



BUILDING SAFETY ACT 2022: PRIORITISING SAFETY POST- GRENFELL

After almost five years since the Grenfell Tower tragedy, the Building Safety Act 2022 (the Act) has been passed containing a wide range of changes to law covering building safety during design, construction and occupation, and the creation of a new regulatory framework for higher-risk (residential) buildings. The Act also makes changes to the overlapping Fire Safety Order which covers safety in workplaces and other premises. This briefing considers the key reforms made by the Act.

The passage of the Act has been controversial and protracted, with significant amendments being made throughout its passage through Parliament. Key among these are the new provisions that limit residential leaseholder liability for defective cladding in existing buildings, and powers to prohibit developers (and potentially others) from carrying out development if they have failed to contribute sufficiently to the remediation of their existing defective buildings. A further key change introduced in the latter stages was the removal of the requirement to appoint a building safety manager in the new higher-risk buildings regime (see further below).

More broadly, the Act contains a range of changes intended to tighten up controls over all actors involved in the building process. It also establishes a special, more stringent, regime for higher-risk (residential) buildings aimed at dealing with the significance and particular nature of the risks inherent in such buildings. The key elements of the amended regime (either set out in the Act or anticipated in secondary legislation) are explained below and apply mainly to England only. Secondary legislation has been published in draft and will be finalised over the coming months. It is expected that the bulk of the new regime will come into force in 18 months' time (i.e. by October 2023) and the limitations on leaseholder liability take effect 2 months after the Act was passed.

GENERAL CHANGES TO BUILDING SAFETY FRAMEWORK

The Act introduces general changes to the building safety framework which will apply to all building work.

Dutyholders

The Act introduces powers to set competence requirements for the following categories of dutyholder under the Construction (Design and Management) Regulations 2015 (CDM 2015): Principal Designer, Principal Contractor,

Key issues

- Act introduces changes to general building safety rules:
 - New competency requirements for building contractors and designers, and new duties to ensure building regulations compliance
 - Automatic lapsing of building approvals after 3 years
 - New safety liabilities for corporate directors
- Act proposes new regime for higher-risk (residential) buildings at least 18m high or with at least 7 storeys) (HRBs):
 - Gateway points for compliance with building safety rules
 - New Building Safety Regulator responsible for HRBs
 - New duties to keep 'golden thread' of building information from design to occupation
 - Building safety sign-off required before occupation permitted.
 - New 'Accountable Person' responsible for building safety during occupation, but obligation to appoint building safety manager is dropped.
 - Continuing Building Assessment Certificate to demonstrate fitness for occupation
- Act makes changes to Fire Safety Regime:
 - Requirement for Responsible Persons (fire safety) to identify themselves, and co-operate with Accountable Persons
 - Competency requirements for those carrying out risk assessments
 - Strengthening requirements for, and provision of, information

Designers and Contractors. Although they will apply to all buildings, the requirements will be more stringent for higher-risk buildings. If there is more than one contractor, the client must appoint a Principal Designer and Principal Contractor. Significantly, Clients would be required to sign a declaration that they are satisfied that the Principal Designer, Principal Contractor and those carrying out building work are competent.

Building regulations will include duties on the dutyholders to co-operate and share information, and importantly, to ensure the work complies with building regulations (and these duties will also apply to works carried out during building occupation). In relation to HRBs, they will also have an obligation to maintain a 'Mandatory Occurrence Reporting' system under which they would be required to report the occurrence of risks likely to lead to death or serious injury to significant numbers of people if unremedied. These requirements go significantly beyond the current requirements of the CDM 2015 which concentrate on managing health & safety of the process of carrying out the work, rather than how safe the resulting building is.

Building control process

Buildings other than higher-risk buildings (for which see further below) will continue to be broadly subject to the current regime of building control, although the Act makes some changes that are applicable to the building safety framework for all types of building. It also provides powers for future building regulations to amend the framework more extensively.

