop the policy around cost recovery. The Health and Safety Executive is actively engaging partners to ensure the future cost recovery approach works, for example engaging the Joint Regulators Group in work to ensure reimbursement arrangements for local authorities and FRAs will work in practice.

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[36] Building Safety Bill Impact Assessment, 5 July 2021, paras 196-198. Also see MHCLG, Impact Assessment: factsheet, 5 July 2021, paras 26-33

[37] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, para 90-91

[38] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, para 61-5

65. The Government will work with the Health and Safety Executive to publish substantial further information on the cost recovery regime in Summer 2021, to support parliamentary scrutiny of the Bill.

3.3 Clauses

Clause 2 of the Bill establishes the Building Safety Regulator ("the Regulator") in the Health and Safety Executive (HSE). The clause introduces Schedule 1 of the Bill which amends the Health and Safety at Work etc. Act 1974 with regard to the Building Safety Regulator's new responsibilities.

The Objectives and 'Regulatory Principles' of the Regulator are established in **Clause 3**. This states that the regulator must exercise its 'buildings functions' 'with a view to':

- securing the safety of people in or about buildings in relation to risks arising from buildings (including those people in or in the immediate vicinity of a building), and
- improving the standard of buildings.

On the second objective the explanatory notes set out that "The Health and Safety Executive could fulfil this objective by taking steps that either improve the quality of a standard or lead to more consistent compliance with an existing standard." To carry out an activity the regulator may consider that only one objective is relevant or carries more weight.[39]

'Building functions' are defined in the Bill as:

- Building functions provided for in this Bill, the Building Act 1984, and related regulations.
- HSE functions defined as building functions by regulations or those provided for under the Health and Safety at Work etc. Act 1974 (including the amendments made by this Bill.

The Bill sets out the principles the regulator should use:

- regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent, and;
- regulatory activities should be targeted only at cases in which action is needed.

These principles do not apply when the regulator is undertaking more general functions such as under clauses 4 to 6, which focus on driving culture change

[39] Bill 139 EN 2021-22, p28-9

and improvement across whole industries, or monitoring safety and standards across all buildings.

Clauses 4 to 6 of the Bill establish three broad duties, and examples of their use are given in the explanatory notes (pages 30-32). The duties are:

- A duty to facilitate building safety in higher risk buildings, by providing assistance and encouragement to relevant persons (who are defined in the Bill).
- A duty to keep safety and standards of buildings under review.
- A requirement to facilitate improvement in competence of industry and building inspectors by providing assistance and encouragement to persons in the built environment industry and registered building inspectors.

The Regulator will have the power to propose regulations under parts 2 and 4 of the Bill (except those made under clause 59, clause 62 and clause 65, where there are specific procedures in place). Parts 2 and 4 of the Bill cover the Regulator and higher-risk buildings. **Clause 7** sets out the process, including consultation, for these regulations. The explanatory notes states that this approach "...reflects the fact that the Building Safety Regulator will, in most cases, be best positioned to propose changes to the regulations".[40]

In pre-legislative Scrutiny the HCLG Committee heard evidence that property protection should be among the regulator's objectives. The committee agreed that the current draft was sensible but recommended that:[41]

> ... the Government keep the objectives of the regulator in clause 3 under review and that it consider including property protection among them once the regime has been established. To this end, we recommend that the Government take a power in the Bill to amend by regulations the list of the regulator's objectives.

The Government agreed with the Committee's recommendation that it should keep the objectives under review. It highlighted the review of regime clause (139) that provides for a review within 5 years. The Government suggested that this would be an appropriate time to reconsider the Regulator's objectives and that:[42]

> 53. Following the independent periodic review, the Government will have to consider what legislative and/or non-legislative steps are required to implement recommended improvements. Given the likelihood that the periodic review will make recommendations

[40] Ibid., p32

[41] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, para 75

[42] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, paras 48-53

> covering several legislative provisions, the Government does not think it is possible to avoid the potential need for primary legislation by taking further delegated powers in advance.

Voluntary reporting

Clause 8 of the Bill requires the Regulator to arrange for a person to establish a voluntary reporting system on building safety. This provision relates to recommendation 1.4 of the Hackitt Review that the existing Confidential Reporting on Structural Safety (CROSS) be extended and strengthened to cover a wider range of engineering safety concerns. The intention of a voluntary system is that it should confidentially capture occurrences that are of a lower risk level and are of value to industry for information sharing, intelligence gathering and improvement of safety within the built environment. Significant risks are captured through a separate mandatory reporting system for higher-risk buildings.

During pre-legislative scrutiny the Committee recommended that the regulator should not operate this system and it should give it to someone else. The Government accepted this recommendation and updated the clause.[43]

Committees

Clause 9 to 11 establish the Building Advisory Committee, the Committee on Industry Competence and the Residents Panels. For all three committees the Bill requires use of section 11A(3) of the Health and Safety at Work etc Act 1974 (as amended by schedule 1) to appoint people to committees and remunerate them. The Bill abolishes the Building Regulations Advisory Committee for England, established under section 14 of the Building Act 1984. Examples of how the Committees might work are given in the Explanatory Notes. All three committees are a result of the Hackitt report recommendations. Under **Clause 12** the Secretary of State can amend or repeal by regulation these provisions.

The purpose of the Residents' panel (**clause 11**), as explained by the explanatory notes, is to "ensure that residents have a voice in the work of the Building Safety Regulator, and the Building Safety Regulator has a broad power to consult the residents' panel on any of its functions which impact the residents of higher-risk buildings." The panel must include residents of higher-risk buildings and the explanatory notes add the additional following groups that may be members:[44]

> owners of residential units (e.g. flats) in higher-risk buildings who are not occupying the property (who could, for example, be impacted by expenses relating to the higher-risk building); and

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[43] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, para 54

[44] Bill 139 EN 2021-22, p38

> groups or organisations which are representative of residents and/or non-occupying leaseholder owners, advocate for them or support them.

The Bill sets out specific circumstances when the residents' panel should be consulted (11(4)):

> (a) guidance to residents of higher-risk buildings about any of their rights or obligations under Part 4 or regulations made under that Part;
>
> (b) guidance relating to any duty under regulations made under section 89 to give information or documents to residents of higher-risk buildings or owners of residential units in such buildings;
>
> (c) guidance relating to any of sections 91 to 93 or 95 or regulations made under any of those sections (engagement with residents etc, and residents' duties).

There are also requirements under clause 17 to consult the panel on the regulator's strategic plan, and under 94 to consult the panel on the system for dealing with complaints escalated to the regulator.

The ability for the Secretary of State to abolish the Committees by regulation was questioned by the HCLG in pre-legislative scrutiny. It argued the power to abolish should be removed from the Bill.[45] In response the Government argued that the Regulator should have the ability to adjust the structure of Committees over time, drawing on examples of changes within the HSE since 1974. It states that any changes require consultation, and the regulations require the affirmative procedure in both Houses.[46]

Assistance from other bodies

Clauses 13-16 of the Bill deal with assistance given to the regulator from other bodies in their regulation of higher risk buildings. Clause 13 provides for assistance from local authorities and fire and rescue authorities, and includes a power for the regulator to direct them when providing support. Clause 14 provides for assistance from Crown Premises Fire Safety Inspectors who regulate Crown Premises, but this does not include a power to direct because of their status as Crown servants. An authority providing staff must ensure they are appropriately qualified. The Bill allows for assistance from local authorities and fire and rescue authorities to be paid for, and the Secretary of State has regulation making powers relating to costs and to make further provision for support to the regulator. Clause 16 allows for guidance to be

[45] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, para 82

[46] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, paras 55-60

issued on support under these provisions. The explanatory notes give an example of its use:[47]

> The guidance could set out what type of competence (skills, knowledge, experience and behaviours) should be demonstrated by local authority building control specialists, when supporting the Building Safety Regulator's work on any complex and higher-risk construction projects, and in order to comply with the requirements around competence in clause 15.

Reporting

Clauses 17-20 deal with the reporting requirements for the Building Safety Regulator. It must:

- Publish a strategic plan setting out how it proposes to carry out its building functions. The first plan must be as 'soon as reasonably practical' after clause 17 comes into force. The plan is submitted to the Secretary of State for approval and the Resident's Panel must be consulted. The Bill provides for the revision of the plan.
- Publish an annual report of aggregated information it has received from dutyholders through mandatory occurrence reporting requirements in the Bill.
- An annual statement, which can be in the regulator's annual report, about how it has engaged with residents of higher-risk buildings and related groups, including the Residents' Panel.

Enforcement

Clause 21 allows the Building Safety Regulator to authorise individuals so that they can exercise powers in relation to 'relevant building functions'. These relevant building functions include building control functions under the Building Act 1984 and the function of enforcing the new occupation regime for higher risk buildings. The authorised person must be suitably qualified and have written authorisation.

Clauses 22 and 23 deal with offences in relation to enforcement – both obstructing an authorised officer in their role is an offence, as is impersonating an authorised officer with intent to deceive. Both offences are subject to a fine. The provision of provide false or misleading information to the regulator is also an offence subject to an unlimited fine, along with up to two years' imprisonment in the Crown court or 12 months' imprisonment in a magistrates' court.[48]

Schedule 2 of the Bill sets out the investigatory powers of authorised officers under the Bill. It provides for entry to a non-domestic premises with and without a warrant, entry to domestic premises with a warrant, powers to

[47] Bill 139 EN 2021-22, p41

[48] Ibid., p46

require information and to retain evidence. Failure to provide the required information, facilities or assistance without a reasonable excuse will be a criminal offence subject to an unlimited fine, along with up to two years' imprisonment in the Crown court or 12 months' imprisonment in a magistrates' court.[49]

Review and appeals

Clauses 24 and 25 deal with the ability to review and appeal the regulator's decisions. This relates to regulatory decisions, such as around gateway applications, rather than enforcement decisions. How the review process will work will be set out by regulation, and the clauses provide for the regulator to be asked to review a decision. Only after a review can the decision be appealed to the First-tier Tribunal.

Information sharing, fees and charges

Clause 26 introduces **Schedule 3,** which creates the power for reciprocal information sharing between the Building Safety Regulator and other persons in connection with certain statutory functions. Schedule 3 also provides for cooperation between relevant bodies. The explanatory notes describe the intent of these provisions:[50]

> …to foster a culture of joint working between the Building Safety Regulator and other regulators and enforcement bodies operating in the same regulatory landscape (with functions relevant to building standards and safety), to support one another to discharge their statutory functions effectively.

Clause 27 allows for the Secretary of State to make regulations to enable the regulator to charge fees or recover costs relating to their functions. These fees and charges will relate to work under parts 2 and 4 of this Bill and relevant functions under Health and Safety At Work etc Act 1974.

[49] Ibid., p205
[50] Ibid., p50

4 Building Regulation and Control Reform (clauses 30-57)

The Building Act 1984 (along with the Building Regulations 2010) is the basis for the current system of building regulation in England and Wales. As amended, it forms the basis of:

- The setting of building regulations and the standards required;
- The process requirements for showing compliance;
- The system of building inspection
- The duties and powers of Local Authorities.

Building regulations are aimed at securing the health, safety, welfare and convenience of people using or affected by a building, and of conserving water and energy and reducing waste. The Building Regulations represent minimum standards. They generally apply to new buildings or where refurbishments relevant to the regulations are taking place.

Work is 'approved' through a monitoring and inspection process as the build takes place. Approval can come directly from local authority run building control services, or through private approved inspectors (PAIs). The role of building control inspectors is to ensure that the technical standards are met - i.e. they perform a compliance role, normally achieved through periodic site inspections and in some cases, approved plans. The inspectors are not responsible for monitoring build quality. A local authority has a duty to ensure that building regulations are being complied with in its area.

An overview of the current system of building regulation for all buildings can be found in the Government's: Manual to the Building Regulations (in England).

4.1 What does the Bill change?

Part 3 of the Building Safety Bill amends the Building Act 1984 to make a series of changes to building control and regulation.

It is proposed that the Building Safety Regulator establish and maintain a register of building inspectors (individuals) and building control approvers (either organisations or individuals). Individuals and organisations currently known as 'Approved Inspectors' who wish to continue undertaking building control work will need to register as 'building control approvers'. The role of a registered building inspector being introduced in this Bill is new. A registered

building inspector is an individual who will be able to provide advice to local authorities or registered building control approvers overseeing building work. Many inspectors in local authorities and Approved Inspectors are expected transition to this role.

