Devonshires

The Building Safety Bill

In July 2020 we published an overview of the then Draft Building Safety Bill. Since that date, the Government has consulted widely with the construction industry and key stakeholders.

The culmination of this has been a revised Building Safety Bill which was published on 5 July 2021 and is before both Houses of Parliament. In this article, we provide an overview of the new Building Safety Bill (**"the Bill"**) highlighting some of the more important changes over the previous version.

Some of the draft regulations needed to support the Bill have also been published and we have already seen the implementation of amendments to other legislation to give effect to some of the key elements of building safety in higher risk-buildings (**"HRBs"**) (see for example the implementation of Gateway 1)

The Bill remains an astonishingly far-reaching document. It still provides us with a wide ranging array of changes and new regimes covering the design, construction and occupation phases of HRBs, a new model for Building Regulations compliance for non-HRBs, resident engagement, service charges for building safety costs and a new Housing Ombudsman, to name just a few.

For those who own HRBs and/or who intend to construct them, the duties and obligations for those accountable persons who own or have a qualifying legal interest in a HRB and who must manage the building over its lifetime remain largely unchanged. There remain significant new enforcement powers too, both at local authority level and through the new Building Safety Regulator.

The message overall for HRBs has not in any sense been eroded. Compliance with Building Regulations and the ongoing safety of occupants through rigorous management and accountability is the new reality. For non-HRBs, the position is equally clear. The new building control regime will be rigorous and deeply professional.

The resident voice has not been dimmed and obligations to keep residents informed in the ongoing management of the building in which they live continue. Residents are also given express duties in relation to the safety of goods within their homes.

To cover every nuance of the Bill would require a small book, and so we have highlighted the most significant elements of the Bill in this article. There remains a hefty palette of supporting regulation, legislation and guidance to be put in place before every aspect of the Bill is ready to go. The Government itself has published a timeline showing its intentions in terms of timing for enacting the Bill and elements of it coming into force:

- The Outline Transition Plan for the Building Safety Bill provides: "…as a large and complex Bill we do not expect passage to take less than 9 months."
- The Timeline for Transition Plan provides that Royal Assent is anticipated 9-12 months after the introduction of the Bill.

This note is divided into the following Sections.

Click below to view the relevant section.

1. The Regulator and its powers

What is its aim and what are its powers?

In order to implement the new regime set out under the Bill, there will be a new Building Safety Regulator (**"the Regulator"**) which will be housed within the Health and Safety Executive under the Health and Safety at Work etc. Act 1974. Amendments will be made to the Health and Safety at Work etc. Act 1974 to reflect this. In summary, the Regulator will be responsible for implementing and enforcing the new regime under the Act (once the Bill comes into force) and will monitor the safety and performance of all buildings. Its aims are to secure the safety of people in or about buildings and improve the standards of buildings.

Its functions are incredibly broad and include the following:

HRBs:

- Under the Bill there will be certain classified HRBs. The Regulator has an obligation to provide the appropriate advice to the Secretary of State for the purposes of identifying a building as being "higher- risk" and also whether a building should cease to be classed as "higher-risk".
- The Regulator has additional powers in relation to HRBs. Namely, they will act as the building control authority under the Building Act 1984, including enforcing Building Regulations in respect of these "higher-risk" buildings.
- It should be noted that there will be one category of HRBs for the purposes of Part 3 of the Bill (Building Act 1984) (i.e. the design and construction phase) and another for the purposes of Part 4 of the Bill (Higher-Risk Buildings) (i.e. the occupation phase). The relevant provisions will be supplemented by a draft statutory instrument in the form of The Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations [2021].

Offer assistance and encouragement to those in the Industry:

- It will offer "assistance and encouragement" to those persons whose role relates to securing the safety of people in or about HRBs including dutyholders under the Building Act 1984, residents of HRBs and persons who are accountable persons or building safety managers within the meaning of Part 4 of the Bill.
- The Regulator must also offer this same "assistance and encouragement" to those persons carrying on activities connected with the design, construction, management or maintenance of buildings and registered building inspectors (as defined under the Building Act 1984), with the aim of improving the competence of those persons.

Enforcement:

- The Regulator will have far-reaching investigatory powers to ensure that the regulations are met and any requirements under the Building Act 1984 are also being complied with.
- The Regulator will appoint "authorised officers" who will carry out those investigations, document their findings with photographs and removing samples of materials, and report back to the Regulator. These "authorised officers" will be able to obtain a warrant to gain entry to both domestic and non-domestic premises where they have been refused entry or cannot locate the appropriate person from whom to obtain permission to enter the premises.
- In carrying out their investigations, the "authorised officers" can request information from any relevant person and it will be a criminal offence, with a potential prison sentence, if that person fails to provide the information requested without a reasonable excuse.

Information Sharing:

- The Regulator and local authorities and the fire and rescue authorities must work together to assist each of them in exercising their building-related functions and this will include sharing all relevant information (noting that the information sharing must not breach any data protection legislation.)

Committees:

- To help offer assistance to those relevant persons in the industry, the Regulator is tasked with setting up a committee on industry competence which will monitor competency within the industry and advise the Regulator accordingly.
- The Regulator will also be responsible for setting up a Building Advisory Committee whose role is to give advice and information to the Regulator about matters connected with any of the Regulator's building-related functions.
- Communications with residents will be improved by the Regulator also setting up a panel comprising of residents of HRBs, who will need to be consulted before any guidance is issued to residents of "higher-risk" buildings by the Regulator. The Regulator may also seek advice from this committee as and when it deems appropriate to do so.

2. Changes to the Building Control Process

The existing building control regime will be overhauled, but the Bill is not drastically different to the Draft Building Safety Bill from July 2020.