Building approvals (deposit of plans, initial notices, and plans certificates) will, in future, automatically lapse after 3 years, rather than allowing local authorities to declare them ineffective after such time.

Approved Inspectors are to be subject to a new registration scheme, required to meet minimum standards, and are rebadged as Building Control Approvers. In addition, a new function of registered building inspector is created to perform an advisory role in relation to the decisions of local authority building control officers, Building Control Approvers and the new Building Safety Regulator (see below).

Liability

Significant changes to the liability structure are contained in the Act. New provisions are included to make corporate directors and managers liable for offences under building safety legislation where breaches are due to their consent, connivance or neglect. This is a formulation commonly seen in environmental and other health & safety contexts and will increase pressure on all companies involved in the development process to prioritise building safety issues.

Time limits for taking enforcement action in relation to breaches of the building regulations will be extended under the Act from 12 months to 10 years.

"Provisions are included to make corporate directors and managers liable for offences under building safety legislation where breaches are due to their consent, connivance or neglect"

Other changes

Currently, construction products are covered by EU-derived product regulations only where EU harmonised standards applied. The Act will extend control to all construction products introducing a power to regulate safety critical products, and a requirement on manufacturers to ensure all construction products are safe. This regime will be managed centrally by a new National Regulator for Construction Products to be established within the Office for Product Safety and Standards, rather than, as at present, relying on local Trading Standards officers.

The Bill also increases regulation of the architect's profession.

"Key among the provisions of the Act is the creation of a new regulatory framework for high-rise residential buildings overseen by a new dedicated regulator"

NEW REGIME FOR HIGHER-RISK BUILDINGS

Key among the provisions of the Act is the creation of a new regulatory framework for higher-risk buildings overseen by a new dedicated regulator. The key elements of this new regime (either set out in the Act or anticipated in secondary legislation) are set out below.

Which buildings and safety risks does the new regime apply to?

Following consultation, the Government has decided to apply the new regime only to fire and structural integrity risks and only in higher-risk buildings (HRBs). HRBs are those which are at least 18 metres in height or with at least 7 storeys, in each case with 2 or more residential units. This will capture a much wider range of buildings (including student accommodation and many mixed used buildings) than simply high-rise residential tower blocks. Certain other residential accommodation is expected to be included (care homes, hospitals) but only for elements of the regime relating to initial design and construction, as reliance would be placed for the occupation phase on the specific regulatory regimes covering those types of buildings. Significantly, the regime could be extended to different types of buildings and risks in due course (e.g. to all high rise buildings, and to explosion risks).

The ongoing duties during the occupation phase will apply to existing, as well as new, HRBs.

New Building Safety Regulator

The Bill establishes a new Building Safety Regulator (BSR) specifically to oversee all elements of the building safety regime applicable to HRBs (in place of local authorities or Approved Inspectors (in future, Building Control Approvers). The BSR will be a division of the Health & Safety Executive (HSE). The BSR may also take responsibility for other buildings where it agrees. Developers of large schemes which feature a mix of uses including high-rise residential, will need to consider whether it makes sense to apply to the BSR to oversee the whole scheme.

"Developers of large schemes which feature a mix of uses including high-rise residential, will need to consider whether it makes sense to apply to the Building Safety Regulator to oversee the whole scheme"

Design and construction of the building

Dutyholders

The existing dutyholders under the CDM 2015 will all have duties under the new framework including the Client, Principal Designer, Principal Contractor, Designers and Contractors.

Gateway points

A series of gateways are established through which safety will have to be demonstrated. Some of the key features of each Gateway are set out in the table below.

