

# The Draft Building Safety Bill



In this article we provide a brief overview of the new Building Safety Bill (“the Bill”). In many ways it is an astonishing document. Its reach is certainly ambitious as it gives us new regimes for building regulations compliance prior to occupation, service charges for building safety costs and a new Housing Ombudsman.

It also contains far reaching duties and obligations for those accountable persons who own or have a qualifying legal interest in a higher-risk building and who must manage the building over its lifetime. There are significant new enforcement powers too, both at local authority level and through the Regulator. The message could not be clearer, compliance with building regulations and the ongoing safety of occupants through rigorous management and accountability is the new reality.

The Bill is very much in draft form and requires a layer of regulation in order to make it work. Much of what has to be done or provided by the various dutyholders will in due course be prescribed by regulations made by the Secretary of State. That said, the Bill sets out the government’s clear ambition to ensure local authorities deal with building regulations compliance comprehensively and that higher-risk buildings remain safe throughout their lifetime.

Residents too are given a powerful voice in the ongoing management of the building in which they live and must be kept informed and updated with anything material that is to occur in or around their building. 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 developments in this article. It will no doubt be some time before the Bill is enacted, and there is a great deal of supporting legislation and guidance to put in place before it is. We have no indication yet as to how transition periods will work, or indeed what a high risk building might eventually be.

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# 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 new Building Safety Act (“the Act”) 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 have been 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 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:

### Higher-risk Buildings

- Under the Act there will be certain classified “higher-risk” buildings. These will be identified by the Secretary of State but any designation of a building being “higher-risk” will be guided by the Regulator. The Regulator has an obligation under the Act 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 “higher-risk”.
- Whilst “higher-risk” buildings are still to be defined, the Explanatory Note to the Bill states that the Government propose to define a higher-risk building as being two or more dwellings where the floor surface of the building’s top storey is 18 metres or more above ground level, or the building contains more than six storeys (ignoring any storey which is below ground level).
- The Regulator has additional powers in relation to “higher-risk buildings”. Namely, they will act as the building control authority under the Building Act 1984 including enforcing building regulations on these “higher-risk” buildings.

### 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 higher-risk buildings including dutyholders under the Building Act 1984, residents of higher-risk buildings and persons who are accountable persons or building safety managers within the meaning of Part 4 of the Act.
- 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 under the Act are met and any requirements under the Building Act 1984 are also being complied with.
- Under the Act, 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 they cannot locate the appropriate person to gain 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

- Under the Act, the Regulator and local authorities and the fire and rescue authorities must work together to assist each of them in exercising their building 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 the 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 functions.
- Communications with residents will be improved by the Regulator also setting up a panel comprising of residents of “higher-risk buildings” 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.

- Local authorities and fire and rescue authorities will also come under the authority of the Regulator to the extent that the Regulator will be able to issue directions to these relevant authorities to do anything which will assist the Regulator in meeting its functions. The monitoring of those directions is done by the Secretary of State who will need to give authority for any direction to be issued by the Regulator.
- The Regulator will be responsible for making recommendations to the Secretary of State regarding new regulations relating to fire and structural failing in buildings. The Regulator will also have additional powers to advise the Secretary of State on new regulations related to “higher-risk” buildings where it deems that a regulation is required to prevent a “major incident” (including incidents which will result in multiple deaths or serious injury) in such a building.

### Plans and Reports

- There will be an expectation on the Regulator to publish various reports which will demonstrate that it has met its functions.
- There will be various reports issued annually which will detail the information it has been provided throughout that period which has guided its decisions and these reports will also detail the Regulator’s engagement with the resident’s committee and any other residents of “higher-risk” buildings.
- The Regulator will publish a strategic plan setting out how it will carry out its building functions for the following 3 years. The Regulator will need to consult the various committees it has established in order to guide the content of the plan before it is then submitted to the Secretary of State for approval.

### Review of the Regulator

- The Secretary of State will appoint an independent person who will produce a report on the effectiveness of the Regulator in:
  - i) exercising its building functions,
  - ii) securing the safety of people in or about buildings in relation to risks arising from buildings, and
  - iii) improving the standard of buildings.
- The Secretary of State will be obliged to publish this report.