Other changes in the Bill include:

- Removing the ability of a person carrying out building work on higher-risk buildings to choose their own building control body where building control is required.
- Changes to procedures for initial notices.
- Allow the Secretary of State to make regulations as to how the new regulatory regime for higher-risk buildings will be applied (if at all) to a public body designated under sections 5 or 54 of the Building Act 1984
- Provide Information gathering powers on building control for the Regulator and Local Authority Building Control.
- Require the Building Safety Regulator to set up the new national electronic register/portal of information governing the work of registered building control approvers.
- Amend the existing powers to give the Secretary of State the ability to designate bodies for the purposes of publishing criteria for and/or approving an insurance scheme.

4.2 The Gateway process

An important part of the system of building regulation for higher-risk buildings is a system of gateways. This means that at each stage in a building's design and construction building safety risks are considered. The changes to the Building Act 1984 in this Bill, along with existing powers will enable this system to be implemented. The Government say in their explanatory notes that the 'Gateways Policy' will be implemented by statutory instrument with three steps:

- Gateway one is at the planning stage. It involves ensuring fire safety matters are integrated into the planning process for high-rise residential buildings and will be implemented by amending the Town and Country Planning (Development Management Procedure) (England) Order 2015 (as amended). On 22 June The Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2021 was made to create this gateway.
- Gateway two occurs prior to construction on a higher-risk building. An application will need to be made to the Regulator outlining the 'full design intention' showing compliance with building regulations. Construction cannot start until the Regulator is satisfied.

- Gateway three occurs at the end of the construction process and replaces the 'final/completion certificate'. Dutyholders will be required to submit to the Building Safety Regulator a building control application with prescribed documents and information on the final, as-built building. The gateway three process will need to be completed before the building can be registered (see section 5).

In pre-legislative scrutiny the HCLG Committee recommended three changes to the gateway process: that details of the gateway process be published as secondary legislation at the same time as the bill, that Permitted Development Rights could impact on the effectiveness of gateway one and that dutyholders should be required to be appointed before gateway one.[51]

In response the Government noted that:

- Secondary legislation for gateways two and three would be published during the Committee stage of the bill in the Commons;
- They intended to introduce fire safety 'prior approval' for schemes involving a relevant building and a permitted development right;
- They welcomed the comment on dutyholders, noting that while planning permission sits with the land not individuals, they were taking this into account when developing the requirements of fire statements in the application.[52]

4.3 Powers of the Building Safety Regulator

Defining a higher risk building and powers for the Regulator

Clause 30 inserts new parts into section 120 of the Building Act 1984 to allow for the definition of a higher-risk building. The drafting and power of these are similar, but not identical to that used for clause 62 of this Bill. For this part, the Bill defines a higher-risk building will be one that is at least 18m or has at least seven storeys. Draft regulations set out that this will cover buildings with at least 2 residential units, hospitals and care homes. See section 5.1 for a more detailed discussion of higher-risk buildings. In addition, the clause adds a specific provision for Wales, allowing "higher-risk building" to be a type of building defined by Welsh Ministers in regulation and that "higher-risk building work" means any work relating to a higher-risk building or a proposed higher-risk building.

[51] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, paras 109-116

[52] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, paras 76-87

Clause 31 amends Section 91 of the Building Act 1984 by inserting new sections (91ZA, ZB and ZC) that would make the Regulator the building control authority for higher risk buildings. Section 91 of the Building Act 1984 places a duty on local authorities to enforce building regulations in their area. In England, the Regulator will take over these responsibilities for higher-risk buildings (as defined in the Bill). The inserted sections also define the situations when responsibility moves to the Regulator – where the buildings are or will be defined as high risk, as well as where the work will turn them into, or cease to be, a higher risk building. New section 91ZB provides for the regulator to take on non-high-risk buildings in relevant circumstances through a 'regulator's notice'. The explanatory notes explain the rationale for this:

> 299 Also, there will be multi-building sites in England comprising both higher-risk buildings and non-higher-risk buildings. Although the Building Safety Regulator will automatically be the regulator for the higher-risk building, a local authority or registered building control approver would normally be the building control body for the non-higher risk building.
>
> 300 The developer may prefer to deal with one body for the whole site. Given that neither a local authority nor a registered building control approver can undertake building control for the higher-risk building, this would mean the developer would choose the Building Safety Regulator to be responsible for providing building control for the whole site. [53]

New Section 91ZD deals with higher-risk buildings in Wales, where the local authority, or a local authority designated by Welsh Ministers, would be the building control body. New section 121A, inserted by clause 36, redefines the 'building control authority' in the Bill as the regulator or local authority, and clarifies the situation for Wales.

Clause 32 would amend Schedule 1 of the 1984 Building Act which defines the powers available under Building Regulations. The new parts of the schedule would provide powers to the Regulator to set the following:

- Procedural requirements relating to building control and the issue of notices and certificates (new paragraph 1A); procedures relating to applications for building control approval, and for requirements to be imposed on approvals (new paragraph 1B). These powers will be used to create procedures for gateways and refurbishment routes.
- Approval of schemes whose members can issue certificates, and provision about those certificates and schemes (new paragraph 1C). This will be used for the ongoing management of competent persons schemes.

[53] Bill 139 EN 2021-22, para 299-300

- Requirements on giving, obtaining or keeping of information or documents (new paragraph 1D). This will allow for the Golden thread, and may also be used to specify when information must be shared.
- Requirements for the establishing of a system relating to mandatory occurrence reporting (new paragraph 1E). This relates to the system to be established for higher-risk buildings.
- The form and content of documents and information to be provided with building control applications (new paragraph 1F). This will be used to require certain documents for applications for higher-risk buildings, such as fire and emergency file.
- Inspection and testing provisions of work, buildings, services and equipment and taking samples (new paragraph 1G). This allows for the testing and sampling of work during the building control process to support assessment of compliance by building control authorities.
- Ability of building control authorities to extend prescribed timescales for deciding applications with the agreement of the applicant (new paragraph 1H). In England this will be used for higher-Risk Buildings.
- Rights to appeal decisions, appeal requirements and procedures (1I). This relates to decisions around higher-risk Buildings from gateway two onwards.

These powers are required in order for procedures and requirements in the new regime for higher risk buildings to be introduced via the Building Regulations. The explanatory notes state that procedures for current building control routes will continue to be available for relevant buildings not covered by the new definition (under Part 3 of the Building Regulations 2010). This clause applies in Wales.

In pre-legislative scrutiny the HCLG Committee raised a concern about the dual role of the Regulator in being the building control body for higher-risk buildings as well as the regulator for the building control profession.[54] In response the Government outlined in more detail how the HSE would operate, stating that these 'safeguards and commitments' would mitigate any conflict of interest.[55]

4.4 Dutyholders and competence

The intention behind the Bill is to create a system of dutyholders throughout the design, construction and occupation of high-risk buildings. When

[54] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, paras 128-9

[55] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, para 102

buildings are designed, constructed or refurbished, those involved in the commissioning, design, construction or refurbishment process will have formal responsibilities for compliance with building regulations. Roles during occupation are given in section 5 below. The Government plan for many aspects of the regime to be taken forward through secondary legislation.

The Government have published a factsheet on dutyholders that explains the planned system, while draft regulations have been published alongside the Bill.

The Bill allows for a new dutyholder regime to be incorporated across the lifecycle of higher-risk buildings. This is based on the principle that the person or entity that creates a building safety risk should, as far as possible, be responsible for managing that risk. When buildings are designed, constructed or refurbished, those involved in the commissioning, design, construction or refurbishment process will have formal responsibilities for compliance with building regulations. These provisions will apply to all work to which building regulations apply.

Clause 33 amends Schedule 1 of the Building Act 1984 to allow for regulations to be made covering 'appointed persons' who will be given a formal role in ensuring compliance with the building regulations. The Hackitt Review recommended that dutyholders (including the Client, and the Principal Designer and the Principal Contractor appointed under Construction (Design and Management) Regulations 2015 (CDM), should be held accountable for building safety during the design and construction phase. This clause provides for this, and draft regulations have been published indicating the use of this power. This clause will apply in Wales and Welsh Ministers intend to set out requirements for principal dutyholders in secondary legislation.

In pre-legislative scrutiny the HCLG Committee stated that they were: "persuaded that the role of principal designer in the CDM regulations differs from the one envisaged for the new dutyholder regime and that this could cause confusion in the industry." They recommended that the Government give clarity to the role, set it out in secondary legislation and publish this with the Bill.[56] The Government response noted their intention to publish draft secondary legislation.[57] The Committee also noted their concerns for insurance coverage for dutyholders, and the Government said that they "will continue to engage with the industry about the availability of related insurance products."[58]

The Bill introduces new competence requirements in England and Wales that can be set by regulation. **Clause 34** allows for buildings regulations to include competence requirements, via an amendment to Schedule 1 of the

[56] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, paras 96-9

[57] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, paras 66-7

[58] Ibid., para 68

Building Act 1984. In the clause competence is measured by "skills, knowledge, experience and behaviours". The requirements will apply to the Principle Designer and Principal Contractor, as well as anyone carrying out building work. A general requirement for competence in building work is not currently part of the building regulations. The overall intent is to ensure everyone doing design work or building work is competent to do their work in a way that is compliant with building regulations. In England the Government is expected to set out statutory guidance initially using an Approved Document.

The HCLG Committee recommended in pre-legislative scrutiny that the Government "include provisions in the Bill itself for establishing a national system of third-party accreditation and registration for all professionals working on the design and construction of higher-risk buildings."[59] The Government disagreed with this stating that they thought this should be for "statutory guidance and wider industry guidance" because that offered "greater flexibility to add to or amend in the future." The Government response noted their work with the British Standards Institution (BSI) to create a suite of national competence standards for higher risk buildings along with other actions.[60]

Following publication of the Bill, Scott Steedman, Director-General, Standards, BSI (British Standards Institute) welcomed the Bill and commented:[61]

> […]
>
> BSI is working closely with the Ministry for Housing, Communities and Local Government (MHCLG) and the new Building Safety Regulator to support the implementation of the Bill in our role as the UK National Standards Body. Our Built Environment Competence Standards programme, launched last year, will support the new legislation, along with the industry training and qualification schemes that will follow and provide a basis for third party accreditation of building safety competence at all levels and across all roles, functions, tasks and activities. We will be publishing specific standards aimed at the competence requirements of the three key roles regulated under the Building Safety Bill, which are those of Principal Designer, Principal Contractor and Building Safety Manager.

Clause 36 inserts a new section in the Building Act after section 30. In the new regime for higher-risk buildings, building regulation approval will be required before work commences; this is not currently the case. This clause provides for an application to the Regulator which has not been determined within a

[59] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, paras 108

[60] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, para 69-75

[61] "BSI welcomes the Building Safety Bill", 5 July 2021

prescribed time period to be referred to the Secretary of State (who can appoint someone to determine it). The same power applies in Wales where an application can be determined by Welsh Ministers.

4.5 Compliance and enforcement reforms

The Bill contains a series of more general reforms to the building control process.

Clause 35 amends Section 32 of the Building Act and applies in England and Wales. It amends an existing power for a local authority to cancel an initial building notice if work has not commenced within three years. Under the new clause, if work has not commenced within three years the building notice lapses and a new application would have to be made (meaning any work would have to comply with updated regulations).

The Bill enhances enforcement action across all buildings in England and Wales. **Clause 37** introduces new compliance and stop notices by inserting new sections 35B, C and D, and 39A into the Building Act 1984. This will allow a compliance notice to be issued by the building control authority requiring a remedy. Where such as notice is not complied with, or where work risks serious harm, a stop notice can be issued. Non-compliance with either notice can be prosecuted under the new clauses while the notices can be appealed to the First Tier Tribunal in England and the Magistrates Court in Wales. The explanatory notes set out that rationale for the change:[62]

> Stop notices are being introduced as, before the Bill, there was no power available to stop non-compliant building work from being continued or completed; the issue of such a notice will also avoid any nugatory further work being done on a non-compliant building by ensuring each stage is compliant before the next is done.

Under current legislation, failure to comply with Building Regulations is only subject to a fine (which is limited). Pursuing non-compliance with building regulations after a completion certificate is issued is limited to twelve months. **Clause 38** reforms this and applies to England and Wales. It introduces a new Offence of contravening Building Regulations, which is subject to an unlimited fine, and up to 12 months imprisonment (Magistrates Court) or up to 2 years in a Crown Court. The offence is widened in the clause to covers requirements required under the regulation such as compliance with a process. Section 36 of the Building Act would be amended to allow the time limit for rectification in respect of a contravention of building regulations to be extended to 10 years (from 12 months). **Clause 39** extends the liability of offences under the Building Act 1984 to officers of corporate bodies. Where a corporate body commits a criminal offence under the Act, any director,

[62] Bill 139 EN 2021-22, p69

manager, secretary or other similar officer of that body is also deemed to have committed that offence in certain circumstances.