Gateways to Approval for High-Risk Buildings		
Gateway One: Planning Application Stage (in force since August 2021)	Gateway Two: Commencement of Construction	Gateway Three: Completion
<ul style="list-style-type: none"> Information on building safety incorporated into planning application through a new Fire Statement BSR acts as statutory consultee Stage only applies if express planning permission required 	<ul style="list-style-type: none"> Obtain Building Control Approval Key information submitted to BSR Construction cannot begin until BSR satisfied design meets the building regulations Payment of the Building Safety Levy (see below) 	<ul style="list-style-type: none"> BSR assesses the building to determine whether the work conforms to building regulations BSR issues a completion certificate once satisfied – No occupation before certificate obtained Employer, Principal Designer and Principal Contractor confirm building complies with Building Regulations

When the process is completed, relevant documents relating to building safety (see below the Golden Thread of information) are then given to the Accountable Person (see further below).

An appeal route will lie to the Secretary of State / First Tier Tribunal where the BSR fails to make decisions on plans or works within prescribed deadlines for approval. This may be important in some cases for developers since it will in future be an offence to begin HRB development at risk (before building control approval is obtained).

Developers of HRBs and their construction teams will need to agree an appropriate pass down of risk, in particular around the consequences of delayed approval by the BSR, and we are already seeing market practice beginning to evolve in that regard.

Occupation of the building

Accountable Person

The Accountable Person is the dutyholder during occupation of the building, and there may be more than one such person for any building. In broad terms the Accountable Person will be the person with legal estate in possession of the common parts/structure/exterior of the building with the following qualifications:

- A management company who does not hold a legal estate in any part of the building but has repair responsibilities in respect of the common parts etc. is an Accountable Person;
- If a tenant is the estate owner in possession of common parts etc. but their landlord is responsible for the repair of those common parts, then the landlord is the Accountable Person; and
- If different parties are responsible for different aspects of the common parts/structure, then each is an Accountable Person for that relevant part.

Where there is more than one Accountable Person, the legislation designates the one responsible for structure and exterior as Principle Accountable Person with enhanced duties. Key duties of the Accountable Person/s are to:

- Ensure a completion certificate is obtained from the BSR **before the relevant part of the building is occupied**;
- Register the building with the BSR **before it is occupied** (this obligation will also apply to existing buildings based on transitional provisions – see below);
- As soon as the building is occupied:
 - assess building safety risks (and continue to do so on an ongoing and regular basis);
 - prepare a Safety Case Report to evidence how they intend to meet the above responsibilities including mitigating risks; and
 - provide a copy of the Safety Case Report to the BSR, updating it when necessary.

The safety case is a proven concept borrowed from controls placed on high risk industrial facilities. Where the BSR considers the Safety Case Report to be inadequate, and problems are not addressed, it will ultimately be able to take enforcement action against the Accountable Person;

- More generally take all reasonable steps to prevent building safety risks materialising and major incidents occurring;
- Apply to the BSR for a Building Assessment Certificate (**BAC**) – the BAC will give residents an indication that the building is fit for occupation from a safety perspective. This application must be made within a 'prescribed period' after being called to do so by the BSR. Certain information about compliance by the Accountable Person with its duties (including a copy of the Safety Case Report) will have to be supplied with the application (this obligation will also apply to existing buildings based on transitional provisions – see below);
- Once issued, display the BAC prominently in the building; and

"Developers of HRBs and their construction teams will need to agree an appropriate pass down of risk, in particular around the consequences of delayed approval by the BSR, and we are already seeing market practice beginning to evolve in that regard"

- Retain the 'Golden Thread' information about the building (see further below).

Modern lease structures for multi-let buildings including residential buildings can be complex. Parties to such lease structures and management companies with repair obligations (for both new and existing buildings) will need to consider the extent to which the Act's provisions would put them in the frame as an Accountable Person / Principal Accountable Person and the associated obligations and responsibilities flowing from that categorisation.

Building Safety Manager provisions dropped

The original draft of the Bill had provided for the appointment of a Building Safety Manager (**BSM**) to help Accountable Persons with the day-to-day management of fire and structural safety risks. The Government removed these provisions from the Act in response to complaints about the costs involved. As a result, Accountable Persons alone will have responsibility for safety. It remains to be seen whether the removal of a requirement for a BSM, which would need to appoint a sufficiently skilled and competent individual to take charge of safety issues, will lead to a demonstrable reduction in safety or similar perception.