## 2. Changes to the Building Control Process

Part 3 of the Bill amends the Building Act 1984. In short, the building control regime, as we know it, shall be subject to a significant overhaul. The main areas of note are as follows:

- a. The building control profession shall be subject to greater regulation. This will include the creation of new roles of “building control inspector” and “building control approver”.
- b. Only the Regulator shall have jurisdiction over higher-risk buildings.
- c. Building regulations shall be amended.
- d. Time-limits for prosecution under the building regulations shall be extended.
- e. 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 31 new sections, numbered 58A to 58Z5 which broadly:

- a. introduce the registration of:
  - individuals as building control inspectors. The building control inspectors shall advise others involved in building control; and
  - individuals and organisations as building control approvers. Before exercising specified and restricted building control functions (which are currently unknown by the drafts-persons of the Bill and shall be set out in secondary legislation – e.g. approval or rejection of full building plans and issuing completion certificates and – in the case of Regulator functions – approving a construction Gateway application for a higher-risk building or issuing a completion certificate), 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 control inspectors or 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 control inspector before exercising a prescribed function as building control approver. Section 45 of the Bill

makes consequential amendments to the Building Act 1984 so that references to “approved inspector” are changed to “building control approver”; and

- b. 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:

- a. must establish and maintain a register in relation to each role;
- b. must prepare and publish (in the case of registered building control 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
- c. may investigate any instance of professional misconduct or contravention of professional conduct rules (as applicable to the respective roles). In relation to:

- registered building control 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; (4) cancellation of a registration.

Further, for this purpose, offences punishable on summary conviction by a fine, have been 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).

- d. The Regulator may 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;
- require the provision of documents or information;
- investigate contraventions of the rules;
- 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 order. Contravention of a notice, without reasonable cause will be an offence punishable by a fine on summary conviction.

### Building Control Authority

The Regulator and local authorities shall become collectively known as “building control authorities”.

By new sections 91ZA and 91ZB of the Building Act 1984, the Regulator shall act as building control authority for higher-risk buildings or proposed higher-risk buildings. This will apply to all building regulations matters; not just fire and structural safety. As such, the ability for those carrying out building work for or on higher-risk buildings to choose their own building control body has been 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. Further, it will become an offence for developers to build at risk 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 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 cancellation 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) shall 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;
- procedures in relation to applications for building control approval and requirements to be imposed on approvals;
- approval of schemes whose members can issue certificates including provisions about such schemes and certificates;
- requirements on obtaining information or documents,

creating documents, keeping information or documents and giving information or documents. For this purpose, the building regulations may:

- require the establishment and operation of a system for the giving of information; and
- make provision about the form and content of documents;
- provisions for the inspection and testing of work and the taking of samples;
- 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; and
- rights to appeal decisions made under, or under an instrument made under, Parts 1, 2 or 2A of the Building Act 1984.

By supplemental paragraph 5A to Schedule 1 to the Building Act 1984, the building regulations may require 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**”): (a) impose duties in connection with the planning or management of the work or other matter; and (b) require their co-operation with other relevant persons.

Paragraphs 5A and 5B shall apply to those appointed under the Construction (Design and Management) Regulations 2015. 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 will create a bridge between the obligations of dutyholders under 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: (a) the skills, knowledge, experience and behaviours of an individual; and (b) 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. Secondary legislation will impose the competency requirements. Specific requirements are expected to apply in relation to the Principal Designer and Principal Contractor

in their capacity as “appointed persons”. This is intended to fill a current void in building regulations relating to the competence of those who carry out building work.

### Enforcement

The time limits, under: (a) section 35A(1)(a) of the Building Act 1984 for prosecution for contravention of building regulations (currently two years); and (b) section 36 for the removal or alteration of non-compliant work (currently twelve months); shall be extended to ten years.

In addition, 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 6 months’ imprisonment (12 months upon the commencement of section 154(1) of the Criminal Justice Act 2003)) or on indictment (carrying an unlimited fine and/or two years’ imprisonment). This is designed to reflect: (a) a contravention of building regulations; and (b) the refusal of an opportunity to rectify such contravention.