With the creation of the Building Safety Regulator, the appeals process under the Building Act 1984 is amended. **Clause 55** introduces Schedule 6, which makes provision for changes to the appeals process so that appeals and other decisions that currently sit with the Secretary of State or the magistrates' court are amended to sit with the Building Safety Regulator and First-tier Tribunal respectively.

Currently local authorities are able to set fees and charges in relation to their duties under the Building Act 1984. **Clause 56** amends this so that levels of fees and charges can be prescribed in the regulations or to be fixed in schemes drawn up by local authorities, the Welsh Ministers or the Building Safety Regulator.

4.6 Reform of the Building Control Profession

When building work takes place under the Building Regulations, work is 'approved' through a monitoring and inspection process as the build takes place. Approval can come directly from local authority run building control services, or through private approved inspectors (PAIs). The role of building control inspectors is to ensure that the technical standards are met - i.e. they perform a compliance role, normally achieved through periodic site inspections and in some cases, approved plans.

The Bill reforms the system of building inspection in England and Wales, creating new roles within the system. The Government argues that this will "…improve competence levels and accountability in the building control sector by creating a unified professional and regulatory structure for building control, changing and modernising the existing legislative framework." Broadly the changes will:

- Create a new role of a 'registered building inspector'. They are an individual who can provide advice to local authorities or registered building control approvers overseeing building work.
- A 'building control approver' can work for local authorities or approved inspectors, but for specified work will be required to take advice from a registered building inspector. Existing Approved Inspectors will need to register as building control approvers.
- Require the Building Safety Regulator to establish and maintain a register of building inspectors and building control approvers.

The Bill removes the ability to choose their own building control body for higher-risk buildings; this will always be the Regulator.

Clause 41 amends the Building Act 1984 and inserts a new Part 2A providing for the registration of building inspectors and building control approvers by the Regulator. The explanatory notes provide further detail in how this might work:[63]

> Individuals in both the private and public sector who wish to be registered building inspectors must in the future meet the same minimum standard criteria to be placed on the register. Registered building inspectors will be able to provide advice to the building control authorities or registered building control approvers, in line with the type of registration they hold. Current "Approved Inspectors" (i.e. organisations) wishing to undertake building control work will also have to meet minimum criteria to become registered as building control approvers, becoming subject to the oversight of the regulatory authority (the Building Safety Regulator in relation to England, and the Welsh Ministers in relation to Wales). Local authorities are not being required to register as they are the default building control authority in an area and are already subject to intervention powers (including the Secretary of State having the power to transfer their building control functions to another local authority or to the Secretary of State) where they are failing (see section 116 of the Building Act 1984, as amended by clause 44). [64]

The amendments provide for the information that should be collected for registration, the ongoing running of the system, such as the ability to vary or amend a registration. The regulations also provide for dealing with misconduct and offences in relation to registration. The provisions also allow for investigations into the work of local authority or registered building control approver. **Clause 42** of the Bill amends Part 2 of the Building Act (via Schedule 4) in relation to Approved Inspectors, so that references to them are changed to 'registered building control approvers'. **Clause 43** amends the Building Act 1984 to require building control authorities to take advice from a registered building inspector in circumstances that will be specified in secondary legislation. The explanatory notes give some examples:[65]

> Some examples of local authority functions that could be specified in secondary legislation as functions which an authority can only exercise after obtaining and considering advice from a registered building inspector may include approval or rejection of full building plans and issuing completion certificates. Some examples of Building Safety Regulator functions that might be specified include approving a construction Gateway application for a higher-risk building or issuing a completion certificate. Some examples of registered building control approver functions that could be specified in

[63] Ibid., p74
[64] Ibid., p74
[65] Ibid., p81

> secondary legislation include sending initial notices and issuing plans and final certificates.

Specific changes are made in relation to higher-risk buildings. **Clause 45** makes a series of changes to the Building Act 1984 to require that the building control authority for higher-risk buildings is the Regulator.

In pre-legislative scrutiny the HCLG Committee picked up on the difference between the registration requirements for local authority 'approvers' and other 'approvers' and recommended that the Bill:

> ...place an explicit duty on the regulator to monitor and assure the competence of local authority building control teams through provisions comparable to those for the registration of building control approvers, perhaps by mandating UKAS accreditation for all LABC teams. [66]

The Government did not agree with UKAS accreditation but agreed that the work of building control teams in local authorities needed monitoring. This would be achieved by the powers for the Regulator to set 'operational standards rules' who would check "compliance by mandating periodic data returns and conducting audits of building control bodies."[67]

The HCLG Committee also recommended the removal of 'dutyholder choice' – that is the ability to choose between local authority building control and a private building control body. It suggested a system of 'independent appointment'.[68] The Government disagreed with this recommendation, because the Bill introduced a new system of regulation for the building control profession.[69]

4.7 Reforms to initial notice procedures

Where an approved inspector is used in the building regulation process, an 'initial notice' is issued to the local authority before work commences and which registers the use of the Approved Inspector. The Bill makes a series of changes to this process:

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[66] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, para 132

[67] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, para 103-5

[68] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, para 123

[69] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, para 88-95

- A registered building control approver will be required to issue a 'plans certificate'. This is currently a statement that the Approved Inspector (where they are the building control body) has checked the plans of the building work and considers them to be compliant with Building Regulations. This is currently voluntary. The change is an outcome from the Government's 2020 Fire Safety Consultation (**clause 48**).
- Amends the process for cancelling an initial notice (**clause 49**).
- Creates additional flexibility in the creation of new initial notices where needed (**clause 50**).
- An ability to seek information from the person named on the initial notice (**clause 51**).
- The creation of a new national electronic portal for initial notices (in England only, **clause 52**).

4.8 Higher-risk buildings: A levy on applications for building control approval

On 10 February 2021, the Government announced several measures aimed at tackling the removal and replacement of combustible cladding on high-rise blocks.[70] This announcement included details of how costs would be recovered from the development industry:

> A 'Gateway 2' developer levy will be introduced via the forthcoming Building Safety Bill:
>
> The proposed levy will be targeted and will apply only when developers seek permission to develop certain high-rise buildings in England, helping to ensure that the industry takes collective responsibility for historical building safety defects. In introducing the levy, we will continue to ensure that the homes our country needs get built and that our small and medium-sized builders are protected.[71]

Clause 57 will amend the Building Safety Act 1984 to give the Secretary of State power to impose a new levy "that will contribute to the government's costs of remediating building safety defects."[72]

The levy will apply to developers making an application to the Building Safety Regulator for building control approval, the new Gateway two process introduced in building regulations. The explanatory notes to the Bill advise:

> Gateway two will occur prior to the beginning of construction work on higher-risk buildings, and act as a 'hard stop' where construction

[70] HC Deb 10 February 2021
[71] HC Deb 10 February 2021 cc329-48
[72] Bill 139 EN 2021-22, para 521

cannot begin until the "Building Safety Regulator approves the building control application.[73]

Consultation over the design of the levy is expected to take place over the summer. Implementation will be via regulations.

The levy will be paid to the Secretary of State or a body designated by the Secretary of State. Funds may be used for administering the levy.[74]

Comment

The Housing, Communities and Local Government Committee considered the levy during its follow-up inquiry into cladding remediation (April 2021).

Concerns raised included the cost being passed to housing associations and home buyers, "the former of which could squeeze out affordable housing contributions and the latter of which is another version of making leaseholders pay."[75] It was noted that not all developers are responsible for fire safety defects, some have already committed funds to rectification, e.g. Taylor Wimpey and Persimmon.

Overall, the Committee supported extending contributions from the industry to its proposed Comprehensive Building Safety Fund. It also expressed support for securing contributions from product manufacturers and suppliers.[76]

[73] Bill 139 EN 2021-22, para 526

[74] Bill 139 EN 2021-22, para 523

[75] Housing, Communities and Local Government Committee, Cladding Remediation— Follow-up, 29 April 2021, HC 1249 2019-21, para 31

[76] Ibid., paras 32-33

5 Occupation of higher-risk buildings (clauses 58-123)

As set out in section 1.4 a key recommendation from the Hackitt Review was the creation of a regulator for high rise residential buildings covering the design, construction and occupation of the building – managing a building through its lifetime. This section of the Bill sets out the process for the Building Safety Regulator to oversee the occupation of these buildings and the roles and responsibilities of key dutyholders and residents.

5.1 Key definitions

Building Safety Risk

Clauses 59-71 of the Bill make key definitions around the higher risk building regime. The meaning of 'building safety risk' is set out in **clause 59**:

> (a) the spread of fire;
>
> (b) structural failure;
>
> (c) any other prescribed matter.

This definition is important as it will determine the risks an Accountable Person will manage in occupation via the safety case, in order to prevent a major incident (see 5.2).

Under clause 59 the Secretary of State has the power to prescribe additional risks (under the affirmative procedure). **Clause 60** allows the regulator to recommend to the Secretary of State that they make regulations for additional risks, while **clause 61** provides for the Secretary of State to require advice from the regulator on regulations they may make. There is also a power to remove risks by regulation, except those on the face of the Bill.

The Explanatory Notes explain how the initial definition was determined:[77]

> The Government sought research from the Health and Safety Executive in relation to risks that are considered to be catastrophic to verify our approach and focus. The conclusions of this research are that the major accident hazards in scope for safety management in a higher-risk building would largely be rapid onset escalating fire,

[77] Bill 139 EN 2021-22, p102

> structural, or explosion events. Explosion events can trigger a rapid onset escalating fire or structural event.

In pre-legislative scrutiny, the HCLG Committee supported the definition of 'building safety risk' in the Bill but recommended "that the government clarify, perhaps in statutory guidance, the extent to which dutyholders need to consider risks arising from electrical and gas failures. We also recommend that the government commit to keeping the definition under review."[78] The Government response stated:

> 43. We welcome the Committee's satisfaction with the wording of Clause 16 of the draft Bill. Based on further feedback during pre-legislative scrutiny we have amended the clause to provide greater clarity on the risk that needs to be managed under part four of the bill. Specifically, we have amended "fire" to "spread of fire".
>
> 44. Government will publish guidance clarifying that dutyholders must mitigate or control the building safety risks regardless of the cause (including electrical and gas failures).
>
> 45. We agree that the definition of "building safety risk" should be kept under review. The Bill makes express provision for this. Government has designed the regulation power under clause 16 of the draft Bill to ensure the definition of "building safety risk" can be expanded in the future should the evidence support it. [79]

Higher risk building

The Bill defines what is meant by a 'higher risk building' on the face of the Bill, supplemented by regulations. The draft Bill simply allowed the definition to be set by regulation.

Clause 62 defines for this part of the Bill that a 'higher risk building' in England is one that:

(a) is at least 18 metres in height or has at least 7 storeys, and

(b) contains at least 2 residential units.

A 'residential unit' is defined as a dwelling or 'any other unit of living accommodation'. The Secretary of State can make regulations to supplement this clause (and amend it). Draft regulations have been published alongside the Bill. While part 3 of the Bill, and accompanying regulations, make hospitals and care homes meeting the height requirement subject to the high-risk regime for design and building control, they are not intended to be part of

[78] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466

[79] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021

the regime for occupation. The Palace of Westminster is also not subject to this part of the Bill.

Secure residential institutions, temporary leisure establishments and military premises are excluded from the regime. The draft regulation also sets out how the height of a building should be calculated.

When making regulations there is a general duty for the Secretary of State to consult the regulator. There are additional requirements if the regulation adds a description of building to the definition - they must have received a recommendation from the Regulator or ask the Regulator for advice and they must undertake and publish a cost benefit analysis.[80]

Clause 66 allows the Regulator to recommend the addition or removal of a description of buildings for a 'higher-risk building'. **Clause 67** allows for the Secretary of State to ask the Regulator to advise them as to whether a description of building should be added or removed from the definition of 'higher-risk buildings'.

The powers to exclude certain classifications of buildings from the definition of a higher risk building, and the power to amend clause 62 overall, are subject to the affirmative procedure.