Golden Thread of information

The Act introduces a principle that there should be a continuous 'Golden Thread' of information about safety relevant to the building that is created through all the design, construction and occupation phases. The dutyholders must compile relevant safety information during design and construction. This will include, among other things, the fire statement, approved plans and documents under the Building Control Approval, and it will be held in digital form and be passed to the Accountable Person who must keep it up-to-date. The Accountable Person must then pass the golden thread on to any subsequent Accountable Person.

Accountable Persons for existing HRBs will need to collate and maintain the Golden Thread of information for their buildings as part of preparing the Safety Case Report and applying for a BAC.

Mandatory Occurrence reporting

The Accountable Person will have to establish a system for mandatory reporting of dangerous occurrences during occupation of the building. Dangerous occurrences might include the discovery of structural safety or fire safety-related defects. They will have to pass on relevant information to the BSR. A similar system would apply to dutyholders during the design and construction phase.

Implications for Residents

A key aim of the Act is to foster dialogue between the Accountable Person/s and residents of the building, particularly in respect of providing relevant information. Among new obligations is a requirement for the Principal Accountable Person to maintain a Residents' Engagement Strategy to identify how safety will be managed in practice and how any complaints can be addressed.

In addition, residents will have clearer duties to keep relevant parts of their flats in repair and not to damage building safety items.

"It remains to be seen whether the removal of a requirement for a BSM, which would need to appoint a sufficiently skilled and competent individual to take charge of safety issues, will lead to a demonstrable reduction in safety or similar perception..."

The Landlord and Tenant Act 1985 is being amended to imply a term into any lease in an HRB which consists of or includes a dwelling in favour of each tenant, requiring landlords which are Accountable Persons to perform their building safety duties under the Act; and in return (in respect of leases granted for over 7 years) for landlords to be able to recover the relevant costs (suitably apportioned) from tenants through the buildings service charge subject to certain controls. This will apply to existing leases and it is not yet clear whether any transitional period would apply for such leases. However, it is not intended that the costs of carrying out *physical works* (including remediation of historic cladding defects) would be covered; only other costs associated with carrying out their duties would be recoverable (e.g. administrative, management and consultancy costs). See below on the new provisions protecting tenants from the costs of remedying historic building safety defects.

New Building Safety Levy

The Act introduces powers for the Secretary of State to create and set the terms of a new building safety levy which will be applied towards the Government's costs of historical cladding remediation. This levy, which will need to be detailed in secondary legislation, will be payable prior to commencement of construction (Gateway 2). The Government recently announced that the levy will be chargeable in respect of "all new residential buildings" (i.e. of any height). During consultation in 2021, the Government proposed that the levy could be calculated on a sqm GIA or per unit basis and may exclude certain types of development (e.g. affordable housing); however, we will need to await the detail in the secondary legislation (expected to be introduced by the end of 2023 and raise approximately £3billion).

"The Government recently announced that the building safety levy will be chargeable in respect of "all new residential buildings" (i.e. of any height)"

Funding historic building safety defects

Alongside the new Building Safety Levy, the Government has also introduced additional measures outside the Act to compel or cajole developers to contribute towards the costs of historical cladding remediation. These include:

- A separate 4% tax which will be applied to profits over £25million from certain residential property development from 1 April 2022. This residential property developer tax is intended to raise £2billion over a 10 year period.
- Seeking a voluntary 'pledge' from the UK's largest housing developers to remediate any building they constructed within the past 30 years. The Levelling Up Secretary Michael Gove has warned developers who fail to sign up to the pledge that they could be blocked from obtaining planning permission or building sign-off or selling their property, and framework powers to implement this have been included in the Act. More than 35 of the requested 53 home builders have signed up to the pledge committing approximately £2billion for remediation works.