### Liability of Officers

By new section 112A of the Building Act 1984, 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 exist 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 may make an order: (a) declaring a local authority to be in default; and (b) instructing the local authority to discharge its functions in a specific way and within a specific timeframe; if the Secretary is 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 the Secretary or another local authority.

By an amendment to section 53 of the Building Act 1984, a local authority can 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 an amendment to section 47 of the Building Act 1984, the Secretary of State 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 new section 52A, 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 52B, 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. The Accountable Person and the Building Safety Manager

#### The Accountable Person – Who is it?

The Accountable Person is the entity that must ultimately discharge the duties in occupation and with whom the buck stops if there are any breaches of those duties. The Accountable Person is the individual or entity (and it will in the vast majority of cases it will be a corporate entity) that owns either a *legal estate in possession in any part of the common parts* which may be as a freeholder or long leaseholder or a person who is under a repairing obligation in relation to any part of the common parts. You will not be deemed the Accountable Person where despite having a long lease that includes the right to use common parts, you are under no legal obligation to keep them in repair. The common parts includes both the structure and exterior of the building or any part of the building provided for the use, benefit and enjoyment of the residents.

It will be immediately clear to most keen observers that the definition could produce a number of Accountable Persons for a typical high-rise building – not least where a long leaseholder has a repairing obligation over some of the common parts with the freeholder retaining an obligation to repair the structure and exterior of the building. This situation is all too common – particularly where registered providers have taken or granted a long lease. Yet the Bill does not expressly anticipate a situation where there could be more than one Accountable Person for a higher-risk building.

One has to assume that the Secretary of State will enact regulations to ensure that where there are one or more Accountable Persons they have to work together or perhaps nominate one to discharge the duties (such as we see with the RRFO). Given the extremely wide nature of those duties, that could well give rise to a great degree of complexity. So, where the Accountable Person is the freeholder who retains all the repairing obligations in respect of the common parts then the position is clear – they will be the one and only Accountable Person. Where the building is subject to a long lease and the repairing obligations are split between the freeholder and the lessee, then there may well be more than one Accountable Person. Because in the vast majority of cases the Accountable Person will be a corporate entity, accountable persons will be required to appoint individuals to discharge the duties and obligations set out below. While those individuals will not become the Accountable Person and take on their liability, their role will be a uniquely responsible one.

#### The Accountable Person's Duties

The Accountable Person has a number of duties. The primary ones are these: -

1. To ensure the building is registered with the Regulator before occupation. A failure to do so is a criminal offence;
2. To apply to the Regulator for a building safety certificate every five years following occupation. A failure to do so is a criminal offence;
3. To appoint a competent building safety manager (which may be a corporate entity or an individual);
4. To carry out a regular risk assessment of the building safety risks in a higher-risk building and to provide a safety case report to the Regulator. Building safety risks are currently limited to fire and structural failure but may include any other category of risk prescribed by the Secretary of State. The risk assessment 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;
5. 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 4 above;
6. To keep all prescribed information in accordance with the prescribed standards (all of which have yet to be prescribed) and;
7. 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 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.

## 4. 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 higher-risk buildings 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 86 and 87 of the draft Bill introduce the following new statutory duties upon residents of higher-risk buildings together with the process the Accountable Person can follow to enforce those duties if not complied with.

### Duties on residents

Section 86 provides that residents of higher-risk buildings over the age of 16 must:

- Keep any 'relevant resident's item' in repair and proper working order. A 'relevant resident's item' means any electrical or gas installation or appliance in a dwelling, other than those which somebody else has responsibility for;
- Take reasonable care not to damage any '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 or its vicinity, for example, signage, sprinklers, smoke alarms; and
- Comply with a request from an Accountable Person to provide information reasonably required for the Accountable Person to perform their duties to carry out an assessment of building safety risks and take steps to reduce those risks.

Such residents are also required to comply with any additional duties that are prescribed by the Secretary of State under this section. If the 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 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.

