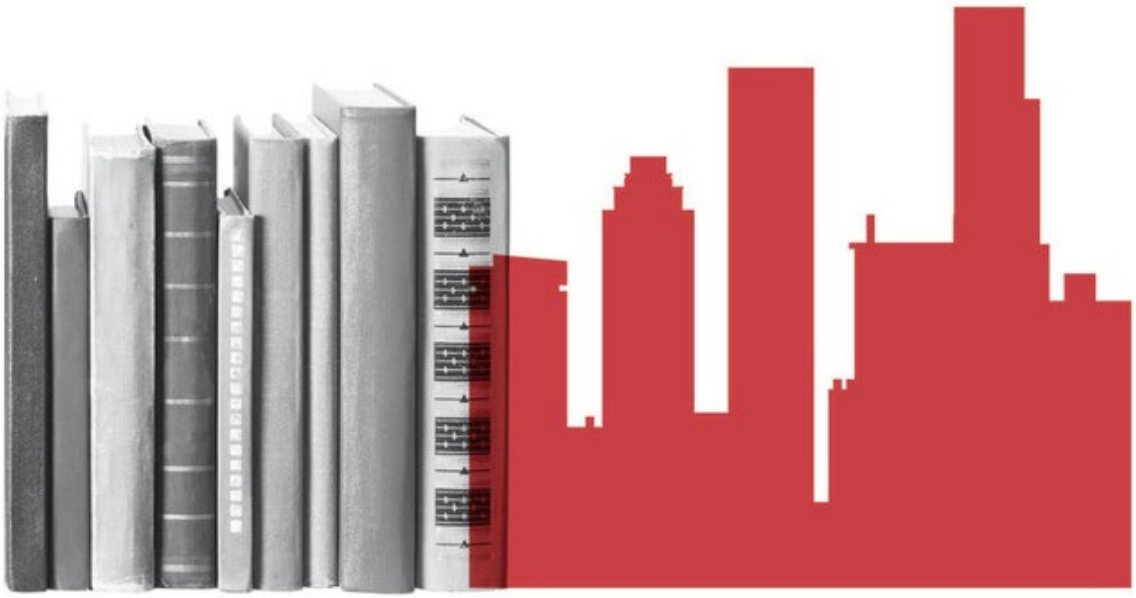
EVERSHEDS SUTHERLAND

The Building Safety Act 2022

What can I expect now?

6 July 2022 | Position in England



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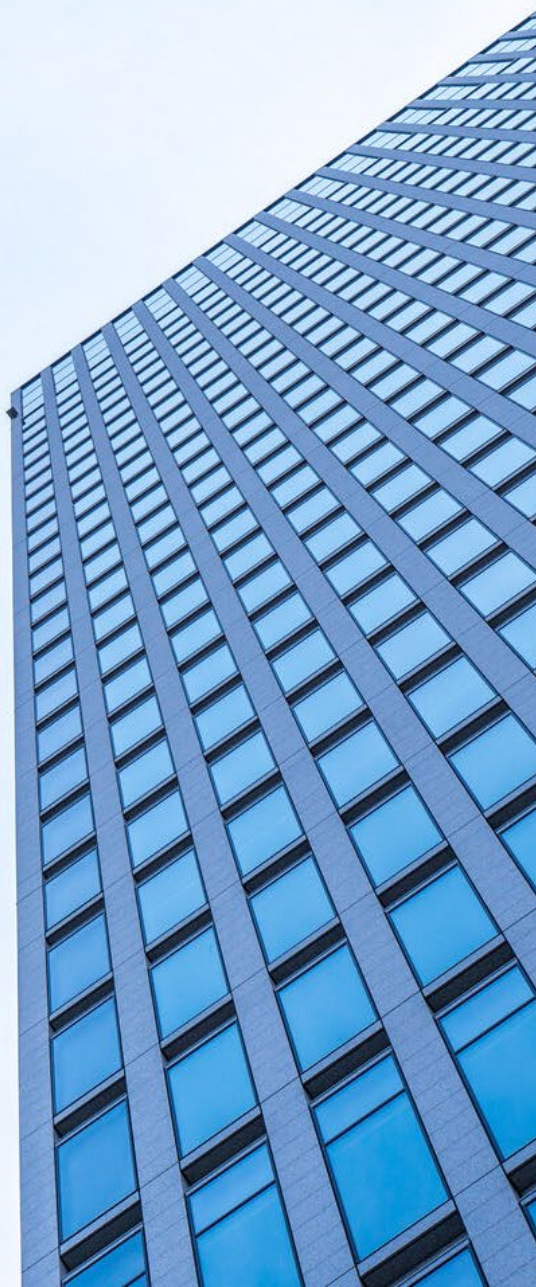