The Hackitt Report recommended that the safety regime apply to high-rise residential buildings 10 storeys or higher. The draft Bill reduced this to 18 metres or more than 6 storeys, but this was not on the face of the Bill, just in the explanatory notes as an indication of the Government's thinking. The HCLG Committee agreed with the height threshold of 18 metres despite hearing evidence that it should be lower. However, it did recommend that the definition of a higher risk building was on the face of the Bill:

> 57.We strongly recommend that the initial scope of the regime be enshrined in the Bill itself, and not be left to delegated legislation, in order to give stakeholders the certainty they need to prepare for the new regime.
>
> [...]
>
> 65.On balance, we consider the initial definition of "higher-risk building" proposed by the Government to be reasonable and practical, though we agree with the evidence calling for the scope to be widened in the future to include a great number of risk factors. In particular, the scope should take account of the vulnerability of residents and their ability to evacuate the building. We also think the Government should keep under review the development of modern methods of construction.
>
> 66.We recommend that the Government specify in the Bill itself by way of a requirement to "have regard" the factors that must be

[80] Bill 139 EN 2021-22, p105

> considered in the future when the scope of the regime is expanded and that the ability of residents to evacuate the building be the principal factor. We also recommend that any requirement to have regard to the ability of residents to evacuate a building explicitly include both the vulnerability of residents and the number of means of egress. Finally, we recommend that the Government indicate its intention to review the scope and set a timetable for doing so.[81]

In response the Government agreed with the recommendation to put the definition of a higher risk building on the face of the Bill. On the final recommendation about expanding the scope in the future it said:

> 40. The Government welcomes the Committee's recognition that other factors may be suitable when exploring the future expansion of the definition of "higher-risk buildings". While Government agrees there is a limit to the types of factors upon which the scope of major incident regimes can be expanded, Government does not agree with the Committee's recommendation that such factors should be specified in the Bill itself by way of a 'have regard' requirement, however, the explanatory notes outline several factors which could determine expanding the scope of the regime (like height, size, design, use, purpose, or other characteristics) and detailed discussion continues.
>
> 41. The Government acknowledges the concerns raised about building safety arising from the quality of design and construction in buildings occupied by those unable to evacuate themselves or without assistance. Consequently, we have widened the scope of the design, construction and refurbishment elements of the regime to include care homes and hospitals which are 18 metres or more in height or at least 7 storeys. Care homes and hospitals are the two uses of building likely to be occupied by those unable to evacuate themselves or without the assistance of others, which were not included in the initial scope indicated by the draft Bill.
>
> 42. Under the Bill, the Regulator must monitor the scope of the regime continuously. This makes a specific timescale for a review unnecessary.[82]

The HCLG Committee also argued that the Government should include "…supplementary provisions in the Bill for mandating regular electrical safety

[81] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466

[82] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021

checks in higher-risk buildings."[83] In response the Government highlighted the actions it was taking around electricity safety for different tenures:

> 139. We welcome the Committee's recommendation and agree that the safety of all residents is paramount.
>
> 140. In June 2020, Government bought forward legislation to require private landlords to require electrical installations to be inspected by a competent person every five years. This legislation was based on a recommendation of the Electrical Standards Working Group, established by MHCLG to review electrical safety standards in the private rented sector. The remit of the group did not extend to the social rented sector where standards were higher.
>
> 141. The Social Housing White Paper published in November 2020, committed Government to undertake a consultation on keeping social housing residents safe from electrical harm. This will consider the issue of extending safety measures in private rented sector to social housing. We will engage with other key stakeholders in an official led working group to inform the content of our consultation.
>
> 142. Government will publish guidance clarifying that the Accountable Person must take all reasonable steps to mitigate or control the building safety risks, the spread of fire and structural failure, regardless of the cause. [84]

Accountable Person and other definitions

Clause 69 of the Bill defines the 'Accountable Person'. In the Bill, the accountable person is responsible for meeting the statutory obligations for higher risk buildings in occupation. The explanatory notes set out how the accountable person is determined in the Bill:

> 597 Subsection (1) states that the Accountable Person is the person who either has the legal estate in possession of, or is under a relevant repairing obligation, for any part of the of the common parts of the building.
>
> 598 Subsection (2) sets out the test identifying the Accountable Persons where there are two or more persons with legal interests in a building in scope. This is formulated on 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. It therefore makes provision for management bodies to be defined as

[83] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, para 188

[84] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, paras 139-142

> Accountable Persons in circumstances where the lease sets out repair and maintenance obligation on that management body.[85]

The notes add that UK property law is "complex" and that "…the definition has been devised to ensure that the right person is defined as the Accountable Person according to their obligations that have been demised under concepts in property law." Where there is more than one accountable person, **clause 70** allows for the identification of a 'principal accountable person', while **clause 71** provides for an 'interested party' to seek that the principal accountable person be determined by the tribunal.

5.2 Registration of occupied buildings

The Bill will require a new system of registration for higher risk buildings prior to occupation. The explanatory notes provide an example of how this might work for new and existing buildings:

> Before new buildings become occupied, the Principal Accountable Person will need to come forward and register their details and that of the higher-risk building with the Building Safety Regulator. For existing occupied buildings, the Principal Accountable Person will be required to register their building following a transitional period once the new regulatory regime comes into force.
>
> Once the applicant has met the requirements of registration, the Building Safety Regulator will add them to the building register. The Building Safety Regulator will publish the register.
>
> Information required in the registration process will be set out in regulations and will include core details of the building, details of the Accountable Persons, Principal Accountable Person and Building Safety Manager, and an address in England or Wales at which notices can be served on the Principal Accountable Person/Accountable Persons. The process is likely to be digitalised.
>
> Information obtained from registration will allow the regulator to produce the national register of higher-risk buildings, and will also ensure the Accountable Persons are identified to the regulator. This information will also be used to support the regulator in prioritising its notifications to the Principal Accountable Person requiring an application for a Building Assessment Certificate, as set out in clause 74.[86]

Following registration, the Bill provides for a system of Building Assessment Certificates. These will allow for the Building Safety Regulator to assess

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[85] Bill 139 EN 2021-22, p111

[86] Ibid., p116-7

whether the dutyholders are, at that point in time, complying with the relevant duties under this part of the Bill. The explanatory notes set out how this might work, with new buildings likely to be required to apply for a certificate within a set period, while it is hoped all buildings will achieve one within five years:

> Building Assessment Certificates issued by the Building Safety Regulator are intended to provide an indication to residents that the regulator assessed the Accountable Person(s) for their building to be meeting specified statutory requirements at the time of assessment. The statutory requirements include, among others, that reasonable steps are being taken under clause 84 to prevent building safety risks materialising and to reduce the severity of any incident resulting from such a risk materialising.
>
> The circumstances and likely timings under which a Principal Accountable Person can expect the Regulator to issue the notice requiring them to apply for certification (the 'call-in') will be set out in the regulator's Strategic Plan, which the regulator must follow, and which will be approved by the Secretary of State. For any building that passes through Gateway three and is registered, the call-in will likely be within a defined period following occupation. For existing occupied buildings, the regulator will be able to create tranches of buildings, for assessment according to tranche, calling in buildings in stages over an extended period. Existing buildings will likely be tranched according to factors such as height and other risk factors. It is intended that all existing occupied buildings will be initially assessed over a 5-year period.
>
> The Building Safety Regulator's approach to calling in existing buildings in tranches will necessarily be flexible to accommodate emerging risk factors and intelligence, allowing buildings to be called in earlier than originally outlined in the Strategic Plan in some cases, if necessary. Should the regulator's overarching approach to tranching shift as a result, the regulator would revise its Strategic Plan to reflect the updated operational timescales.
>
> The Building Safety Regulator will also be responsible for calling in buildings for reassessment periodically. A maximum period by which the regulator must assess any given building for its Building Assessment Certificate will be set out in regulations made by the Secretary of State. Within this maximum period, the regulator will be able to take a risk-based approach to calling in buildings for reassessment, and this approach will be outlined in the Strategic Plan. There may be scenarios under which reassessment is automatically triggered, such as a significant refurbishment, and these circumstances will also be set out in the Strategic Plan.
>
> A Building Assessment Certificate will not be issued by the Building Safety Regulator if the Accountable Person(s) are failing to meet the specified statutory obligations, save for where the regulator

considers that the breach can be remedied promptly and is done so, further to the terms of a notice issued pursuant to clause 74(4).[87]

Clause 73 provides for the arrangements for a register of higher risk buildings. It allows for regulator to create and maintain the register, while regulations will set out how the application process works, and how the register should be maintained by the regulation, such as the information contained in it and how buildings are removed.

Clause 72 requires the principle accountable person register a building by creating an offence if an occupied building is not registered (without a reasonable excuse). The offence is subject to an unlimited fine and/or a imprisonment of up to 12 months (Magistrates Court) or 2 years (Crown Court). Similarly, clause 74 requires the principle accountable person to apply for a building safety certificate within 28 days of being directed by the regulator to do so; not doing so again creates an offence subject to an unlimited fine and/or a imprisonment of up to 12 months (Magistrates Court) or 2 years (Crown Court).

Clause 75 sets out the requirements of an application for a building assessment certificate, while the Secretary of State has a power to make regulations on the application process. An application will require:

- prescribed information demonstrating compliance by the principal accountable person with their duties under section 78 or 81(4);
- a copy of the most recent safety case report for the building unless a copy of that report has been provided under 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 for the building with their duties under section 89;
- a copy of any residents' engagement strategy.

Clause 76 requires the Regulator to assess an application for a building safety certificate and issue one if it considers relevant duties have been met. It also allows for an application to be refused, or for the Regulator to give notice of a contravention and required remedy, and if that remedy is met within a timescale it can issue the certificate. The relevant duties are set out in the Bill:

(a) section 78 or 81(4) (duty to appoint building safety manager etc).

(b) section 83 (duty to assess building safety risks).

(c) section 84 (management of building safety risks).

(d) section 85 (duties relating to safety case report).

[87] Ibid., p117-8

> (e) section 87(5) (duties relating to mandatory occurrence reporting system).
>
> (f) section 89 (provision of information to regulator, residents etc).
>
> (g) section 91 (duty to produce a residents' engagement strategy).

Clause 77 creates a requirement for the principle accountable person to display 'in a conspicuous position' in the building:

- a notice in the prescribed form containing prescribed information about accountable persons, and any building safety manager, for the building.
- the most recent building assessment certificate relating to the building.
- any relevant compliance notice.

An offence is created in the clause for not displaying this information. The requirement to display the information in the building is a direct outcome from the Hackitt Review. The duty to display the name and contact details of the Accountable Persons and any Building Safety Manager ensures residents know who is responsible for their building and how to contact them, while the requirement to display a compliance notice means residents will be informed on any existing risks or concerns regarding the building.

5.3 The Building Safety Manager

The Bill creates a new role of the Building Safety Manager for a relevant building. The Hackitt Report identified the need for nominated building safety manager in the new system of building regulation. The Building Safety Manager's role is to assist the Accountable Person in managing safety and overseeing the systems and processes in place for the building's safety. The explanatory notes set out that:

> The appointment of competent individuals to assist dutyholders is commonplace in many high hazard sectors that require a systemic approach to risk management. The requirement to appoint a Building Safety Manager, whether or not an individual, mirrors this, ensuring the holistic and coordinated oversight of delivering safe outcomes.[88]

Clauses 78-82 set out the appointment process for a Building Safety Manager. **Clause 78** requires the principal accountable person for a higher-risk building to appoint a building safety manager before the building becomes occupied. If, at any time, there is no building safety manager when the building is occupied, they must be appointed as soon as reasonably practicable. Breaching both these requirements is an offence. The clause provides for an organisation to be appointed to the role but an individual

[88] Ibid., p124

should be identified to manage those duties; it also requires that anyone appointed has the skills, knowledge, experience and behaviours necessary to carry out the role.

Clause 79 deals with the appointment of a building safety manager where there are multiple accountable persons, while **clause 80** sets out that the contractual arrangements for the building safety manager.

Clause 81 provides an exemption for the appointment of a building safety manager where the principle accountable person is qualified, individually or as an organisation, to take on the role. **Clause 82** deals with this process where there are multiple accountable persons.

Managing Building Safety

Accountable persons are required under the Bill to regularly assess building safety risk, while the principle accountable person is required to prepare a Safety Case Report.

Clauses 83 and 84 set out the requirement to manage building safety risks. Clause 83 (1) requires:

> An accountable person for an occupied higher-risk building must as soon as reasonably practicable after the relevant time assess the building safety risks as regards the part of the building for which they are responsible.

The accountable person is required to make further assessments at regular intervals or at any time when they have 'reason to suspect' a change of situation. Where there are multiple accountable persons they are expected to cooperate in meeting this requirement.

Clause 84(1) creates an ongoing duty for accountable persons to:

> …take all reasonable steps for the following purposes—
>
> (a) preventing a building safety risk materialising as regards the part of the building for which they are responsible;
>
> (b) reducing the severity of any incident resulting from such a risk materialising.