An example of where this process could be used by the Accountable Person is where a leaseholder of a flat in a higher-risk building is responsible for ensuring that the gas boiler in the flat is regularly serviced and kept in good working order. If the Accountable Person had grounds for believing that the leaseholder was failing to keep their boiler in good working order, they may serve a notice requiring the leaseholder to have the boiler checked by a gas engineer. If the resident refused to do so, the Accountable Person could seek an order from the county court requiring the resident to have their boiler checked.

### Access to dwellings

Section 87 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.

The court can only make such an order where it is satisfied that:

- The Accountable Person has made a written request seeking permission to access the dwelling;
- The request is either made in connection with the Accountable Person's duty to assess building safety risks or in connection with the residents' duties under section 86;
- Entry to the dwelling has not been permitted; and
- The order needs to be made so that the Accountable Person is able either to determine whether a resident has breached their duties, or so that the Accountable Person is able to perform the relevant duty for which access is required.

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.

## 5. Building Safety Charge

Sections 88 and 89 of the Bill provide for terms to be implied into a lease of more than 21 years of a dwelling in a higher-risk building (including shared ownership leases) whereby every landlord will owe duties to each leaseholder to carry out appropriate building safety measures where they are the Accountable Person and to co-operate with the Accountable Person where they are not. Each leaseholder will owe corresponding duties to the landlord to pay their fair share of the reasonable costs of certain prescribed building safety measures. The draft Bill also provides for building safety costs to fall outside the definition of relevant costs for the purpose of service charges under the Landlord and Tenant Act 1985.

The costs payable by the tenant in relation to the building safety measures are referred to as “Building Safety Charges”. As such, it will be an implied term of a relevant lease that the tenant will pay the landlord any building safety charges within 28 days of a demand. This will be introduced by amending the Landlord and Tenant Act 1985 and adding sections 17A-17X to the 1985 Act. However, the draft Bill also introduces a number of restrictions and limits on how building safety charges can be recovered.

The Bill includes provision for consultation with tenants. As such, the landlord must provide the tenants with certain information before requiring the tenant to pay the building safety charge. This includes providing the tenant with a budget for the costs of the works and in respect of the costs that will actually be payable by the Tenant. If the Landlord does not provide this information the tenant is allowed to withhold payment of the charge.

Additional consultation provisions are envisaged whereby the tenant is advised of the proposed works, provided with estimates and invited to propose contractors from whom estimates should be obtained. Failure to comply with such consultation provisions will mean the amount the Landlord can recover from the tenant in respect of the building safety charge is capped unless a Tribunal dispenses with the consultation requirements or if the works are urgent in order to comply with a compliance notice. If the works are urgent then the tenant is to be served with an exemption notice.

Dispensation will be granted if it is reasonable to do so. The building safety costs that are payable by a tenant must also be reasonably incurred and, where the works or services are provided, they must be of a reasonable standard. However, it should be noted that certain costs are not to be taken into account when calculating the building safety

charge to be paid by the tenant. These costs are:

- a. costs incurred or to be incurred solely as a result of any penalty imposed or enforcement action taken by the regulator;
- b. costs incurred or to be incurred by reason of any negligence, breach of contract or unlawful act on the part of an accountable person; and
- c. prescribed costs incurred or to be incurred in connection with the carrying out of prescribed building safety measures, i.e. costs prescribed by the Secretary of State.

Further, where financial support has been provided to the Accountable Person to carry out prescribed building safety measures, for example by way of a grant, then the amount of financial support should be deducted from the building safety costs and the building safety charge reduced accordingly.

Additional points of note are:

- There is also an 18 month time limit on making a demand for payment of the building safety charge. Such demands must be made within 18 months of the costs being incurred unless written notice is given to the tenant within the 18 month period that the tenant will be required to contribute to those costs.
- Demands for payment of the building safety charge must be accompanied by a summary of rights and obligations in the prescribed form. If the summary of rights and obligations is not provided, the tenant can withhold payment.
- The appropriate Tribunal will be able to determine if a building safety charge is payable.
- Contributions to the building safety charge are to be held on trust.