The main areas of note are as follows:

- The building control profession shall be subject to greater regulation. This will include the creation of new roles of "building inspector" and "building control approver".
- Only the Regulator shall have jurisdiction over HRBs.
- Various amendments shall be introduced to the Building Act 1984 and Building Regulations.
- Breaches of Building Regulations may be triable in the Crown Court and time-limits for the rectification of contraventions of the Building Regulations shall be extended.
- Liability shall be extended to officers of a body corporate who consent to an offence, or to whom an offence can be attributed on account of neglect.

Regulation of Building Control Profession

Part II of the Building Act 1984 shall be supplemented by a new Part 2A entitled "Regulation of Building Control Profession".

Part 2A includes new sections, numbered 58A to 58Z8 which are summarised below:

- The registration of individuals as building inspectors shall be introduced. The building inspectors shall advise others involved in building control in relation to the exercise of its building control function.
- The registration of individuals and organisations as building control approvers shall also be introduced. Before exercising specified and restricted building control functions, building control approvers will be required to obtain and consider advice from registered building inspectors. This is to ensure that important building control decisions are made on the advice of individuals who have demonstrated relevant competence. The building control approver shall replace the "approved inspector" as we know it. Therefore, approved inspectors may register as building inspectors or as building control approvers. They may also register as both, in which case they will be able to rely on their own expert advice as building inspector before exercising a prescribed function as building control approver. Consequential amendments will be made to the Building Act 1984 so that references to "approved inspector" are changed to "building control approver".

The new sections will provide for operational standards rules. These measures are designed to improve competence levels and accountability in the building control sector by the introduction of a professional and regulatory structure.

For the purposes of the new roles, the Regulator:

- must establish and maintain a register in relation to each role;
- must prepare and publish (in the case of registered building inspectors) a code of conduct setting out standards of professional conduct and practice or (in the case of registered building control approvers) professional conduct rules; and
- may investigate any instance of professional misconduct or contravention of professional conduct rules (as applicable to the respective roles). In relation to:
    - registered building inspectors, this includes conduct that: (1) falls short of the standards of conduct and practice expected of registered building inspectors; or (2) is likely to bring the profession of registered building inspectors into disrepute; and
    - each role, disciplinary orders may be imposed including: (1) financial penalty; (2) variation of a registration; (3) suspension of a registration; or (4) cancellation of a registration.

Further, for this purpose, offences punishable by a fine on summary conviction, will be created of: (1) a registered building inspector/building control approver (as applicable) acting outside the scope of their registration; and (2) pretending to be a registered building inspector/building control approver (as applicable).

The Regulator may additionally make operational standards rules applicable to local authorities and registered building control approvers in relation to their exercise of building control functions. The rules may make provision about standards to be met and practices, procedures or methods to be adopted.

Under the rules, the Regulator may:

- direct the provision of reports, returns and other information;
- give improvement notices where it appears that the rules have been contravened; and
- give serious contravention notices if it appears that: (1) the authority or approver has contravened the rules; and (2) as a result, the safety of persons in or about buildings has been, or may be put at risk. Such a

notice may require the authority or approver to remedy the contravention by doing or refraining to do anything specified in the notice. Contravention of a notice, without reasonable cause, will be an offence punishable by a fine or summary conviction.

Building Control Authority

The Regulator and local authorities shall become collectively known as "building control authorities" (further defined by the insertion of a new Section 121A in the Building Act 1984).

By new sections 91ZA and 91ZB of the Building Act 1984, the Regulator shall act as building control authority for HRBs or proposed HRBs. This will apply to all Building Regulations matters; not just fire and structural safety. As such, the ability for those carrying out building work in respect of HRBs to choose their own building control body will be removed. Further, those wishing to carry out such work may not use a registered building control approver or a local authority to supervise that work. In addition, it will become an offence for developers to build "at risk", i.e. without building control approval.

In all other cases, the building control authority shall be the relevant local authority.

Under the new regime:

- If, after an initial notice is in force, it appears that the building work has become higher-risk, the registered building control approver, the person carrying out the work and the local authority are each under an obligation to cancel an initial notice. The Regulator will then step-in and enforce Building Regulations.
- A failure, without reasonable excuse, by the registered building control approver or the person carrying out the work, to give notice to a local authority of cancelation of an initial notice, shall constitute an offence, punishable by a fine on summary conviction.

Building Regulations

Schedule 1 to the Building Act 1984 (Building Regulations) will be amended.

By supplemental paragraphs 11A to 11H, there are powers for Building Regulations to set:

- procedures in relation to building control and the issue of notices and certificates (new paragraph 1A);
- procedures in relation to applications for building control approval and requirements to be imposed on approvals (new paragraph 1B);
- approval of schemes whose members can issue certificates including provisions about such schemes and certificates, including insurance (new paragraph 1C);
- requirements on obtaining information or documents, creating documents, keeping information or documents and giving information or documents (new paragraph 1D). For this purpose, the Building Regulations may:
  - require the establishment and operation of a system for the giving of information (new paragraph 1E); and
  - make provision about the form and content of documents (new paragraph 1F);
- provisions for the inspection and testing of work, buildings and the taking of samples (new paragraph 1G);
- provision for the extension by agreement of any prescribed period for the doing of a thing by a building control authority in connection with an application (new paragraph 1H); and
- rights to appeal decisions made under, or under an instrument made under, Parts 1, 2 or 2A of the Building Act 1984 (new paragraph 1I).

Dutyholders and general duties

A supplemental paragraph 5A to Schedule 1 to the Building Act 1984 shall be introduced. This will provide a power for prescribed appointments to be made in relation to any work or other matters to which Building Regulations are applicable. Such person shall be known as an "appointed person".

Further, by supplemental paragraph 5B, for the purpose of facilitating compliance with any requirement of the Building Regulations, the regulations may, in relation to an appointed person or prescribed person ("relevant persons"):

- impose duties in connection with the planning or management of the work or other matter; and
- require their co-operation with other relevant persons.