The clause sets out that this may involve the accountable person carrying out work on the areas of the building for which they are responsible and that this work must be carried out 'promptly'. A series of examples of the application of clause 84 are given in the explanatory notes (p133-6).

This assessment of building safety risks is brought together by **clause 85** and the 'safety case report'. A duty is created for principle accountable person to prepare a safety case report when the building is occupied or when they become accountable for it. The report must include any assessment of the

building safety risks and a brief description of any steps taken under section (clause) 84 by an accountable person for the building. This report must be revised following changes to the assessment, and the Secretary of State can make regulation on the 'content and form' of safety case reports. **Clause 85** requires the principal accountable person to notify the regulator that the report is complete or has been updated. The regulator has the power to request a copy of the report, while there is a regulation making power for the arrangements of notifications in this system.

The explanatory notes set out how the system is expected to work and how it compares to systems in other industries:[89]

> 722 The new 'safety case review' system is therefore the main way that the Building Safety Regulator will hold the Accountable Person to account for identifying the hazards and risks in their building, describing how risks are controlled and describing the safety management system in place so that building safety risks are reduced and all reasonable steps are taken to prevent major incidents arising from building safety risks.
>
> 723 Safety case requirements are employed in many high hazard industries. They provide the means by which dutyholders demonstrate to themselves and regulators that they are effectively identifying and managing risks to an acceptable level. In these regimes the regulator gives permission to a dutyholder to carry out certain categories of intrinsically high-hazard work. In a safety case review system, the dutyholder provides information to the regulator to demonstrate that they have considered what could go wrong in an installation, what the worst-case scenarios are, the consequences if those scenarios are realised and to show that they have preventive, protective and reactive measures in place to manage the risks of the scenarios occurring. When the regulator is content that the dutyholder has fulfilled the relevant requirement(s) they 'permit' operation and subsequently seek reassessments for any significant changes as well as reviewing Safety Case Reports on a routine cycle.
>
> 724 In the context of managing building safety risks in higher-risk buildings, the Accountable Person will therefore make the claim that the building is safe for occupation (meets the outcome of clause 84), argue that the sum of the measures they have in place support that claim, that decisions have been taken in accordance with the prescribed principles and direct the reader to the evidence that supports that argument.

Information Requirements

The Bill creates a series of information and reporting requirements for higher risk buildings.

[89] Ibid., p137

Clause 87 creates a mandatory occurrence reporting system. The principal accountable person must establish and operate an effective mandatory occurrence reporting system while accountable persons must report information to the regulator as they specify. It is an offence to not comply, punishable by a fine. The system will be assessed as part of the Building Assessment Certificate application. The Bill sets out the framework for the system to be established but not the detail, however the explanatory notes suggest how it might work:

> 735 It is intended that the power given to the Secretary of State will be used to require Accountable Persons to report certain structural and fire safety occurrences to the Building Safety Regulator, similar to those duties that exist in other industries such as aviation. This will involve reporting to the Building Safety Regulator any structural or fire safety event that occurs in or about the part of a higher-risk building for which the Accountable Person is responsible and which represents a significant risk to life safety. Mandatory occurrence reporting will complement voluntary occurrence reporting, which will capture safety occurrences not of a high enough risk to be required reporting under mandatory occurrence reporting.
>
> 736 Secondary legislation will prescribe which occurrences which must be reported to the Building Safety Regulator. This will be based on occurrences which, if they were to occur within a higher-risk building, would likely meet the threshold of a significant risk to life safety. Guidance will be provided to Accountable Persons to assist them in determining whether an occurrence must be reported as laid out in secondary legislation.
>
> 737 The specified manner of reporting will likely be via an online portal. Current proposals for the timeframe for reporting are an immediate notification to the regulator as soon as a mandatory occurrence is identified, followed by a full report as soon as practicable and not later than ten calendar days from the time of the occurrence being identified.
>
> 738 The occurrences specified in secondary legislation may include the discovery of a structural safety or fire safety related defect.[90]

Clause 88 requires the accountable person to keep certain information relating to the building and to keep it up to date. The precise requirements will be set out in regulations. This provision is part of the intention to maintain a 'golden thread' of information. **Clause 90** requires this 'prescribed information' to be passed to a new owner, with the detail of the process set out in regulation. Not complying with this requirement is an offence. It is the result of records not being kept or being easily accessible over time in existing buildings, particularly during changes of ownership.

[90] Ibid., p141

Clause 89 creates a regulation making power for the Secretary of State to require the accountable person to give specified information to the Building Safety Regulator, to other Accountable Persons in the building, to residents of the building and owners of flats in the building, and other types of persons to be specified. An example of the use of this power might be providing information to a new leaseholder during the purchase of a property.

Pre-legislative scrutiny and roles in occupied buildings

In pre-legislative scrutiny the HCLG Committee made a series of recommendations around the roles and responsibilities when managing occupied buildings. These included (Government response in brief in brackets:[91]

- That there should be a general duty for accountable persons to cooperate (this was agreed with by the Government and changes were made).
- That there should be statutory guidance on the roles of the accountable person and responsible person under the Fire Safety Order (the Government plan to publish guidance for dutyholders).
- That there should be a duty on the Building Safety Manager to make the Accountable Person aware of their duties (this duty has not been included but the roles in the Bill have been reviewed).
- There should be statutory guidance on the kind of actions that would mean compliance with all reasonable duties to avoid a major incident (a first draft of prevention principles will be published during passage of the Bill).
- That the Government publish guidance outlining what information a safety case report should contain (this will be set out in regulations and that in "the coming weeks and months we hope to share more with Parliament about this approach").
- A recommendation regarding the competency framework to be used for the Building Safety Manager, highlighting the report produced by a competency working group (the Government are sponsoring a BSI standard, expect it to be available in early 2022 and for it to be aligned with the working group's report).
- That there should be, in legislation or in statutory guidance, a national system of accreditation to agreed common standards and a central register of building safety managers (this should be an industry decision, but the Government can see the benefits, but warns the registration should only be a starting point for demonstrating competence).

[91] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466 and Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021

- That the Government work with the insurance industry to ensure appropriate indemnity insurance is available for building safety managers (the Government will continue to work with the insurance industry).
- That the Government publish statutory guidance alongside the Bill outlining the respective responsibilities of accountable persons and building safety managers (roles and responsibilities have been clarified in the Bill).

5.4 Engagement with residents and their duties

The Bill creates new requirements for engagement with residents on safety issues in occupied higher risk buildings.

Clause 91 creates a duty for the principle accountable person to prepare a 'residents' engagement strategy' for promoting resident involvement in building safety decision making. The strategy will need to be reviewed at prescribed intervals and once complete or revised must be given to every identifiable owner or resident aged 16 or over. Regulations can be made on the content or distribution method of the strategy. Clause 91 (3) states that the strategy must cover:

> (a) the information that will be provided to relevant persons about decisions relating to the management of the building,
>
> (b) the aspects of those decisions that an accountable person will consult relevant persons about,
>
> (c) the arrangements for obtaining and taking account of the views of relevant persons, and
>
> (d) how the appropriateness of an accountable person's methods for promoting participation will be measured and kept under review.

In pre-legislative scrutiny the HCLG Committee argued that the Government should consider 'facilitating' the formation of resident groups in every building.[92] In response the Government 'strongly encouraged' the formation of these groups but said they should be voluntary.[93]

Clause 92 provides residents with a right to request information about the building from the accountable person on request. Regulations will set out the information this will cover and the way it should be delivered, while there are

[92] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, para 178

[93] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, para 134-7

likely to be exemptions for issues around security and vulnerable residents. The explanatory notes set out what is envisaged to be covered:

- Full, current and historical fire risk assessments.
- Planned maintenance and repairs schedules.
- Outcome of 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.
- Planned and historical changes to the building.

Clause 93 requires the principle accountable person to establish a complaints process for residents and owners to complain about the performance of a duty of an accountable person. The requirements of the system will be set out in secondary legislation. **Clause 94** requires the Building Safety Regulator to establish a complaints process to investigate issues raised with them or via clause 93 relating to the safety of a higher risk building. Regulations will set out the establishment and operation of the system and the Regulator is required to consult the Residents' Panel on the establishment of the system and any changes.

Clause 95 introduces a series of duties on residents or owners 16 and over in higher risk buildings. They will be required to:

- not act in a way that creates a significant risk of a building safety risk materialising;
- not interfere with a relevant safety item; and
- comply with a request made by the appropriate Accountable Person, for information reasonably required to perform their duties to carry out an assessment of building safety risks and to manage those risks.

If a resident or owner has contravened or is contravening these duties**, clause 96** allows for the accountable person to give them a contravention notice which will set out:

- what the resident has supposed to have done and why this is a breach of one or more of their duties;
- what action the resident should take so that they are no longer in breach and a reasonable time for doing so;
- anything the resident should not do to avoid further breaches of the duty; and
- what may happen next if the resident fails to comply with the notice.

The contravention notice can ask for a reasonable sum to repair or replace an item if necessary. Once the notice has been issued the accountable person can apply to the County Court to seek an order for compliance.

The explanatory notes give an example of the use of the power – that the accountable person may, for example, request information to confirm an annual boiler check by a competent gas engineer, and the owner could be required to provide it via a contravention notice.[94]

Clause 97 allows the accountable person to request access to a property for a reason relating to assessing building safety risk or compliance with residents' duties. 48 hours of written notice must be given. The accountable person is can apply to the County Court for the request for access to be required. The explanatory notes justify this power by stating:[95]

> The Accountable Person may need access to one or more spaces controlled by the resident or owner - residential unit and or other premises - in the building so that they can satisfy themselves that the resident is complying with a specified duty, or in order to perform their own duties to assess building safety risks and take reasonable steps to minimise them.[96]

In pre-legislative scrutiny the HCLG Committee encouraged the Government to make clear in the Bill whether the clause that provided for access to a resident's property authorised the use of force.[97] In response, the Government said that it "does not consider that the use of force is appropriate in this context and the Bill does not permit this."[98]

5.5 Enforcement

The Building Safety Regulator is required under **clause 98** to enforce part 4 of the Bill. **Clause 99** gives the regulator the power to issue a compliance notice to an accountable person. This notice can:

- require the accountable person to take specified steps within a specified period, or
- require the accountable person to remedy the contravention or the matters giving rise to it within a specified period.

[94] Ibid., p149
[95] Ibid., p152
[96] Ibid., p152
[97] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466, para 184
[98] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, para 138

Subsection 99(4) allows for the issuing of an 'urgent action notice' which the explanatory notes state:

> The consequences of this are i) that the regulator is likely to set a shorter period to rectify the contravention and ii) any appeal against the notice will not suspend its effect unless the Tribunal determines that it should (see clause 112(3)).[99]

Non-compliance is an offence and subject to an unlimited fine and 12 months imprisonment (Magistrates Court) or 2 years (Crown Court). The notices are appealable to the First Tier Tribunal. Under **Clause 100** the Secretary of State can make further regulations on compliance notices. For the most serious breaches of building safety requirements by accountable persons, an offence of contravention giving rise to risk of death and serious injury is created by **clause 101**, and can be used directly by the regulator without the issue of a compliance or urgent action notice.

Clause 102 to 111 deal with arrangements for a 'Special Measures Order'. The Bill provides for the Regulator to apply to the First Tier Tribunal for an order to appoint a Special Measures Manager for an occupied higher-risk building. This manager would take on the role of the accountable person and the responsibilities under this part of the Bill. The Tribunal can make this order if it "is satisfied that there has been a serious failure, or a failure on two or more occasions, by an accountable person for the building to comply with a duty imposed on that person under, or under regulations made under, this Part." The explanatory notes highlight that this measure is going further than recommended in the Hackitt Review:

> The Independent Review recommended that there needs to be a regulator in relation to fire and structural safety of a residential building in occupation who can hold duty-holders to account with robust sanctions where necessary.
>
> The Government is going further and introducing a Special Measures Manager who would take on the management of risks in a building as a last resort, where the Building Safety Regulator considers it appropriate to keep residents safe from that poor management of building safety risks.[100]

In the Bill **Clause 102** requires notice of such an application to be given to a wide range of people relevant to the building including the accountable person and residents. **Clauses 103 and 104** deal with the making of a Special Measures Order. **Clauses 105 to 111** deal with the operation of the special measures order as well as amend the Landlord and Tenant Act 1987 to allow for its operation.