The Building Safety Act 2022

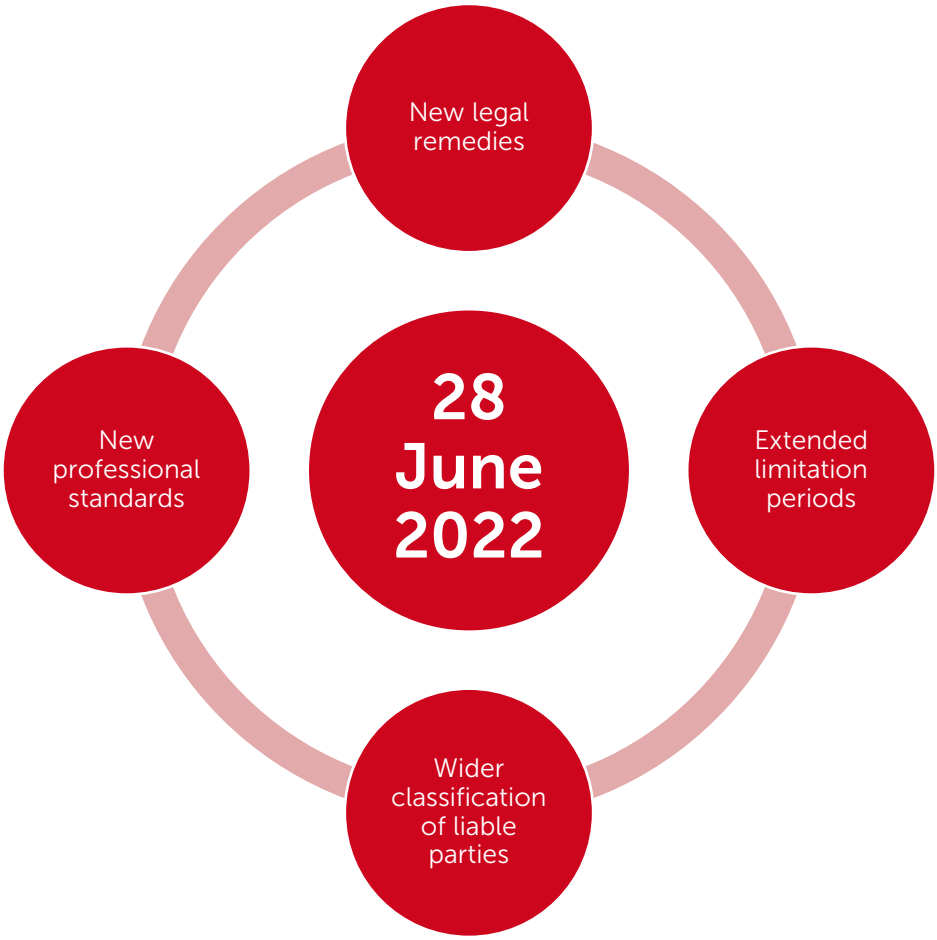
The Building Safety Act passed on 28 April 2022 and proposes widespread legal and regulatory reform. It is broad in scope, with some of its provisions affecting all buildings (not just higher risk buildings). A lot of its detail has been reserved for secondary legislation and its implementation is expected to be staggered over 2-18 months from the date of the Act. This will take effect by way of separate regulations, which means that building safety will continue to be a developing area over this period.

With such change on the horizon, it is important to know which elements of the Act are in force or immediately forthcoming. From 28 June 2022 a number of provisions came into effect which change the claims landscape. We will consider these in this article.