Dutyholders under paragraph 5B shall include those commissioning or undertaking work as well as those appointed, controlling or managing the work.

In summary, these provisions are designed to create a bridge between the obligations of dutyholders under the Construction (Design and Management) Regulations 2015 and the Building Regulations. They will ensure that dutyholders also have obligations under Building Regulations.

By supplemental paragraph 5C, the Building Regulations may impose competence requirements on relevant persons in relation to:

- the skills, knowledge, experience and behaviours of an individual; and
- the capacity of a person other than an individual to perform its functions under the Building Regulations.

This is intended to ensure that those undertaking design or building work are competent to do their work in accordance with Building Regulations. Statutory guidance, to support these requirements, in the form of an Approved Document is intended to be provided by the Government.

A draft statutory instrument in the form of The Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations [2021] has been prepared in relation to these supplemental paragraphs (5A, 5B and 5C of Schedule 1 to the Building Act 1984).

Compliance notices & stop notices

New sections 35B to 35D to the Building Act 1984, shall provide a regime of compliant notices and stop notices in respect of contravention of the Building Regulations.

A compliance notice may be issued in relation to non-safety related items. In contrast, a stop notice may be issued where a compliance notice has been contravened or the work, in contravention of the Building Regulations, would present a serious risk of harm to people in or about the building if the building were used without the contravention being remedied.

Each notice is designed to provide building control authorities with the ability to address non-compliances without resorting to criminal prosecution.

Where either notice is given and a person breaches the notice, the building control authority will be able to prosecute the breach.

The offence will be triable on summary conviction (carrying a maximum penalty of an unlimited fine and/or 12 months' imprisonment (six months until the commencement of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020) or on indictment (carrying an unlimited fine and/or two years' imprisonment).

Breach of Building Regulations

A new Section 35 to the Building Act 1984 shall:

- extend the existing offence of contravening Building Regulations to include a requirement imposed by Building Regulations; and
- replace an existing summary-only and fine-only offence (penalty for contravening Building Regulations). The offence will now be triable either way with imprisonment as a sentencing option. In the Magistrates' Court, that is 12 months (six months until the commencement of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020). In the Crown Court, that is two years imprisonment. In either Court, there is also the possibility of an unlimited fine.

Further, the time limits, under section 36 for bringing prosecutions for the removal or alteration of non-compliant work (currently twelve months); shall be extended to ten years.

Liability of Officers

A new section 112A of the Building Act 1984 shall provide that if an offence is committed by a body corporate and is:

- committed with the consent or connivance of any director, manager, secretary or similar officer, or a person purporting to act in such capacity, including a partner in the case of a partnership or a member of an unincorporated body; or
- is attributable to any neglect on the part of such person;

that person (as well as the body corporate) shall commit an offence and be liable to prosecution. This is a response to the fact that while an offence may be committed by a body corporate, such offence will have occurred on account of personal failure by an individual(s).

Other Provisions of Interest

By an amendment to section 116 of the Building Act 1984, the Secretary of State (in England) and Welsh Minister in Wales may make an order:

- declaring a local authority to be in default; and
- instructing the local authority to discharge its functions in a specific way and within a specific timeframe;

if they are satisfied that a local authority has failed to perform its functions. Further, the Secretary of State may make a transfer order which assigns the building control functions of the authority in default either to himself or another local authority.

By an amendment to section 47 of the Building Act 1984, the Secretary of State (in England) and Welsh Minister in Wales will be entitled to designate bodies that approve insurance schemes and to publish guidance as to the adequacy of such schemes. This is to ensure that specialist bodies with specialist insurance expertise undertake this function of the Secretary of State. By an amendment to section 53 of the Building Act 1984, a local authority may seek information from a registered building control approver where it has ceased to supervise a project. The information must be provided to the local authority and the person carrying out the work. This is understood to fill a void in the Building Act 1984 which enabled the administrators of approved inspectors that went into administration post-Grenfell to

refuse to provide information to local authorities and the clients of the approved inspectors.

By a new section 56A of the Building Act 1984, the Regulator must establish and maintain a facility to take the form of a national electronic register/portal for a specified person such as the registered building control approver, the person carrying out the work or the local authority to submit information.

Further, by new section 56B, the Regulator must keep a register of specified information to be maintained in electronic form with specific parts available for inspection by the public.

3. Gateways

The Draft Building Safety Bill published in July 2020 did not set out the proposed gateways in any detail, including the information that will be required at each gateway. However, the Government's consultation paper, "A reformed building safety regulatory system: government response to the Building a safer future consultation" published in April 2020 made reference to the gateways which will underpin the design and build process of buildings going forward.

In this, the Bill and in some recent significant changes to secondary legislation (as referred to below in more detail), we see these gateways taking a clearer form. As we knew already, the gateways will be introduced at the planning, construction and occupation phases, with the aim of ensuring that fire safety is properly and thoroughly considered throughout the design and build process of a building. The emphasis on information will start at the very early design stage for gateway one, and will continue through to occupation and beyond gateway three.

The three gateways can be summarised as follows:

- Gateway one (Planning): applicants must demonstrate that the planning application incorporates a strategy on fire safety (where it relates to land use planning). Specialist fire safety expertise will be provided to local planning authorities on a statutory basis.

- Gateway two (technical design and construction phase) bolsters the current building control deposit of plans stage, where the application will be made to the Regulator. The Regulator is the regulating body for in-scope buildings. A building control application will be required. Importantly, this gateway provides a 'hard stop' where construction will not be allowed to commence until the Regulator has approved the building control application.

- Gateway three: (building control completion) will provide a 'hard stop' at which the Regulator undertakes final inspections and issues a completion certificate for in-scope buildings. Prescribed documents and as built information will be required. The information must then be handed over to the person(s) responsible for the building once in use (the accountable person during occupation).