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[99] Bill 139 EN 2021-22, p153

[100] Ibid., p157

Clauses 112-116 deal with appeals under this part of the Bill, detailing that the decision of the regulator that can be appealed to the First Tier Tribunal.

Clause 117 allows for the regulator to issue statutory guidance covering:

- how to assess the competence of a prospective Building Safety Manager;
- mandatory reporting requirements for Accountable Persons;
- duties to keep or give information to residents and others; and
- how an Accountable Person should operate a complaints procedure for residents.

Clause 118 requires multiple accountable persons for a building to cooperate; they must also cooperate with any responsible persons within the meaning of article 3 of the Regulatory Reform (Fire Safety) Order.

Clause 119 amends section 24 of the Landlord and Tenant Act to ensure that building safety is kept discrete from other management functions which can allow for the appointment of manager by tenants in specific situations.

5.6 Landlord and tenant etc (clauses 120-122)

Recovery of safety related costs: Building Safety Charges

A lease agreement sets out the respective rights and obligations of the landlord and tenant. **Clause 120** will amend the Landlord and Tenant Act 1985 to provide new implied covenants in relation to building safety. These covenants will apply to all leases in higher-risk buildings in England.

Landlords will be under an obligation to tenants to comply with building safety duties as an Accountable Person and to comply with any order appointing a Special Measures Manager. Tenants will be obliged to allow access for building safety purposes, to comply with residents' building safety duties and comply with any order appointing a Special Measures Manager.

Additional covenants will be implied into 'relevant leases' of higher-risk buildings which are defined as those for a fixed-term of seven years or more where tenants are required to pay a variable service charge for the upkeep of the building. Under these additional covenants landlords will be able to pass on the cost of running/managing the new safety regime to tenants. These costs will not be included in the service charge but in a new building safety charge.

Detailed provisions on building safety charges are set out in **Schedule 7** to the Bill which will be inserted into the Landlord and Tenant Act 1985 as new Schedule 2. Schedule 7 sets out how the building safety charge will operate in detail. It covers the 'relevant building safety measures' involved, a landlord's obligations, the basis for calculating and apportioning the charges and a

series of protections for tenants. Some of the proposed protections for tenants replicate those in place in relation to service charges.

The Government has said it will not be possible to recover historical costs via the building safety charge (see below).

The building safety charge is intended to come into force within 12 to 18 months of the Bill receiving Royal Assent.[101]

Comment

Recovery of historical costs

The Housing, Communities and Local Government Committee's report on the draft Building Safety Bill said of the proposed building safety charge, "Nothing aroused nearly so much anger or upset in the evidence to our inquiry"[102] and, "Quite simply, no one besides the Government thinks the leaseholder should pay."[103]

These comments were made in the context of concerns that the proposed charges could be levied to cover historical remedial work. The Committee called on the Government to amend the draft Bill to ensure that the building safety charge cannot be levied to cover the cost of rectifying historical defects.[104]

The Government agreed with this recommendation:

> The Building Safety Charge will only cover the ongoing costs of the new regime. This will give leaseholders assurance, transparency, and protection in relation to ongoing building safety costs. We believe that by providing this transparency on these costs leaseholders will be able to hold their Accountable Person to account for providing safety to their building in the most effective and efficient way.[105]

Service charges vs a building safety charge

The Committee received conflicting evidence on the merits of establishing a building safety charge as distinct from a service charge and concluded:

> The Government should provide for recovery of ongoing building safety costs through existing service charge provisions while improving the transparency of such charges, preferably by

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101 Ibid.

102 Housing, Communities and Local Government Committee, Pre-legislative scrutiny of the Building Safety Bill, 24 November 2020, HC 466 2019-21, para 22

103 Ibid., para 23

104 Ibid., para 32

105 Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, para 25

> implementing the Committee's previous recommendations for standardised forms for service charge invoices. The building safety charge should be reserved only for any leases without a service charge and should be treated as a service charge for the purposes of leaseholder protection.[106]

In response, the Government said they did not consider it appropriate to rely on service charge provisions to recover building safety costs on the basis that "Service charge provisions vary and we can't guarantee that provisions will clearly be in place to enable the recovery of the building safety costs."[107]

The Government response provides the following rationale for establishing a new and distinct charge:

> The separation enables leaseholders to start with a 'clean slate' in respect of building safety charges and upon introduction, all leaseholders will have a nil balance in respect of the charge irrespective of any service charge debt. It also ensures that payments cannot be subsumed by general service charge payments or debt or applied towards matters other than building safety. A leaseholder in dispute with the landlord may wish to withhold payment of service charges but will be able to make payments of the building safety charge.
>
> Creating a separate Building Safety Charge allows us to put in place statutory rights and protections which will work with the new statutory building safety regime and it will allow Accountable Persons to anticipate and be responsive to safety issues without being restricted by pre-existing terms and rules which were not necessarily established with the Building Safety Act regime in mind.
>
> The Building Safety Charge provides greater certainty and clarity to leaseholders and increases transparency on the costs charged in relation to building safety. It provides a clear cost recovery mechanism for leaseholders, ensuring a fair application of the statutory regime, which is intended to provide additional safety measures for all who live in higher-risk buildings.[108]

How much will leaseholders pay?

Commentators have welcomed changes made to the Bill to ensure historical costs will not be recoverable through building safety charges. However, there is disappointment amongst leaseholder groups that the Bill does not prohibit the recovery of historical costs through service charges:

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[106] Housing, Communities and Local Government Committee, Pre-legislative scrutiny of the Building Safety Bill, 24 November 2020, HC 466 2019-21, para 54

[107] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, para 34

[108] Ibid., paras 36-38

> All that has happened is these costs have not been included in the Building Safety Charge, not that they have been prevented from being passed to leaseholders at all, which was the Select Committee's intention.[109]

Concerns have been expressed about the cost of the new regime. The Leasehold Knowledge Partnership has said:

> ...it will make living in high-rise residential buildings much more expensive than at present. In particular, the charge as currently drafted requires leaseholders to pay all of the fees associated with this extensive new system of regulation via the new Building Safety Charge.[110]

The Bill's Impact Assessment has a detailed section on leaseholder impacts which contains estimates of potential building safety charges:

> Using a range of 35-100 leaseholders per building and central estimates of costs per building, we estimate that each leaseholder could incur average monthly costs between £9 and £26, with a central estimate of £16, via the Building Safety Charge. These costs are based on reference buildings and show costs averaged over multiple years; in years where reviews of documentation (e.g. of the safety case) take place, costs will be higher than these averages. There will also be considerable differences between buildings, depending on the complexity of each building and the number of leaseholders. The Building Safety Charge costs presented in this section are not inclusive of costs relating to enhanced Fire Risk Assessments as policy and potential guidance around the required frequency of such assessments is still under development.
>
> We also expect that over the first two years of the new regime, leaseholders will face higher than average Building Safety Charge costs. This is because the existing building stock will incur transitional costs implementing new requirements (e.g. setting up Safety Cases and establishing the golden thread). We estimate in the first two years, the monthly cost of the Building Safety Charge will be between £15 and £42, with a central estimate of £26.
>
> From year three onwards, we expect the existing building stock to be meeting the new requirements of the regime. We therefore expect the monthly cost of the Building Safety Charge to be between £8 and £23, with a central estimate of £14.[111]

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[109] Building Safety Bill is a device for which the batteries aren't included. It could be improved, if only officials would listen ..., Leasehold Knowledge Partnership, 6 July 2021

[110] Ibid.

[111] Building Safety Bill Impact Assessment, 5 July 2021, paras 395-397

Leaseholder bodies have expressed scepticism over the Government's estimate of £16 per month.[112]

Will the 'protections' be adequate?

Questions have been raised by leaseholder bodies over the replication of provisions in the Landlord and Tenant Act 1985, such as sections 18[113] and 20[114], which are aimed at providing protection in respect of building safety charges. There is a view that these provisions do not provide adequate protection and are overdue for reform.[115]

The Leasehold Knowledge Partnership (LKP) describes the existing consultation requirements for major works, which the Bill replicates for building safety charges, as "inadequate and widely abused".[116] LKP is advocating for strengthened consultation and information requirements in relation to building safety expenditure and service charges in general. They also support the digitisation of leaseholder consultation rights to make them easier to exercise and harder for landlords and agents to ignore.[117]

Where is the low-interest long-term loan scheme?

On 10 February 2021, the Government announced the creation of a long-term low-interest loan scheme for long leaseholders in blocks requiring cladding remediation between 11 and 18 metres in height. Payments will be capped at £50 per month.[118]

The Building Safety Bill was expected to provide the legislative framework for the scheme. Background notes on the 2021 Queen's Speech described the contents of the Bill including:

> Making provisions to support the removal of unsafe cladding, including through a financing scheme to pay for costs and a levy to ensure the development industry pays its fair share of the costs of remediating unsafe cladding.[119]

In its follow-up inquiry on cladding remediation the Housing, Communities and Local Government Committee was critical of the proposed loan scheme.

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[112] Building Safety Bill is a device for which the batteries aren't included. It could be improved, if only officials would listen ...., Leasehold Knowledge Partnership, 6 July 2021

[113] Requires service charges to be reasonable and services provided to be of a reasonable standard.

[114] Sets out the consultation process landlords must follow when major works are proposed which will cost an individual leaseholder more than £250.

[115] Building Safety Bill: Made by officials. By themselves. Talking to themselves. Will the cogs turn?, Leasehold Knowledge Partnership, 6 July 2021

[116] Building Safety Bill is a device for which the batteries aren't included. It could be improved, if only officials would listen ...., Leasehold Knowledge Partnership, 6 July 2021

[117] Ibid.

[118] Government to bring an end to unsafe cladding with multi-billion pound intervention, MHCLG, 10 February 2021

[119] Background briefing notes on the 2021 Queen's Speech, 11 May 2021

The Committee called for the scheme to be abolished and for leaseholders' costs to be met through a fully funded Comprehensive Building Safety Fund.[120]

Provision of building safety information

Clause 121 will insert new provisions in the Landlord and Tenant Act 1987 to require landlords to include certain specified building safety information in demands for rent, service charges, administration charges and building safety charges. This information will include details of the Accountable Person, the Building Safety Manager, and the contact details of the Building Safety Regulator. The statement will advise the tenant that the premises consist of or include a dwelling in a higher-risk building.

With some exceptions, where a landlord does not comply with the requirement the sums demanded from the tenant will not become due until the notice provisions are complied with.

Amendments to the Commonhold and Leasehold Reform Act 2002

Clause 122 aligns the Commonhold and Leasehold Reform Act 2002 with the Building Safety Bill.

The commonhold association will be the Accountable Person. A commonhold community statement for a higher-risk commonhold in England will have to include provisions requiring the association to comply with its duties under the Building Safety Bill in relation to each unit and the common parts.

The statement must require directors to make an annual estimate of income required from unit-holders to meet building safety expenses, and require each unit-holder to pay a percentage of the estimate in relation to their unit.

[120] Housing, Communities and Local Government Committee, Cladding Remediation— Follow-up, 29 April 2021, HC 1249 2019-21, para 29

6 Remediation and redress (clauses 124-126)

6.1 Service charges in respect of remediation works

The Outline Transition Plan for the Building Safety Bill says the Bill does not make leaseholders liable for the cost of works such as the removal of unsafe cladding and goes on:

> However, where existing leases allow for these remediation costs to be passed on, the Building Safety Bill will bring forward measures to protect leaseholders, by placing additional duties on the building owner to explore alternative cost recovery routes before passing costs to leaseholders.[121]

Clause 124 will amend section 20 of the Landlord and Tenant Act 1985. Section 20 places a duty on landlords to follow a consultation process where the cost of proposed works will result in any leaseholder paying more than £250.[122]

Where prescribed remediation works are planned,[123] clause 124 will require landlords to take reasonable steps to recover costs through other avenues before passing on costs to leaseholders. Landlords will have to inform leaseholders about steps taken to recover costs elsewhere. For example, they will be required to check whether grant funding is available and, where appropriate, apply for it. They will be required to take reasonable steps to pursue monies from third parties such as through insurance, guarantees or indemnities, or from the developer or anyone involved in designing or carrying out works on the building.[124]

Where funding is obtained, landlords will be obliged to reduce the cost for leaseholders accordingly. Where a landlord fails to take reasonable steps to recover costs, leaseholders will be able to seek an order to limit the relevant costs of remedial work they are liable to pay.

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[121] The Outline Transition Plan for the Building Safety Bill, MHCLG, 5 July 2021, para 12

[122] For an overview of current provisions for private freeholders/agents see: Section 20 Consultation for Private Landlords, Resident Management Companies and their Agents - The Leasehold Advisory Service [accessed on 8 July 2021]

[123] Regulations will prescribe the type of work covered by this section.