Changes in effect from 28 June 2022

It is not surprising that the provisions which have been prioritised are those that provide homeowners and occupiers with additional rights to have building safety concerns addressed. In comparison, those areas that require regulatory reform and new systems to be put in place before such change can be effective have a longer lead in time.

With effect from 28 June 2022, two months since the Act was passed, a number of provisions came into effect which fall under the following four themes.



We will look at each of these in turn.

New legal remedies

The Act offers new rights to claim against defective work, particularly at dwellings, to encourage rectification and greater accountability.

Refurbishment work that causes a dwelling to be unfit for habitation

The Defective Premises Act 1972 (DPA) has been amended, with the addition of s.2A[1], which provides homeowners and leaseholders with a right of action where refurbishment works results in their dwelling being unfit for habitation. This right is against those who carry out the works or arranges for the works to be done.

Previously the DPA only offered a remedy for works that were for the "provision" of a dwelling, and so was limited to new build or conversion works. It should be noted that this change affects all dwellings and is also in relation to any defective work that renders a dwelling unfit for habitation (i.e. not just in relation to unsafe cladding or building safety concerns).

Civil remedy for breach of building regulations

s.38 Building Act 1984 was previously introduced but never brought into force, until now[2]. This section allows a claim for damages where breach of the building regulations causes harm. Such harm could relate to death or injury to any person, but does not include pure economic loss . There are no restrictions on who can bring such a claim and it applies to any building.

Remediation orders

A tribunal can issue a landlord with a remediation order to remedy defects within a specified time[3]. This can be made in respect of buildings that are at least 11 metres high or have 5 storeys and contain at least two dwellings (referred to as a "relevant building"). The defects must relate to anything that is not correct with the works which was done in the past 30 years from 28 June 2022 and which causes a building safety risk[4], hereafter referred to as the "relevant defects". An application for this order can be made by the Building Safety Regulator, a local authority, a fire and rescue authority, a person with a legal or equitable interest in the relevant building of any part of it, or any other person who may be later prescribed by regulations.

Liability for construction products and past defaults relating to cladding products

A party with a right or interest in a dwelling or a building containing two or more dwellings can now make a claim against another party if:

- the other party fails to comply with construction product requirements in relation to a construction product, markets or supplies a construction product with a misleading statement, or manufactures a construction product that is inherently defective
- such product is installed or attached to a dwelling or a building which contains two or more dwellings and
- that product results in such dwelling or building being unfit for habitation[5] (referred to elsewhere as a "construction product claim").

A party can also claim for defective cladding products if the above conditions are met[6], (referred to elsewhere as a "cladding claim"). These provisions also provide an express right for damages in relation to personal injury, damage to property or economic loss suffered by the claimant, and so provide an important remedy that would otherwise not be available in a negligence claim.

All of these provisions provide additional statutory rights, meaning that they exist as legal remedies even where the contract is silent or the parties do not have a contract with each other. Together they raise the standards of what can be expected regarding works done at dwellings, encourage compliance with the building regulations, and facilitate the rectification of defective work.

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1 Made by virtue of s.134 of the Building Safety Act 2022 (BSA)
2 s.135 BSA
3 s.123 BSA
4 A building safety defect is defined in relation to a building as any risk to the safety of people arising from the spread of fire or the collapse of a building of any part of it (s.120(5) BSA).
5 s.148 BSA
6 s.149 BSA

Extended limitation periods

The Act offers extended limitation periods for these new types of claim and certain other claims. A limitation period is the time in which a party has to bring a claim, calculated from when the event giving rise to their claim occurred. Typically contractual disputes in construction, where the contract has been executed as a deed, have a 12 year limitation period from the date of practical completion. Previously claims under the DPA had a limitation period of 6 years from completion of the new build or conversion works or from completion of any rectification in relation to such works.