Which buildings?

All three gateways will apply to multi-occupied residential buildings of 18 metres or more in height or 7 or more storeys – these are HRBs as defined in the Bill.

Gateway 1 - Planning

This gateway has been predominantly enacted via changes to the Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2021. These changes are set to introduce new fire safety requirements into the planning system from 1 August 2021.

Gateway 1 Actions:

1. A fire statement setting out fire safety considerations will need to be included in the planning application

Developers will need to submit a fire statement setting out fire safety considerations specific to the development with an application for planning permission for development which involves one or more relevant buildings. Fire statements should include as much information as is relevant regarding fire safety. MHCLG have issued a draft fire statement which shows that they expect information submitted with planning applications to include consideration of external wall systems, balconies, evacuation plans and emergency vehicle access. It is recommended that the form is completed by a suitably qualified fire engineer.

2. The HSE (and, once established, the Regulator) will become a statutory consultee to provide specialist fire safety advice to local planning authorities before planning permission can be granted

The Health and Safety Executive (HSE) will become statutory consultee for all planning applications and will provide assistance to planning authorities when assessing applications.

If the Regulator becomes aware of relevant buildings that have not been through gateway one, it has the power to issue stop notices and force construction to stop until the requirements of gateway one have been met.

Gateway One is acknowledged within the industry as the least onerous of the three gateways. It utilises the existing planning processes in England, which most developers are familiar with and it would appear from initial review and trials that the fire statement should only take one to two hours to complete, if you have the correct information to hand.

However, the requirement for the fire safety form to be completed by a suitably qualified professional will inevitably increase the cost, risk and time of the planning process.

Gateway 2 - Construction

This construction gateway must be passed in order for works to start on site. Although similar to the current process, in that an application is made to the building control authority for approval, under the Bill the building control authority for HRBs is going to be the Regulator.

Part 3 of the Bill makes significant amendments to the Building Act 1984 (as set out in the section above).

Those changes will allow the Regulator, acting as the building control authority, to ask for revised versions of any relevant documents and to prevent work from proceeding beyond a certain stage or at all. It is expected that this will be a rigorous process, so any planning applications will need to be prepared carefully and thoroughly to avoid delays to any agreed start on site date.

There is a real concern within the industry that this gateway, and the approval process by the Regulator, will cause significant delays to projects, and this risk will need to be considered by parties entering into contracts.

Gateway 3 – Occupation

Before the building is occupied, the Principal Accountable Person (as set out in this article below) must apply to the Regulator to register the building. The requirements of this application are yet to be set out in any detail, but it is anticipated that there will be an expectation that the Principal Accountable Person will need to be able to demonstrate that they have met all planning conditions and other requirements set out by the Regulator at the beginning of Gateway 2. Should the Regulator refuse to register the building then the building cannot be occupied. If the building is occupied without registration, the Principal Accountable Person may be found guilty of a criminal offence. This gateway is therefore another absolute requirement, or a 'hard stop' stage, for the progression of the use of the building.

Summary

Gateway 1 is imminent (1 August 2021) and so developers need to be applying immediate thought to the fire safety statements which will be required as part of the planning approval process.

Whilst the Bill itself is not expected to come into force until 2023, gateways 2 and 3 should start to be considered now, so that when it is enacted the processes are already in place within client organisations, to prevent any significant delays to projects.

4. The Accountable Person and the Building Safety Manager

The Accountable Person and Principal Accountable Person – who are they?

The Accountable Person is the entity that must ultimately discharge the duties in occupation for a HRB, and with whom the buck stops if there are any breaches of those duties.

The Accountable Person is defined as the individual or entity (and it will in the vast majority of cases be a corporate entity) that has a legal estate in possession of any part of the structure and exterior of the HRB or any part of the HRB provided for the use, benefit and enjoyment of the residents (defined in the Bill as the common parts). This may be as a freeholder or long leaseholder. The definition also extends to a person who does not have a legal estate, but is nevertheless under a repairing obligation in relation to any of the common parts. This may, for example, be due to contractual obligations owed by that person under a licence or management agreement (for example) to someone such as the freeholder or leaseholder.

There may of course be a number of Accountable Persons in any one HRB. The freeholder may retain a legal estate in possession over the structure and exterior of the HRB, while imposing on the leaseholder an obligation to repair other elements of the common parts. Similarly, there may be a number of parties contracted to either the freeholder or leaseholder who have repair obligations in connection with one or more elements of the common parts.

Who then is responsible for discharging the obligations of the Accountable Person? The Bill has tried to deal with the problem of there being more than one Accountable Person by introducing the concept of a Principal Accountable Person (**"the PAP"**). The Accountable Person will be the PAP where it is the only Accountable Person. Where there is more than one Accountable Person, then the PAP will be that Accountable Person who holds a legal estate in possession of the relevant parts of the structure and exterior of the building. In the vast majority of cases where the HRB is the subject of a long lease it will either be the freeholder or the head leaseholder who will be the PAP, as they are more likely to have retained a legal estate in possession over the structure and exterior of the HRB.

It follows from this that the PAP cannot be a leaseholder whose repairing obligations do not extend to the structure or exterior of the HRB. Nor will it be a party who does not have a legal estate in the building, but is under a relevant repairing obligation pursuant to a bare agreement to carry out repairs to the common parts.

While this clarification is to be welcomed, there still remains the scope for argument and confusion. In an effort to deal with this, the Bill grants a right to the Regulator and any person who holds a legal estate in any part of the building to seek a declaration from a tribunal (which will be set up in due course) as to who is either an Accountable Person or the PAP.

It is entirely conceivable that there may be more than one Accountable Person who has responsibility over different elements of the structure and exterior of the HRB. In those circumstances the tribunal will make a determination as to which Accountable Person is the most "appropriate" PAP. Quite how appropriateness is to be measured and determined remains to be seen.