For some developers this will mean that they will be subject to three separate contributions towards remediation.

The Act has also introduced protections for tenants in buildings at least 11m high or having at least 5 storeys (subject to certain exceptions). These provisions which take effect 2 months after the Act was passed (28 June 2022) and:

- Prohibit the costs of remedying cladding defects being passed onto tenants;

- Prohibit costs of building safety defects being passed onto tenants where the building owner or their affiliates (including beneficiaries under trusts) were responsible for the defects; the building owner is worth more than £2m (per defective building); or the lease is worth less than £175,000 (or £325,000 in Greater London); and
- Cap tenants' liability in other cases at £10,000, or £15,000 in Greater London (higher caps apply to dwellings worth more than £1m).

More generally further new rules will help tenants to seek additional redress for building defects, including:

- Extending limitation periods for claims under the Defective Premises Act 1972 (for failing to provide dwellings which are 'fit for habitation') from six years to 30 years with retrospective effect (i.e. in relation to work already completed);
- Extending the scope of the Defective Premises Act 1972 going forwards so it includes refurbishment and other works to a dwelling as well as provision of new dwellings, in each case with a limitation period of 15 years; and
- Bringing section 38 of Building Act 1984 into force going forwards, allowing claims for compensation to be brought for physical damage (e.g. injury or damage to property) caused by a breach of building regulations with a 15 year limitation period (from date that works were completed).

Enforcement

The BSR will have a range of enforcement powers to ensure non-compliance with building standards or other requirements is corrected, including compliance and stop notices. It will also have powers of prosecution, since failure to comply with many duties under the amended regime will result in a criminal offence being committed (with the potential for fines and terms of imprisonment). The BSR will also have default powers to replace the Accountable Person in case of serious failures, by applying to the First Tier Tribunal for a Special Measures Order.

Timing

The Government intends that the regime will apply to new buildings as soon as the provisions come into force in around 18 months' time (expected towards the end of 2023), while existing buildings will be 'transitioned' into the regime. 12,500 existing HRBs are expected to be brought into the regime and will need to be assessed for a Building Safety Certificate. This is likely to take around 5 years with the first buildings being called for assessment around 6-12 months after the provisions come into force (probably late 2024). For this reason, existing Buildings will be divided into tranches for assessment with priority given to certain safety risk features (e.g. where ACM cladding remains unremediated, or the building has a single staircase and no sprinklers, or there are concerns over past management of risks).

Occupied HRBs will also need to be registered under the Act. It is understood that a transition period of 6 months will apply after the provisions come into force to allow these buildings to be registered. However, due to conflicting information coming from Department for Levelling Up,

"The regime will apply to new buildings as soon as the provisions come into force in around 18 months time (expected towards the end of 2023), while existing buildings will be 'transitioned' into the regime"

Housing & Communities and the HSE, it is not currently clear whether existing HRBs will have to be registered between April 2023 and October 2023 or between October 2023 and April 2024.

A diagram showing the Government's full anticipated timings for implementation of the Act can be seen [here](#).

HOME OMBUDSMAN SCHEME AND NEW BUILD HOME WARRANTIES

A new scheme will be established to provide a dispute resolution mechanism for determining complaints by buyers of new build homes. It will replace the voluntary codes which builders currently sign up to when issuing new homes warranties (e.g. NHBC). Developers will be required to become and remain members of the scheme and sign up to codes of practice, with penalties for failure to comply including payment of compensation or being expelled from the scheme.

New home warranties will also be required to be provided to purchasers of new homes, lasting for a period of 15 years, with financial penalties for failing to provide these.

FIRE SAFETY IN WORKPLACES AND OTHER PREMISES

Hand-in-hand with the changes mentioned above, the Government continues to consult on changes to the Fire Safety Order (FSO). This is logical since the FSO regulates workplaces and the non-domestic parts of blocks of flats. The FSO places obligations on each 'Responsible Person' in respect of a building, which is generally the person who has control of premises (usually the owner or landlord) and the employer of any workplace in the premises where the employer has a level of control over the premises (e.g. of a floor leased by a business).