Under the Act limitation periods have been extended to 15 or 30 years for certain types of claim, as set out below:

15 year limitation period	30 year limitation period
s.1 DPA claim, if right of action accrued on or after 28 June 2022	s.1 DPA claim, if right of action accrued before 28 June 2022
s.2 DPA claim	cladding claim, if right of action accrued before 28 June 2022
s.38 Building Act claim	
construction product claim	
cladding claim, if right of action accrued on or after 28 June 2022	

Where the 15 year limitation period applies, this is in relation to claims that arise following the implementation of this provision (from 28 June 2022). However, the 30 year limitation period has retrospective effect and applies to claims that arose before 28 June 2022. The 28 June 2022 has been used as a defining date simply because it is two months from when the Act came into force.

This means that if a defect under these sections is up to 30 years old (i.e. going back to 1992 or later) , it can still be brought before the courts (unless it has previously been determined or settled). It also means that such claims that have accrued before 28 June 2022 have a 30 year period in which the parties can make a claim (e.g. the limitation period for a claim that arose in 2022 can last until 2052). If a potential claimant's 30 year limitation period has only one year left to run (ie expires before 27 June 2023), then they are given an additional year from 28 June 2022 to make their claim, so that they have the opportunity to take legal advice.

These provisions mean that historic claims, that a party may have thought had long since expired, may now be resurrected if they can be claimed under those rights that have a 30 year limitation period. This provides claimants with longer rights to claim defects and greater periods of time in which to bring their claim.

Wider classification of liable parties

One of the problems encountered in the first wave of remediation work to high rise residential buildings after Grenfell was that the liable party was no longer available to pursue. This could be because the developer had no assets (due to either being an investment vehicle (such as a SPV) or becoming insolvent), or because there were jurisdictional issues in pursuing entities that were based overseas.

The Act therefore introduces a number of provisions that surmount this problem, by making other entities liable who may have some association with the original liable party. The meaning of what counts as being "associated" with another party changes according to when it is used for the following new measures:

Remediation contribution orders

Under this provision the tribunal may on the application of an interested person, require a specified body corporate or partnership to contribute to the costs incurred or to be incurred in remedying relevant defects at a relevant building (as such terms have been previously defined)[7]. There is no definition of who constitutes an "interested person". Those who may be "specified" by the tribunal include a landlord, a person who was a landlord at the qualifying time (i.e. at the beginning of 14 February 2022), a developer in relation to a relevant building or any person "associated" with any such persons. The term "associated" has a specific meaning in the Act[8], which largely relates to shared directorships, or where one party controls another.

Remediation costs under qualifying leases (s.116 to s125 and Schedule 8)

In certain circumstances service charge amounts relating to relevant defects in a relevant building are not payable and such amounts can be recovered by the landlord. This is a substantial issue in its own right and discussed in a separate legal update.

Meeting remediation costs of insolvent landlord

Under this provision the High Court can impose liability on another party, upon the application of an insolvency practitioner, to contribute to the costs of rectifying relevant defects at a relevant building where the landlord is insolvent[9].

Building liability orders

The High Court can impose an order making a body corporate responsible for the liabilities of another, where such liabilities arise under the Defective Premises Act 1972, s.38 Building Act 1984, or as a result of a building safety defect. This can be imposed regardless of whether or not such liability was incurred before or after the commencement of this section. This order can be made whenever the High Court considers it just and equitable to do so, whether or not the original party has been dissolved. These liabilities can be imposed on another "associated" body, which is defined in the Act[10] and arises when one party controls another.

Previously parties could assess their liability by reviewing the contracts that they have entered into. These provisions now impose liability on parties that they might not otherwise have had such liability, due to their association with the original liable party (most often when part of the same group of companies). There are also provisions to make original developers and previous landlords accountable, even if they have since disposed of their interest in the property. These provisions overturn established legal principles, so that there is a statutory means to hold the original parties, or parties who have some relation with the original parties, accountable for the sake of financing remediation works.

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7 s.124 BSA
8 s.121 BSA
9 s.125 BSA
10 s.131 BSA

Higher professional standards

Architects discipline and professional requirements

New disciplinary orders can be made by a statutory body (the Architect Registration Board) against architects, which are kept on a register for public inspection. There is also new competency requirements placed upon architects to undertake continuing professional development, which will be monitored by the Board. If an architect does not meet the requirements of the Board then they will be struck off the register. These provisions apply to all architects and not just those working on higher risk buildings.