Determining who is or is not the PAP is of significant importance, as it is the PAP that has the obligation to comply with the numerous occupation phase obligations contained within the Bill.

The PAP's Duties

The PAP has a number of relevant duties. The primary ones are:

- to ensure the building is registered with the Regulator before occupation. A failure to do so is a criminal offence;
- to apply for, within 28 days of being directed to do so by the Regulator, a building assessment certificate. A failure to do so is a criminal offence;
- to apply to the Regulator for a building safety certificate every five years following occupation. A failure to do so is a criminal offence;
- to appoint a competent building safety manager. Competent means they must have the skills, knowledge, experience and behaviours to carry out the role of building safety manager. The building safety manager may be a corporate entity or an individual;
- to carry out an ongoing assessment of the building safety risks within the HRB and to include those risks and their mitigation into the safety case. Building safety risks are currently limited to fire safety and structural failure, but may include any other category of risk prescribed by the Secretary of State in due course. Any risk assessment undertaken must be suitable and sufficient. A failure to comply with this duty may result

in enforcement action through a compliance notice, or where the failure gives rise to a significant risk of injury or death, to a criminal prosecution;
- to promptly take all reasonable steps to prevent or reduce the severity of a major incident. A major incident is one where significant number of people might be killed or seriously injured. Enforcement of this duty is the same as above;
- to keep all prescribed information in accordance with the prescribed standards (all of which have yet to be prescribed); and
- to prepare a resident engagement strategy that promotes the participation of residents (among others) in the management of the building, and any decisions that flow from it.

The Building Safety Manager – who is it?

The Principal Accountable Person is responsible for appointing the Building Safety Manager. Where the Building Safety Manager is a corporate entity it must appoint a nominated person whose details must be made known to residents, so they have an actual individual to contact.

The primary role of the Building Safety Manager is to manage the building in accordance with the safety case report that follows a risk assessment of the building safety risks. Where that safety report requires work to be done, or measures to be put in place, it will be the Building Safety Manager's responsibility to do this.

The Building Safety Manager's Duties

The Building Safety Manager has a number of duties. The primary ones are these:

- To manage the building in accordance with the safety case report; and
- To provide certain information to the Regulator under mandatory reporting obligations (the extent of this information is yet to be prescribed) and to establish a system for doing so.

5. Residents' Duties

Although the vast majority of the Part 4 of the Bill focuses on the duties of the Accountable Person and the Building Safety Manager, there is also a recognition that residents of HRBs have their part to play in relation to helping to keep their building safe. This flows directly from the recommendation in Dame Hackitt's review, that residents of such buildings should have a clear understanding of their responsibilities. Sections 95, 96 and 97 of the Bill introduce the following new statutory duties upon residents of HRBs, together with the process the appropriate accountable person (**"Appropriate Accountable Person"**) can follow to enforce those duties if not complied with.

Duties on residents

Section 95 provides that residents (or owners) of HRBs over the age of 16 must:

- not act in a way that creates a significant risk of a building safety risk materialising;
- must not interfere with a relevant safety item. A 'relevant safety item' means anything in the common parts of a building that is intended to improve the safety of anyone in the building; and;
- comply with a request from an Appropriate Accountable Person to provide information reasonably required for the Appropriate Accountable Person to perform their duties to carry out an assessment of building safety risks and take steps to reduce those risks.

If the Appropriate Accountable Person suspects that a resident has contravened one of these duties, they are entitled to serve them with a notice which specifies:

- what the resident is 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 the deadline 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.

Following service of a notice on the resident, the Appropriate Accountable Person may request that the County Court make an order requiring a person to do a specified thing or provide specified information within a certain timescale or, alternatively, not to do a specified thing. As such, the order acts as a form of injunction.

There are also additional provisions which cater for the recovery of any sum specified in the notice where it has been necessary to repair or replace the relevant safety item as a result of the contravention (so long as the sum does not exceed the reasonable cost of repairing or replacing that item).

Access to dwellings

Section 97 provides that, upon an application by the Accountable Person, the County Court may make an order:

- requiring the resident of a dwelling to allow the Accountable Person, or a person authorised by them, access to the dwelling at a reasonable time on a specified date or within a specified period; and
- may, if it appears to the court necessary, permit the taking of measurements, photographs, recordings or samples.

It is worth bearing in mind that any request for access as a precursor to such an application should be made in writing and in accordance with the technical requirements of Section 97. Further, the request for access must be made in connection with either facilitating the performance of the Accountable Person's duties under section 83 or 84 (assessment of building safety risk etc.), or determining whether a duty under section 95 (duties on residents and owners) has been contravened.

This power has been introduced in recognition of the fact that the Accountable Person may need access to one or more dwellings 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. As such, it provides a specific statutory power under which an Accountable Person can apply to ensure they can lawfully obtain access to any dwelling. The court's order will again act as a form of injunction.

6. Building Safety Charge

The proposed Building Safety Charges have been controversial from the moment they were first outlined. Indeed, when the Bill went through pre-legislative scrutiny in 2020, the HCLG Committee extended much criticism on the basis that they would *"permit leaseholders to be charged for the cost of remediating historical safety deficiencies…"*. The Committee was clear in that the Bill should not allow a Building Safety Charge to cover the rectification of defects that are historical.

By virtue of Clause 120 and Schedule 7 of the Bill, Building Safety Charges will be introduced as a requirement upon certain leaseholders to pay for building safety costs (notably this is regardless of any provisions contained within their lease).

The charge provisions will only attach to those in HRBs and where the lease is for seven years or more with relevant service charge obligations. As we have discussed above, the obligations of the Accountable Person include an obligation to comply with their new building safety duties – the costs of compliance with such obligations can be passed on under the building safety charge (which the leaseholder will now covenant to pay) by the insertion of a new Section 30 D of the Landlord and Tenant Act 1985.