[124] Bill 139 EN 2021-22, para 942

These provisions were not included in the draft Building Safety Bill. The explanatory notes to the Bill say the change is being made "to give leaseholders further rights and protection in ensuring other cost recovery routes are appropriately explored and financing schemes remain affordable."[125]

Commentators have made the point that this measure will not relieve leaseholders of the burden of paying for remediation works. Building owners will be able to pass on costs if they can show that all other avenues have been exhausted.[126]

Leaseholder groups are concerned that the protection offered by clause 124 is unlikely to be in place for at least a year, and therefore offers no immediate help where building owners are not seeking to recover costs elsewhere. The Leasehold Knowledge Partnership has said:

> There may be no recoveries a landlord can actually make to spare leaseholders from the costs, in which case leaseholders continue to have no protection. Clause 124 does not create any new money to pay the ruinous costs faced by leaseholders.[127]

On publication of the Bill the Shadow Secretary of State, Lucy Powell, said:

> Rather than yet another betrayal of their promises to leaseholders, we need legal protections to ensure that millions of pounds of cladding remediation costs are not passed on to innocent homeowners and tenants.
>
> This is what the Government promised, and Labour will work cross-party to fight for protections to be included in the Building Safety Bill.[128]

6.2 Amending the Defective Premises Act 1972 and limitation periods

Clause 125 of the Bill would add a new section to the Defective Premises Act 1972. This Act provides a right to claim compensation for defective work connected with the provision of a dwelling where the work renders the dwelling not "fit for human habitation"'.[129]

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[125] Bill 139 EN 2021-22, para 953

[126] 'What impact will the Building Safety Bill have? The key takeaways,' Inside Housing, 6 July 2021 [subscription required]

[127] Building Safety Bill is a device for which the batteries aren't included. It could be improved, if only officials would listen ...., Leasehold Knowledge Partnership, 6 July 2021

[128] Lucy Powell responds to publication of Building Safety Bill - The Labour Party, 5 July 2021

[129] Bill 139 EN 2021-22, para 966

Work carried out on existing buildings, e.g. refurbishment, is not currently covered by the 1972 Act. Clause 125 will expand the right to claim compensation to any work undertaken on a dwelling if that work is done in the course of a business. Only work carried out after the clause is brought into force will be covered – the provision will not apply retrospectively.

Clause 126 will insert new provisions in the Limitation Act 1980. This Act governs the period within which legal action must be brought in regard to section 1 of Defective Premises Act and section 38 of the Building Safety Act 1984.[130] The intention is to extend the limitation period from six to fifteen years. The fifteen year limit will also apply to the new section 2A added to the Defective Premises Act by clause 125.

The fifteen year limit will apply to section 1 of the Defective Premises Act (work connected with the provision of a dwelling) prospectively and retrospectively. Where this results in a limitation period of less than 90 days, the clause provides that a minimum period of 90 days will apply "to give potential claimants the necessary time to take advice and lodge a claim."[131]

Where a claim is lodged to take advantage of the extended limitation period, i.e. where the six-year period has expired, the court will be able to dismiss it if continuation would breach the defendant's human rights. Where a claim has previously been dismissed, the extended limitation period will not be sufficient to reopen the claim.[132]

Clause 146 (commencement) provides for clause 126 to come into force two months after Royal Assent. For example, if Royal Assent takes place on 1 April 2022, the limitation period would be extended to fifteen years from 1 June 2022. Claims under section 1 of the Defective Premises Act could be taken in respect of dwellings provided since June 2007.

These provisions, which will also apply in Wales, were not included in the draft Building Safety Bill. The extension of the 1972 Act to refurbishment, coupled with an extended limitation period has been welcomed, particularly considering the amount of refurbishment work required to address ongoing safety concerns.

There are questions over the number of leaseholders in affected blocks who will be able to benefit from the changes. Inside Housing reported on a snap poll carried out the UK Cladding Action Group over 3/4 July which indicated that 236 buildings built before 2007 would not benefit from the legislation.[133]

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[130] This section is not currently in force, but the Government has said it will be commenced at the same time as clause 126. Section 38 provides for claims against a developer for a breach of duty with regards to building regulations.

[131] Bill 139 EN 2021-22, para 969

[132] Bill 139 EN 2021-22, para 970

[133] 'What impact will the Building Safety Bill have? The key takeaways,' Inside Housing, 6 July 2021 [subscription required]

Commentators have questioned whether leaseholders will have the resources to launch complex legal claims against developers, many of whom are no longer in business. Inside Housing notes:

> So far there have only been a handful of cases where leaseholders have launched claims against developers and many others are sceptical about their ability to challenge, due to costs and the argument from developers that these buildings were built to the building regulations and standards of the time.[134]

The National Audit Office's Report - Investigation into remediating dangerous cladding on high-rise buildings (June 2020) records MHCLG as knowing that "only in a minority of cases would it be financially justifiable for building owners to bring legal action to recover money."[135]

The power to dismiss claims based on developers' human rights has been referred to as a "loophole" which could limit the effectiveness of the reforms for leaseholders.[136]

[134] Ibid.

[135] NAO, HC 370, Session 2019-21, 19 June 2020, para 19

[136] Building Safety Bill is a device for which the batteries aren't included. It could be improved, if only officials would listen ..., Leasehold Knowledge Partnership, 6 July 2021

7 The New Homes Ombudsman (clauses 127-132)

Calls for improved consumer redress: new build housing

While political attention is focused on the need to increase house-building rates, there are long-standing concerns about the quality of new-build housing and consumers' rights of redress when things go wrong.

The All-Party Parliamentary Group (APPG) for Excellence in the Built Environment carried out an open inquiry into quality and workmanship of new housing for sale in England and published More Homes, Fewer Complaints in July 2016.[137] Amongst several recommendations, the APPG called for improvements to customers' means of redress "through the establishment of a New Homes Ombudsman".[138]

During a Westminster Hall debate on 16 October 2017 Steve Double compared the lack of protection buyers of new homes have with those buying faulty goods:

> The homeowner has far more consumer rights and protection for a new kettle in their kitchen than they do for the new building that houses it. For the vast majority of people, buying a new home will be the biggest purchase they ever make, and surely we should provide more adequate protection for them. On the thankfully very rare occasions when the builder has completely failed to construct a property fit for habitation, house purchasers should not have to resort to the courts to establish their rights. Sadly, that is too often the case in the current set-up.[139]

The APPG published a further report, Better redress for home buyers in June 2018 which focused on how a New Homes Ombudsman could drive up standards and improve consumer redress for buyers of newly built homes.[140]

[137] All-Party Parliamentary Group on Excellence in the Built Environment, More Homes, Fewer Complaints, July 2016

[138] Ibid., p7

[139] HC Deb 16 October 2017 [National House Building Council] c691

[140] All-Party Parliamentary Group on Excellence in the Built Environment, Better redress for home buyers, June 2018

The Government issued Strengthening consumer redress in the housing market: a consultation in early 2018. On 1 October 2018, the Government announced an intention to create a New Homes Ombudsman to "champion homebuyers, protect their interests and hold developers to account".[141]

The summary of responses to Strengthening consumer redress in the housing market, together with the Government response, was published in January 2019.[142] June 2019 saw publication of a technical consultation, Redress for Purchasers of New Build Homes and the New Homes Ombudsman, which explored the detail of proposed legislation and how a New Homes Ombudsman would be delivered, the outcome of which was published in February 2020.[143]

Additional information on quality issues and consumer redress can be found in the Library paper (CBP07885) New-build housing: construction defects – issues and solutions (England).

The Bill and comment

The provisions in brief

Clause 127 will require the Secretary of State to "make arrangements" for a New Homes Ombudsman (NHO) scheme. **Subsection 128(1)** sets out conditions the scheme must meet. **Schedule 8** to the Bill sets out further detailed requirements.

There is provision for the Secretary of State to provide financial assistance to the NHO scheme but the explanatory notes to the Bill say the intention is for it cover its costs "and to finance itself through fees charged to developers."[144]

Relevant owners of new build homes will be able to escalate complaints against members of the scheme and have those complaints investigated and determined by an independent individual (subsection 128(1)). The NHO scheme may allow for other people or organisations to have complaints investigated.

The scheme will allow for the NHO not to investigate complaints which are being considered by another redress scheme or which are subject to legal proceedings.

Clause 129 sets out definitions for 'relevant owners', 'developers' and 'new build homes'. Complaints will be considered from owners who occupy a new

[141] **Government announces new housing measures,** News story, 1 October 2018

[142] Strengthening Consumer Redress in the Housing Market – Summary of responses to the consultation and the Government's response, MHCLG, January 2019

[143] Redress for Purchasers of New Build Homes and the New Homes Ombudsman Summary of responses to the consultation and the Government's response, MHCLG, February 2020

[144] Bill 139 EN 2021-22, para 975

build home, and from certain residential landlords, if the complaint is made within the first two years of the property first being purchased from a developer. Complaints will be considered in respect of "certain new build homes constructed or converted after clause 129 comes into effect".[145]

The Secretary of State will have power to make regulations to expand the definition of a developer. This power may be used if it becomes apparent that the original definition does not cover all intended structures.[146]

The Secretary of State, under **clause 130**, will have a regulation making power under which developers of new build homes in scope will be required to join and remain members of the NHO scheme for a specified period. These regulations will be subject to the affirmative resolution procedure.[147]

The same regulations may provide for the imposition of civil sanctions where developers are in breach of duties imposed by clause 130. The Secretary of State may designate a person to investigate suspected breaches and impose sanctions. Developers will have a right of appeal.

The person who maintains the NHO scheme will be required to keep a register of developer members under **clause 131**. Consumers will be able to check if a developer is a member of the NHO scheme.

Clause 132 will give the Secretary of State power to issue, and or, give approval to a code of practice setting out standards of conduct and quality of work which members of the NHO scheme should meet. This power may be invoked if the industry does not develop its own scheme or a scheme is developed which cannot be approved.

Comment

The Housing, Communities and Local Government Select Committee considered provisions on the NHO scheme during scrutiny of the draft Building Safety Bill. The Committee "received mostly very positive submissions on the introduction of the new homes ombudsman scheme".[148] The Committee said it was "broadly satisfied" with the scope of the NHO scheme.[149] Areas where the Committee sought change included:

- Enabling prospective buyers who pull out of a transaction due to the actions of a developer to lodge a complaint.
- Placing a duty on developers to put in place their own complaints procedures and inform purchasers of their rights under the NHO scheme.

[145] Bill 139 EN 2021-22, para 979

[146] Bill 139 EN 2021-22, para 985

[147] An SI laid under the affirmative procedure must be actively approved by both Houses of Parliament.

[148] Housing, Communities and Local Government Select Committee, Pre-legislative scrutiny of the Building Safety Bill, 24 November 2020, HC 466 2019-21, para 213

[149] Ibid., para 215

- A commitment to monitor the scheme and amend its scope if necessary.[150]

The Bill has been changed to take account of some of the Committee's recommendations. On prospective purchasers' complaints, the Government has said this will be possible because the NHO scheme may allow other persons to lodge complaints and have them investigated. It will be left to the scheme to determine who will be covered.[151]

The recommendation to require developers to have their own complaints procedures was rejected on the basis that "setting standards of service is already foreseen in the draft Building Safety Bill."[152] The code of practice will set an expectation for developers to have complaints procedures and the standards it should meet. The Bill has been amended:

> ...so that it is clear that the procedures to become and remain a member of the New Homes Ombudsman scheme may include a requirement for a developer to have internal procedures in place for the handling and resolution of complaints and inform purchasers of their rights under the New Homes Ombudsman.[153]

The Government has agreed to monitor implementation of the scheme and amend its scope where necessary.[154]

The requirement to publish a register of members was not included in the draft Bill. Clause 131 was added following consideration of written evidence submitted to the Committee.[155]

New Homes Quality Board (NHQB)

In 2019, Natalie Elphicke was selected to head up an interim New Homes Quality Board to oversee the creation of permanent governance arrangements and develop a new code of practice for the housebuilding industry. The NHQB was formally launched in February 2021. The website says it will oversee the appointment of a New Homes Ombudsman Service (NHOS) to adjudicate against the new code.

Consultation on a draft New Homes Quality Code ran from 9 June to 7 July 2021.[156]

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[150] Ibid., para 216

[151] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, paras 173-174

[152] Ibid., para 175

[153] Ibid.