## 6. Enforcement

Within the Bill there are three sections on Enforcement. The first deals with the investigatory powers of the Regulator (who is to be the Health & Safety Executive), the second with penalties for contravening building regulations (done through amendments to the Building Act 1984) and finally enforcement in relation to higher-risk buildings specifically. We deal with each below in turn. It should be noted that where an offence is committed under Part 2 (the Regulator) or Part 4 (higher-risk buildings) of the Bill by a corporate body with the consent or connivance of any director, manager, secretary or other similar officer, or the offence is attributable to any neglect on the part of any such person, that individual as well as the corporate body will be deemed to have committed the offence and is liable to be prosecuted. This means that individual directors cannot now turn a blind eye to the requirements of this Bill.

### Authorised Officers

The Regulator can authorise a person to use the investigatory powers set out in Schedule 2 as they relate to a function of the Regulator. The intention is that the authorised officer will carry out an investigation and report back to the Regulator so that the Regulator can properly and fully carry out its functions and duties as set out in the Bill. Such powers include the following:

1. Entry into non-domestic (with or without a warrant) and domestic (with a warrant) premises when the authorised officer has reason to believe it is necessary for them to enter.
  - They can take measurements, photographs, recordings and samples of anything in the premises.
  - They can seize anything on the premises if it appears to be evidence of an offence under the Bill or if they have reason to believe the evidence will otherwise be concealed, lost, damaged or destroyed.
2. Requesting information or documentation about a premises. The authorised officer can inspect and take copies of the documents provided.

There are four (4) offences under this section:

Offence	Penalty
Obstruction of an authorised officer	Fine
Impersonating an authorised officer, with intent to deceive	Fine
Providing false or misleading information to the Regulator, where you know that, or are reckless as to whether, the information is false or misleading	Imprisonment not exceeding 2 years and/or a fine
Failing to comply with a request for information or documentation (made by the regulator or an authorised officer)	Imprisonment not exceeding 2 years and/or a fine

### Contravention of the Building Regulations

The Bill introduces clear penalties for a contravention of the building regulations, and this is done through amendments to the Building Act 1984.

Firstly, a **compliance notice** can be issued by a local authority to a person who appears to have contravened, be contravening, or is likely to contravene the building regulations. A compliance notice requires the recipient to take steps specified in the notice within a time period specified in the notice. The steps will either seek to remedy the contravention or prevent it from happening at all. It is worth noting that a compliance notice cannot be issued for a contravention that occurred more than 12 months before the date on which the notice is issued. This means that compliance notices are limited to new or expected breaches of the building regulations.

It is an offence to contravene a compliance notice without a “reasonable excuse”. Quite what a reasonable excuse might be is not yet clear, but you would be sensible to comply with any compliance notice received unless you have a very good reason (which can be evidenced) not to because the penalty for being found guilty of this offence is imprisonment not exceeding 2 years and/or a fine. It is also worth noting that any fine imposed will continue to be incurred for each day following a conviction until the notice is complied with.

Secondly, a **stop notice** can be issued by the building control authority if:

1. Works are being carried out in contravention of the building regulations and the “risk of serious harm” condition is met. This condition will be met where use of the building without the contravention being remedied would likely present a risk of serious harm to users of the building;
2. A compliance notice relating to the works has been contravened; or
3. Carrying out the works would contravene the building regulations.

A stop notice will prohibit either immediately or from a specified date, the carrying out of the work until the (i) completion of specified steps; (ii) occurrence of specified circumstances; or (iii) remedying of a specified contravention or the matters giving rise to it.

As with a compliance notice, contravention of a stop notice is an offence which could lead to a prison sentence of up to 2 years and/or a fine. It is worth noting here that it is a defence if you can prove that you took “all reasonable precautions and exercised all due diligence to avoid the

commission of this offence”. This will again involve you needing to provide clear evidence of why you could not comply with the stop notice. You have an obligation to take reasonable steps to avoid committing this offence; simply being unable to process the notice through your internal systems will not be a sufficient reason to avoid a prosecution.

### Appeals

You can appeal a compliance notice. If an appeal is lodged the notice will have no effect pending final determination or withdrawal of the appeal. You can also apply for an extension to the period for complying with the specified actions in the notice. We will have to see over time how successful appeals and applications for an extension are. That said, we suspect that to be successful any application for an extension will have to be made quickly upon receipt of a notice otherwise you are likely to pass the deadline before having a final decision.