There may be different Responsible Persons within one building, and any particular Responsible Person may or may not be an Accountable Person under the Act. There is the potential for overlapping responsibilities of Accountable Persons under the Act and Responsible Persons under the FSO, and this will be particularly evident in a mixed use building containing residential flats and other uses such as offices or hotels. The Housing Health and Safety Rating System under the Housing Act 2004, which looks at broader safety issues, brings further complexity. The Act seeks to ensure the regimes work together and clarify some of the overlapping responsibilities.

Key changes to the FSO regime made by the Act include:

- Ensuring that Accountable Persons and Responsible Persons will be required to co-operate and share information relevant to fire safety (the reciprocal duties of Accountable Persons are contained in the Act);
- Competency requirements for the person carrying out the Responsible Person's risk assessments;
- Requiring Responsible Persons to identify themselves to other Responsible Persons in the same building, and to Accountable Persons; and
- Provide risk assessment, details of safety measures and other information to residents.

In addition, the Fire Safety Act 2021 was passed in April 2021 introducing two key reforms:

- Clarifying that where a building has two or more dwellings, the FSO applies to the building's structure, external walls, common parts and doors between dwellings and the common parts; and
- Strengthening the significance of fire safety guidance under Article 50 of the FSO in determining any breach of the FSO.

The Government also intends to implement additional changes requiring installation of Premises Information Boxes in HRBs containing relevant plans, and risk assessment, evacuation plans and contact information in all new buildings over 11m in height (a duty that is likely to be extended to existing buildings). Further changes are being considered which would require Responsible Persons to:

- Provide details of building design to the local Fire and Rescue Service (LFRS), digital versions of floor plans, and key fire-fighting equipment;
- Carry out more regular checks on all lifts, dry and wet risers, smoke control systems and suppression systems, and on fire doors; and
- Draw up evacuation plans and send them to the LFRS.

FINAL COMMENT

Despite its protracted journey through Parliament, the passing of the Act represents a landmark step for improving building safety in England. Much, however, remains to be done. In particular, many of the framework powers in the Act will need to be completed by enactment of secondary legislation. Although some of this legislation has been published in draft, finalisation of the secondary legislation is likely to take several months. Finally, beyond legislation and regulation, significantly more effort needs to be made both in the public sphere and in the development and real estate management sectors to embed a new 'safety first' culture at all stages of design, construction and occupation of buildings.

CONTACTS



Nigel Howorth
Partner
Environment & Planning
T +44 207 006 4076
E nigel.howorth@cliffordchance.com



Anneke Theelen
Senior Associate
Environment & Planning
T +44 207 006 3045
E anneke.theelen@cliffordchance.com



Katie Kempthorne
Senior Associate
Environment & Planning
T +44 207 006 3143
E katie.kempthorne@cliffordchance.com



Michael Coxall
Knowledge Director
Environment & Planning
T +44 207 006 4315
E michael.coxall@cliffordchance.com



Ian Painter
Partner
Real Estate
T +44 207 006 4972
E ian.painter@cliffordchance.com



Marianne Toghil
Director
Head of UK Real Estate
Construction
T +44 207 006 4373
E marianne.toghil@cliffordchance.com



Angela Shepherd
Senior Associate
Real Estate
T +44 207 006 4213
E angela.shepherd@cliffordchance.com



Angela Kearns
Partner
Real Estate
T +44 207 006 4833
E angela.kearns@cliffordchance.com



Adam Waite
Senior Associate
Real Estate Construction
T +44 207 006 1290
E adam.waite@cliffordchance.com



Samuel Comer
Lawyer
Real Estate Construction
T +44 207 006 1629
E samuel.comer@cliffordchance.com



Lindsay Mann
Knowledge Director
Real Estate
T +44 207 006 4373
E lindsay.mann@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2022

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

10231805609