[154] Ibid., para 176

[155] Ibid., para 177

[156] New Homes Quality Code Consultation [accessed on 8 July 2021]

8 Other Provisions

8.1 Regulation of Construction Products

The Bill creates a new UK-wide regulatory framework for construction products. The current system of regulation is the EU Construction Products Regulation 2011, as retained in UK law. This only covers some of the products placed on the UK market - where a designated standard has been adopted or a UK Technical Assessment applies (around 400 product families). The Bill provides powers so that all construction products marketed in the UK fall under a regulatory regime, allowing them to be withdrawn from the market if they present a risk. The Hackitt reported recommended measures to improve the regulation of construction products.

Some other products used by consumers may fall under the General Product Safety Regulations 2005. However, the explanatory notes add:[157]

> ...There are many construction products where there is no existing EU harmonised standard, or European Technical Assessment, and they are not used by consumers – Aluminium composite material (ACM) cladding being one example and some types of fire doors another. This gap in regulation became apparent after the Grenfell Tower Fire.

In January 2021 the Secretary of State, Robert Jenrick, made a written statement on construction product safety, providing updates on construction product regulation and testing. He also announced the extension of the remit of the Office for Product Safety and Standards into construction product safety, noting:

> Secondly, I am pleased to announce today that this Government will establish a national regulator to ensure that the regulations are better enforced, and to provide vital market surveillance that will enable us to spot and respond to safety concern earlier and more effectively. We will do this by extending the remit of the Office for Product Safety and Standards (OPSS), which will take on oversight of construction products alongside its existing responsibilities. OPSS has valuable skills and experience in regulating consumer products and of working closely with local authority Trading Standards and

[157] Bill 139 EN 2021-22, p184

> other regulators, and will be granted up to £10 million in 2021/22 to establish the new function.[158]

New powers on construction product safety

Clause 133 introduces **Schedule 9** which makes the following broad changes:

- The Secretary of State is given the power to make 'construction products regulation'.
- These regulations can require the safety of products placed on the market during 'normal or reasonably foreseeable conditions of use', and this includes during storage, transportation or packaging.
- The regulations can impose standards of product performance and other specific requirements to be met by persons carrying out activities in relation to construction products (such as manufacturers and distributors). This will be used to replace EU regulations where relevant. It will not be used in Northern Ireland.
- There is a power to create a list of safety critical construction products, to regulate those products by reference to safety critical standards. The schedule provides for creating a market surveillance regime and powers of enforcement. There is a power to create offences (subject to paragraph 22 of the schedule).
- There are information sharing requirements.

Regulations relating to safety critical products and any criminal offences are subject to the affirmative procedure. All other regulations are subject to the negative procedure.

The Transition Plan explains how enforcement under the regime will take place:

> The national regulator for construction products, which is being established within the Office for Product Safety and Standards (OPSS) will operate the new robust powers of enforcement in addition to Trading Standards. OPSS is an experienced regulator and will use the time before new powers for regulating construction products are granted under the Building Safety Bill to develop capacity to delivery the new national regulator for construction products and provide support to existing regulators while operating within the scope of the current regulatory regime.
>
> Once legislation is in place, OPSS will:
>
> - Provide vital market surveillance and oversight, including maintaining a national complaints system and supporting

[158] HCWS722 19 January 2021

local Trading Standards so that safety concerns can be spotted and dealt with quickly;

- Lead and co-ordinate the enforcement of the improved construction product regulations, including removing products that pose a safety risk from the market;
- Provide advice and support to the industry to improve compliance as well as providing technical advice to the Government;
- Carry out or commission its own product-testing to investigate non-compliance;
- Establish a robust and coherent approach with the Building Safety Regulator and Trading Standards to drive change across the sector.

Comment on the construction product regulation

During pre-legislative scrutiny the HCLG Committee raised a number of concerns around the construction product provisions:[159]

- That the Government should publish proposals for improving the product testing regime.
- That the Government should provide for the publication of test failures and re-run tests.
- That the testing market needed more capacity.
- That the testing regime should consider products as parts of systems.
- That the system needed to take account of different applications of products and regulations were required to cover this.

While the Government did not make direct changes as a result of these recommendations, it details in its response the various actions it is taking around testing that relate to these points, such as the provisions in the Bill, the Independent Review into product testing launched on 22 April and where it was seeking voluntary industry measures rather than statutory measures (see paras 143-166 of the Government Response).

The Government accepted a Committee recommendation around re-wording the schedule for overseas standards; the Committee also recommended that Government indicate whether or how quickly it intended to review the existing European harmonised standards. The Government responded that it had no

[159] HCLG Committee, Pre-legislative scrutiny of the Building Safety Bill, Fifth Report of Session 2019-21, 24 November 2020, HC466

current plans to review, and their priority was the transition to the new UK based system.[160]

8.2 Fire Safety

The Regulatory Reform (Fire Safety) Order 2005 (or Fire Safety Order) applies in England and Wales and is the main legislation governing Fire Safety. The 2005 Order applies to all non-domestic premises, including communal areas of flats. This is defined by article 6 which works by expressly excluding specific types of premises.

The Order designates those in control of premises as the responsible person for fire safety and this duty normally falls on landlords, building owners or building managers. They have a duty to ensure that a risk assessment is carried out to identify hazards and risks, and to remove and reduce these as far as possible. The responsible person then ensures a set of appropriate measures are in place to achieve fire safety (the order sets out detail on different aspects under Part 2). Government guidance sets out how fire risk can be assessed.[161] The fire risk assessment may be affected by any new issues that arise during the building's lifetime.

As noted in section 1.6, the Government consulted on changes to the Fire Safety Order in 2020. A Government response was published on 17 March 2021 and noted three methods of implementing the outcomes; one was through primary legislation and the Building Safety Bill.

Most of the changes in the Building Safety Bill relate to the aim of strengthening he Fire Safety Order in relation to guidance, the requirements of the responsible person, the information that must be recorded and increasing the level of fines related to breaching some parts of the order. Responding to the consultation, the Government noted that respondents were broadly supportive of the measures proposed. Further detail is available in the Government response.

Clause 134 would amend the Regulatory Reform (Fire Safety) Order 2005 in the following ways:

- The responsible person will be required to record their fire safety assessment in full, rather than the current requirement of recording significant findings.
- A requirement that the responsible person must not appoint a person to assist them in a fire risk assessment unless they are competent. This

[160] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, paras 170-2

[161] Home Office, Fire safety law and guidance documents for business

would mean they would need to have sufficient training, experience or knowledge and other qualities to enable them to undertake this role.

- All responsible persons will have to record their fire safety arrangements. It is currently only required in specific circumstances, such as having five or more employees.
- A requirement to provide fire safety information to residents of buildings where there are two or more sets of domestic premises. This is currently not required (but is required in workplaces). The clauses sets out the information to be provided, and this can be amended by English or Welsh Ministers by regulation.
- A requirement that responsible persons establish whether their responsibly is shared with other responsible persons in a building. This is to deal with a potential scenario where a building has more than one distinct area and the responsible persons may not cooperate.
- A requirement for outgoing responsible persons to share specified (in the Bill) information with incoming responsible persons relating to fire safety. Regulations can extend the requirements as well as set the format and frequency. This measure is to complement the 'golden thread' for buildings established in this Bill.
- Where a building is considered under this Bill to be a higher-risk building, there is a requirement for the responsible person and accountable person to cooperate. There is a similar provision in clause 117. In practice the roles will be held by the same person in many circumstances.
- Financial penalties for failing to comply with requirements relating to the installation of luminous tube signs, failing to comply with any requirements imposed by an inspector, under article 27(1)(c) or (d) of the Fire Safety Order, and impersonating an inspector, are increased to unlimited fines.
- An amendment that builds on changes in the Fire Safety Act 2021 to provide that non-compliance with guidance issued under Article 50 of may be relied on as evidence of non-compliance with the Fire Safety Order.

8.3 Changes to the Architects Act 1997

The Architects Act 1997 is the current basis for the registration and disciple of Architects in the UK. The Act establishes the Architects Registration Board. In order to use the title of 'architect' in the UK, an individual must be registered with the ARB.

The Government ran a consultation between November 2020 and January 2021 on proposed changes to the Architect Act 1997. The changes related to the following areas:

- In line with the Building Safety Bill and the intention to increase competence across the construction sector, proposed changes to strengthen the ARB's role in monitoring and maintaining competence of registered architects.
- Measures relating to contesting a decision of the ARB and the listing of disciplinary orders against an architect on the register.
- Allowing the ARB to expand its list of chargeable services.
- Amending the recognition of internationally qualified architects through the creation of a new recognition system for EU and non-EU qualified international architects.

The first three bullets relate to changes in the Building Safety Bill. The final bullet relates to a change in the Professional Qualifications Bill, currently being considered by the House of Lords.

The government response to the consultation was published on 8 June 2021. This included the range of views expressed during the consultation on these changes; some of the proposals received mixed views from respondents.

Clause 135 of the Bill relates to disciple and continuing professional development for Architects. It amends the Architects Act 1997 to allow for disciplinary orders made against architects by the Professional Conduct Committee (PCC) of the ARB to be listed alongside an architect's entry in the Register of Architects. The 1997 Act is also amended to provide for the ARB to monitor competence of architects through their registration. The clause sets conditions for removal from the register. The explanatory notes add:[162]

> This power will allow the Board to determine which practical experience or training should be assessed and how the assessment should take place. The Board must consult professional bodies and other stakeholders before introducing a competence regime.

Clause 136 provides the Secretary of State, by regulation, to make provision for the services for which the ARB may charge a fee. This is expected to be used to allow the ARB to recover additional costs in relation to the implementation of new routes to the register for architects who qualified outside of the UK.

The ARB has a webpage detailing the proposed changes to the Architects Act.

[162] Bill 139 EN 2021-22, para 1038

8.4 Housing complaints made to a housing ombudsman

The Localism Act 2011 provided for a new approach to dealing with complaints by social tenants against their landlords. These provisions came into force on 1 April 2013. The aim was for councillors, tenant panels and MPs ("designated persons") to play a more active role in resolving complaints at the local level. This was referred to as a democratic filter. Referral of a complaint to a designated person was expected to take place only after a landlord's complaints procedure had been exhausted. Alternatively, tenants must wait until eight weeks after the completion of the landlord's complaints procedure before escalating the matter to the Housing Ombudsman directly.

Background information can be found in in the Library briefing paper (CBP06644) Housing complaints – the role of designated persons.

Clause 137 of the Bill will remove the democratic filter and referral of complaints by a designated person. Tenants of social landlords[163] will be able to escalate complaints directly to the Housing Ombudsman. A new paragraph will be added to the Housing Act 1996 to retain the requirement on tenants to exhaust their landlord's complaints process before escalating to the Housing Ombudsman.[164]

The democratic filter has faced criticism "for undermining consumer empowerment". There is evidence of designated persons not fully understanding their role.[165]

The Housing, Communities and Local Government Select Committee said, "The few submissions that mentioned the removal of the democratic filter all welcomed it without qualification."[166]

8.5 The Liability of Corporate Officers under this Bill

Clause 138 extends the liability of offences under parts 2 and 4 of this Bill to officers of corporate bodies. Where a corporate body commits a criminal offence under the Act, any director, manager, secretary or other similar

[163] Housing associations and local authorities.

[164] Bill 139 EN 2021-22, para 1048

[165] Bill 139 EN 2021-22, para 1055

[166] Ministry of Housing, Communities and Local Government, Building Safety Bill: Government response to pre-legislative scrutiny by the Housing, Communities and Local Government Select Committee, CP 473, 7 July 2021, para 211

officer of that body is also deemed to have committed that offence in certain circumstances.

8.6 Review of Regulatory Regime

Clause 139 provides for a review of the regulatory regime established by this Bill within 5 years of it gaining Royal Assent, and every 5 years after. The report is made to the Secretary of State but it must be published. The appointed reviewer must be independent from organisations and sectors related to the system. The review would cover:

> (a) the effectiveness of the regulator in—
>
> (i) exercising its building functions,
>
> (ii) securing the safety of people in or about buildings in relation to risks arising from buildings, and
>
> (iii) improving the standard of buildings,
>
> (b) the adequacy and effectiveness of—
>
> (i) provision made by or under Parts 2 and 4 of this Act, and
>
> (ii) provision made by or under the Building Act 1984 (except section 105C) that applies in relation to England,
>
> (c) the effectiveness of the regulation of construction products in the United Kingdom,
>
> (d) such matters connected with any of the matters mentioned in paragraphs a) to (c) as the person considers appropriate, and
>
> (e) any other matter specified in the appointment.

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