You can also appeal for a direction that a stop notice has no effect pending final determination or withdrawal of the appeal. Please note though that unlike compliance notices, until a final direction is given the stop notice continues to have effect despite any appeal. The reason for this is that a stop notice will be given where there is clear evidence of a contravention of the building regulations and therefore no building should continue until a final decision has been made.

### Higher-risk buildings (Part 4)

The Bill places a clear and express duty on the Regulator to enforce the provisions of this part (relating to higher-risk buildings). The Regulator has several powers as follows:

1. **A compliance notice:** the Regulator may give a compliance notice to a relevant person who appears to the Regulator to have contravened, be contravening or be likely to contravene a relevant requirement as set out in this part of the Bill (the requirements of the relevant person have been set out earlier in this note). A notice will require the relevant person to take specified steps within a specified period in order to remedy or avoid the contravention.
2. **An urgent action notice:** where the Regulator believes that a contravention of the requirements in this part (relating to higher-risk buildings) has placed or will place people in the building in imminent danger, the Regulator can specify that a compliance notice is an “urgent action notice”.

When a compliance notice is issued the Regulator must take reasonable steps to notify:

- (a) the local authority for the area in which the building is situated;

- (b) the fire and rescue authority for the area in which the building is situated;
- (c) where the Accountable Person for the building is a registered provider of social housing, the Regulator of Social Housing; and
- (d) any other prescribed person.

This means that for RPs, the Regulator of Social Housing (RSH) will automatically be notified by the Regulator that you have contravened the requirements of the Bill. As these are statutory, mandatory requirements we would expect the RSH to take such a contravention very seriously and further questions will be raised by them directly. Any such contravention may also lead to a regulatory downgrade, particularly if the contravention leads to a prosecution and a significant fine.

### Appeals

If you receive a compliance notice, which is not an urgent action notice, and you make an appeal the compliance notice will not be effective pending the final determination or withdrawal of the appeal. If you receive an urgent action notice you can appeal it. You can also apply to the tribunal for a direction that the compliance notice be of no effect pending the final determination or withdrawal of the appeal, but unlike normal compliance notices, unless and until any such direction is given the compliance notice will continue to have effect despite the lodging of the appeal.

### Offences

In relation to this Part 4 of the Bill there are two (2) offences:

Offence	Penalty
Contravention of a compliance notice without a reasonable excuse	Imprisonment not exceeding 12 months and/or a fine. You should again note that if a fine is imposed this will continue to accrue for each day on which the default continues after you are convicted
Contravention without reasonable excuse of a requirement of this Bill where that failure places one or more persons in the building at critical risk. Note that “critical risk” means a significant risk of death or serious injury arising from a building safety risk	Imprisonment for a term not exceeding 2 years and/or fine. You should again note that if a fine is imposed this will continue to accrue for each day on which the default continues after you are convicted

The second type of offence is primarily aimed against breaches by the accountable person of their obligations (see the duties at Section 3)

## 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 106 to 109 of the Bill were born. There is currently no statutory obligation upon developers of new build homes to belong to a redress scheme and/or 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 (Section 106)

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 individual; and
- the scheme meets certain requirements set out in Schedule 7 of the draft 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 requirements for occupation differ for those in

Scotland.

The definition in the draft legislation only allows 'individuals' to be a relevant owner, rather than any other 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:
  - i. a building the construction of which began after the coming into force of this section; or
  - ii. 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 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.

### Enforcement Action

The proposed sanctions that may be imposed include civil penalties and orders prohibiting a person from carrying out any specified activities. If members breach any such order, they may be guilty of a criminal offence. Any regulations should make provision for appeals to a court or tribunal against the imposition of a sanction and any other provisions considered appropriate to safeguard the interests of the person on whom the sanction is imposed. It is expected that the NHOS will be able to direct compensation to be paid of up to £50,000.

The draft legislation does not prescribe that the NHOS must undertake the enforcement role and therefore the NHOS may assign the responsibility to another (existing) body.

### 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 about the standard 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 issued 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 investigation 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.

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