The proposals therefore create a new statutory vehicle to require payment of building safety charges (i.e. the running costs of the new building safety regime required by the Bill) by leaseholders – mirroring closely the current service charge regime (i.e. subject to considerations of reasonableness, payment timing and consultation requirements for example).

The Bill's proposals also include a requirement upon a landlord to seek any third party funding (e.g. a warranty, an insurance policy or grant funding) or risk the charges that otherwise would be pursed against leaseholders being refused. These provisions are likely to simply put the current state of the law on a statutory footing.

7. The New Housing Ombudsman

Introduced by Part 5 of the Bill, the New Homes Ombudsman Scheme (**"NHOS"**) is intended to provide a central 'hub' for owners of new build homes to make complaints, and have such complaints investigated and determined by an independent ombudsman.

The Government initially announced their intention for such a scheme in October 2018 and following consultation, sections 127 to 132 of the Bill implement the scheme. There is currently no statutory obligation upon developers of new build homes to belong to a redress scheme, and/or in any way to easily enforce the technical requirements in Building Regulations – this legislation is intended to fill the gap that currently exists for purchasers of new build homes.

The relevant sections will be underpinned by regulations from the Secretary of State and allow the Secretary of State a wide discretion as to the operation of the NHOS. In addition, the draft Bill also seeks to remove the need for social housing residents to pass through the 'democratic filter' in order to access the Housing Ombudsman.

The New Scheme

The draft legislation provides that the NHOS can either be established and maintained by (someone appointed on behalf of) the Secretary of State or, the Secretary of State can make arrangements with another person (who is entirely independent) to establish and maintain the NHOS.

In any event, the scheme must comply with specified conditions. These conditions are that:

- membership of the scheme is open to all developers;
- the scheme enables relevant owners of new build homes to have complaints against members of the scheme investigated and determined by an independent ombudsman; and
- the scheme meets certain requirements set out in Schedule 8 of the Bill.

A person will be considered a 'relevant owner' if that person:

- is an individual;
- has a relevant interest in the land that includes the home; and
- meets the occupation condition.

The occupation condition requires a person to occupy the home or be the landlord under a lease of land that includes the home and is granted for a term not exceeding 21 years to another individual for that individual's occupation of the home. The definition in the draft legislation only allows 'individuals' to be a relevant owner, rather than any another legal entity. However, the draft provisions do not limit the NHOS to receiving complaints from relevant owners only. The Secretary of State has the flexibility to make provision for organisations and others (i.e. not relevant owners) to make complaints. The particulars of who can make a complaint and in what circumstances they can do so remains to be set out in regulations.

The scheme will only apply to a new build home, which is included in the definition if:

- the home is, or is contained in:
  - a building, the construction of which began after the coming into force of this section; or
  - a building that has been converted so that it consists of or contains the home, where the conversion began after the coming into force of this section;
- there is a person who is, or was, a developer in relation to the home; and
- no more than two years have elapsed since the first acquisition, by any person, of a relevant interest in land that include the home from the person mentioned in the paragraph above.

This two year period accords with the current defects liability period for the majority of new build home warranties. It will also not restrict the homebuyer's rights to pursue a dispute through the courts.

Finally, a person has a relevant interest in the land if they have:

- an estate in fee simple absolute in possession; or
- a legal estate which is a term of years absolute granted for a term of more than 21 years from the date of the grant.

Who must join the NHOS?

The Secretary of State may, by regulations, require developers, or developers of a specified description, to become members. In addition, the Secretary of State may require members to maintain their membership for a specified period. Provision may be made for an investigation of suspected membership breaches and sanctions may be imposed if any person required to be a member is not a member and/or if they do not maintain their membership for the required period. It is intended that regulations will require members to belong to the NHOS and publicise their membership by obtaining a certificate confirming their membership, displaying the certificate and producing a copy of the same on request.

Who is a developer?

A developer is a person who undertakes or commissions:

- the construction of a new building that is to consist of or contain a home;
- the conversion of an existing building so that it consists of or contains a home; or
- the conversion of an existing building so as to alter the number of homes contained in it;

with a view to granting, or disposing of, a relevant interest in land that include the home or, in the case of a conversion within the bullet point above, any of the homes, or who is of a description specified in regulations made by the Secretary of State.

As above, the Secretary of State is granted the flexibility to include an additional description of persons (for example, in relation to their connection to a developer) who are required to be members. This will be laid out in regulations which can also provide additional provisions to supplement the definition.

Code of Practice

The Secretary of State has the ability to approve a code of practice setting standards of conduct and quality of works expected by NHOS members or, in the event that others or the industry do not come forward, the NHOS may issue its own code. Thereafter, in considering a complaint under the NHOS, they must have regard to any code of practice issue or approved. It is anticipated that an independent board made up of those in the house-building industry, consumer groups and others will produce a code governing the standards of service, quality and workmanship. The intent behind this provisions is to create a level playing field for owners and developers, and to allow investigations and the determination of complaints to be consistent.

Costs and Funding

The NHOS will be free for consumers making complaints. The draft legislation allows for the Secretary of State to provide funding to the NHOS, however, the likely intention is that the NHOS will cover its own costs by charging membership fees.

8. Defective Premises Act 1972 and Section 38 of the Building Act 1984

The Bill makes three important amplifications to the existing civil rights and liabilities of those living in buildings, those who own residential dwellings and those carrying out works to construct or refurbish buildings containing residential dwellings.