Construction product regulations

In the aftermath of Grenfell it was discovered that aluminium composite material cladding and certain types of fire doors were not included in the existing regulatory framework on construction products. The Act facilitates the introduction of new Construction Products Regulations, will require construction products to be safe and will create a list of safety critical construction products[11]. The current regulatory framework derives from EU Law and applies to products with a EU harmonised standard. There are many construction products where there is no existing EU harmonised standard and so these new regulations should cover any gaps that are currently present.

These provisions apply to all construction work and thereby elevate the professional standards required across the construction industry.

Transition plan

The Act makes provision that the rest of its provisions of the Act will come into force on such day as the Secretary of State may appoint by way of regulations. However, in July 2021 a draft transitional plan was published by the Government in relation to the Bill, which at the time of writing has not since been updated. This provides a notional list of implementation dates which provide an insight into when we might expect these further changes to be made. They anticipate that the other provisions of the Act will be in place between 12-18 months from when the Act was enacted (i.e. between April 2023- October 2023). These include the gateway regime, the provision of the golden thread of information, the role and the new dutyholder requirements, including the duties of the Accountable Person.

As golden thread requirements will affect existing higher risk buildings as well as new build developments, it would be prudent to gather this information where possible before the requirements come into force. However, there are currently no draft regulations specifying what this golden thread of information should consist of. The Act simply refers to the "prescribed information". In general preparation for these provisions is still dependent on further information being released and the accompanying regulations that provide detail on what needs to be done.

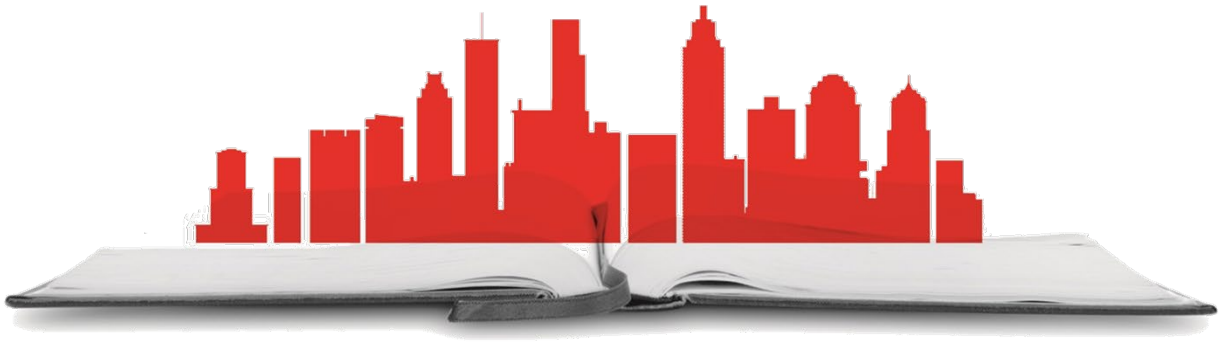
Conclusion

The extent of these changes show that the Act is a major piece of legislation, broadening the net of those who can be held liable for the rectification of defects that affect dwellings and building safety concerns. As these provisions are to promote the fitness for habitation and public safety of buildings, it is right that these measures are hard hitting and have been prioritised. However, the means by which a party can be liable under the new Act are surprising and widespread. Parties should be aware of these additional measures both when making and defending claims and be prepared for any additional litigation that could pursued, particularly for liabilities that had previously been discounted as being too historic or remote.

[11] s.146 BSA

Key definitions

relevant building	a building that is at least 11 metres high or has at least 5 storeys and contains at least two dwellings
relevant defect	a defect that arises as a result of anything done (or not done) or anything used (or not used) in connection with relevant works and which causes a building safety risk[12]
building safety risk	means in relation to a building a risk to the safety of people in or about the building arising from the spread of fire, or the collapse of the building or any part of it[13]
higher risk building	a building that is at least 18 metres high or has at least 7 storeys and contains at least two dwellings, as further defined by separate regulations



12 s.120(2) BSA
13 s.120(5) BSA

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