These are:-

- the commencement of section 38 of the Building Act 1984 and the prospective extension of limitation for liability under that section from six years to fifteen years;
- the extension of limitation for liability under section 1 of the Defective Premises Act 1972 where a dwelling is rendered unfit for habitation by work taken on for, or in connection with, its provision (i.e. erection from scratch or conversion into a residential dwelling) from six years to fifteen years; and
- the creation of a new right under the Defective Premises Act 1972, mirroring the requirement for fitness for habitation under section 1, but applying to any other works carried out in the course of a business where a new dwelling is not provided.

What does limitation mean? By 'limitation' we mean the period of time within which a party must make a claim, and after which the defending party can raise a limitation defence. To the extent that a limitation defence applies, the claim will likely fail, because it has been brought out of time.

Absent some exemptions, the usual limitation period for claims under contract or negligence is usually six years from the date the claiming party had a right to make a claim. Some contracts, and many construction contracts, are executed as deeds and this extends the limitation period in the law of contract to twelve years. Similarly, claims under the Latent Damage Act 1986 are subject to a 15 year longstop date, although the primary limitation is that a claim must be brought within three years of acquiring knowledge that a claim might be brought.

Section 38 and extension of limitation

The Government has indicated, as part of the proposed Bill, that they intend to bring section 38 of the Building Act 1984 into force two months after the Bill receives Royal Asset.

Under Section 38 of the Building Act 1984, a breach of duty imposed by Building Regulations becomes "actionable" insofar as it causes "damage" – this includes death or injury to a person. This means that someone who has suffered "damage" which has been caused by another's breach of duty under the Building Regulations will now be able to bring a civil claim against the breaching party in the courts. The claiming party must prove that a duty existed, that it was breached by the defendant party, and that this breach caused damage.

Whilst this may plug a gap in the law for future generations of claimants, such as leaseholders, who do not have a contractual nexus with the original contractor and/or designer, it seems that given the definition of "damage" in section 38(4), section 38 will not provide those who wish to bring defects rectification claims with golden ticket to claim for defects rectification claims based on non-compliances with the Building Regulations. The ability to bring a claim for damages requires – much like an insurance policy – damage to have actually occurred. That damage, however, is not limited to damage to property, it also encompasses injury to the person whether physical or mental. Thus, in the future, an individual who suffers impairment of their physical or mental condition, will have a claim insofar as that damage resulted from a breach by a dutyholder of its duties under Building Regulations.

As we mention above, as well as bringing section 38 of the Building Act 1984 into force, the Government is at the same time extending the limitation period from six years to fifteen years. This is prospective, i.e. only affecting breaches of Building Regulations from the date of commencement of section 38 onwards.

Retroactive extension of limitation in respect of section 1 of the Defective Premises Act 1972

Section 1 of the Defective Premises Act 1972 is pithily titled "duty to build dwellings properly". The prolix formulation is that those who take on work in connection with the provision of a new dwelling owe a duty that, as regards the work they take on, it is carried out in a workmanlike or professional manner and with proper materials such that, as regards the work, the dwelling will be fit for habitation when completed.

Section 1(4) provides that the group of people who "take on work" include those who, in the course of a business which consists of providing dwellings, arrange for others to take on work – a provision intended to capture developers who might otherwise have escaped liability.

The duty under section 1 cascades from the developer, to their professional consultants and architects, and to the main contractor, to sub-contractors and their employees.

Every person subject to the duty – everyone who takes on work or is deemed to have taken on work – must ensure that the dwelling is fit for habitation as regards their part of the work. For an individual operator on a site, this obligation is to carry out his or her work in a workmanlike manner with proper materials; for an architect or employer's agent, the professional obligations can range much wider than that. The courts have held that the duty does not apply to Approved Inspectors for the purposes of Building Regulations.

This duty is owed to the person for whom the new dwelling is provided, as well as anyone who holds or acquires a legal or equitable interest in the dwelling, which includes everyone who has a tenancy of a flat. If the duty is breached leading to loss, those who are owed the duty may bring a civil claim against the breaching party and claim money as compensation.

Since 1974, this duty has been owed for a period of six years from when the dwelling was completed (or later if rectifying works were carried out). The Bill extends this period to fifteen years, and crucially (and unusually) will apply retrospectively once implemented, covering all past breaches of duty under section 1.

This means that a huge number of people – individual residents and companies that own buildings or operate in the housing sector – will be given a renewed right to compensation from other parties that did not exist prior to the passage of the Bill. In respect of any building constructed more than six years ago, as the law currently stands, those individuals will have no claim. After the passage of the Bill, they will have a claim provided the dwelling or rectifying works were not carried out more than fifteen years ago.

The measure of damages for claims under section 1 is the amount of money required to make the dwelling fit for habitation, which can be an extremely high figure.

There will be claims for breaches of duty under section 1 of the Defective Premises Act 1972 that have settled, or been decided by the courts, in the immediate past on the basis that the unamended limitation period, and those outcomes could have been radically different if subject to the extended limitation period under the proposed Bill. However, the Bill does not provide that such cases can be re-opened or such settlements set aside. That said, parties may feel justifiably aggrieved if the law has changed "under their feet" during the course of a dispute.

The Bill also provides, without any further explanation in the explanatory notes, that if a civil claim is brought and it would have been barred under the old six-year limitation period, the court must dismiss it if it is necessary to do so to avoid a breach of the defendant's rights under the European Convention on Human Rights as implemented by the Human Rights Act 1998. A defending party may seek to argue that allowing a claim to proceed where, but for the retroactive extension of limitation, they would have had a limitation defence is a breach of the Article 6 right to a fair civil trial or the Article 1, Protocol 1 right to peaceful enjoyment of their possessions. It seems almost inevitable that this issue will need to be determined by the Supreme Court at some point.

In summary, this is extending liability for a large number of organisations for the fitness for habitation of dwellings which they have been involved in providing.

Creation of new duty under the Defective Premises Act 1972 for refurbishment works

The duty under section 1 of the Defective Premises Act 1972 predominately applies only to the provision of new dwellings, whether newly constructed or converted from another use of the building. The Bill proposes a new section 2A of the Defective Premises Act 1972 which creates an equivalent duty (and right to civil compensation) where a person "in the course of a business, takes on work in relation to any part" of a building consisting of or containing one or more dwellings. As with section 1, as regards the work taken on, the dwelling must be fit for habitation. This duty is therefore very broad, because it could apply to any work carried out in an entirely non-residential part of a building which has one residential dwelling within it – it is also likely to mean that it can be actionable against a builder who carries out work just as much as a landlord complying with repairing obligations under a lease for example.

As with section 1, those who "take on work" is deemed to include those who arrange for others to take on work in the course of a business.

The new section 2A also benefits from the extended limitation period of fifteen years, but will apply only prospectively, not retrospectively.

This new section 2A will have consequences for those carrying out refurbishment works and it will make it easier for residents to bring civil action against people such as contractors with whom they have no direct contractual relationship, for the extended period of fifteen years.

Conclusions

One of the intentions of the Bill stated in the explanatory notes is to "[increase] redress through the Defective Premises Act 1972". There is no doubt that the draft Bill achieves this. The retroactivity of the changes to the Defective Premises Act 1972 will prove controversial. They provide a substantial new channel for liability for defective buildings and, together with implementation of section 38 of the Building Act 1984, establish an uncompromisingly lengthy period for liability of those involved in constructing them, refurbishing them and ensuring they comply with Building Regulations. As we state above, the Bill creates a greater nexus of liability, where a greater number of people owe duties and possibly compensation to a greater number of people, for a longer period of time.

9. Wales

Whilst the Bill's 'territorial extent' encompasses the United Kingdom, its application is largely limited to England. Although some provisions of the Bill are applicable to Wales, it is possible that the Welsh Government will utilise powers granted to the Senedd by the Bill to implement a slightly different regime from that envisaged in England.

The landscape in Wales is vastly different to England, with just 148 buildings of more than 18 metres in height compared to over 12,000 high risk buildings in England. The differing landscape explains the divergence from the Bill and the requirement to implement a broader regime which imposes more stringent obligations on dutyholders of buildings below 18 metres in height.

In January 2021, the Welsh Government issued a Building Safety White Paper and started a consultation on its proposed reforms. The White Paper sets out the Government's proposals for a new building safety landscape. There are a number of proposals which follow the Building Safety Bill, such as the concept of a golden thread and new dutyholder roles similar to those set out in the Bill. Additionally, the Welsh Government also seeks to adopt the 3 Gateways applicable to HRBs envisioned under the Building Safety Bill.

However, there are a number of key differences between the proposed regime and the Building Safety Bill as follows:

In-scope buildings

The Welsh Government proposes that the Building Safety Regime will cover all multi-occupied residential buildings. The regime will therefore be applicable to all buildings where there are two or more dwellings such as a house converted into two flats or a licensed HMO.

The White Paper proposes that in-scope buildings will be divided into two categories:

Category 1 Buildings: Category 1 buildings will be those above 18 metres in height or more than 6 storeys, and containing two or more dwellings. These buildings will be subject to the most onerous requirements under the regime; and

Category 2 Buildings: Category 2 buildings will be those below 18 metres in height or less than 6 storeys, and containing two or more dwellings. Category 2 buildings will be subject to numerous requirements under the Building Safety Regime such as the requirement to register Category 2 buildings in addition to having an annual fire risk assessment.

The Regulator

The Bill enables the Welsh Government to create a new Building Safety Regulator which will oversee the regime and ensure dutyholder compliance. The Welsh Government is yet to determine the agreed model for a new Building Safety Regulator under the proposed Building Safety Regime. There are currently three proposed models under the regime including a new national building safety regulator; one lead regulator such as the Local Authority or Rescue Authority; or multiple regulators.

An Accountable Person

Whilst there are similarities between the Bill and the Welsh Building Safety Regime in respect of the creation of a dutyholder role during the occupation phase i.e. an 'Accountable Person', the scope of their responsibilities differs quite significantly under the different regimes.

Whereas an Accountable Person under the Bill will be responsible for HRBs (above 18m or 6 storeys in height, and containing two or more dwellings) only, the Welsh Building Safety Regime proposes that the Accountable Person will be responsible for all in-scope buildings under their ownership/control i.e. Category 1 and Category 2 buildings.

Additionally, there are a number of possibilities as to who can undertake the role of an Accountable Person. Rather than specify a particular body or individual to undertake this role, the Welsh Government has chosen to articulate the responsibilities that an Accountable Person would be expected to undertake. Where there is no nomination provided, the Accountable Person is likely to be the freeholder.

Fire Risk Assessments (FRAs)

The Welsh Government proposes a new system to ensure that FRAs are (a) conducted to a suitable standard with sufficient frequency; (b) recorded properly and (c) have regard for the interests of residents. The Welsh Government proposes to define fire safety outcomes which Accountable Persons should be seeking to attain. The purpose of the FRA would be to determine the extent to which the outcomes were attained and identify measures required to achieve the outcomes.

Furthermore, FRAs must be reviewed annually and on every occasion that the premises are subject to major works or

renovations. Additionally, FRAs should identify and address any flaws in compartmentation. These FRA requirements are applicable to **all in-scope buildings** irrespective of the risk category.

It must be noted that there is currently no legislation in place implementing the proposed Building Safety Regime.

Devonshires will keep a close eye on any developments and will provide updates on the current proposals as and when they occur.

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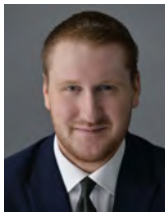

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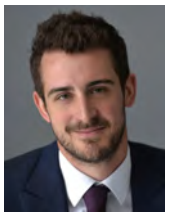

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