

What you need to know

The Building Safety Act 2022

8 June 2022 | Position in England



Contents

Background to the Building Safety Act	1
Introduction of the Building Safety Act	1
Why is the Building Safety Act so important?	1
New regulatory regime for building safety	2
Clearer roles and responsibilities	4
Rights of redress for residents	6
What's next?	9
Key contacts	10

Eversheds Sutherland (International) LLP is a limited liability partnership, registered in England and Wales, under registration number OC304065, registered office One Wood Street, London EC2V 7WS and is authorised and regulated by the Solicitors Regulation Authority. A list of the members' names, together with those who are non-members, but are designated as partners is available for inspection at the above office, together with details of their professional qualifications. Please note that when we refer to a "partner" or "partners" of Eversheds Sutherland (International) LLP, the term "partner" indicates a member of Eversheds Sutherland (International) LLP. It should not be construed as indicating that the members of Eversheds Sutherland (International) LLP are carrying on business in partnership for the purposes of the Partnership Act 1890.

Eversheds Sutherland (International) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.



Background to the Building Safety Act

The Grenfell Tower tragedy on 14 June 2017 was a widespread fire through a 24-storey residential building, comprising 129 flats, which led to the death of 72 people. A public inquiry into the incident found that the external walls of the building failed to comply with building regulations and that the cladding used promoted the spread of fire. The inquiry also found that similar materials had been used in over 400 other high rise buildings throughout the country.

In July 2017 Dame Hackitt was appointed by the government to conduct an independent review of the building regulations and fire safety. This review published an interim report (December 2017) and a final report (May 2018). The final report proposed a new regulatory framework which aimed to:

- create a simpler and more effective regime for driving building safety;
- provide stronger oversight on dutyholders with incentives for the right behaviours and effective sanctions for poor performance; and
- reassert the role of residents in being able to seek legal redress for defective and unsafe work.

The Building Safety Bill was published on 5 July 2021. Initial reaction was that it did not provide sufficient detail on the new proposals, nor did it go far enough in providing remedies for disadvantaged residents. As a result there were numerous revisions to the Bill, particularly with regards to the ability of residents to bring claims for defective works relating to building safety.



Introduction of the Building Safety Act

The Building Safety Act 2022 (the **BSA**) received royal assent on 28 April 2022 and is available for review [here](#). Its provisions will come into force gradually during the next 2 to 24 months. The government has published its transition plans, which are available [here](#). New regulations (by way of secondary legislation) will provide further detail on how its provisions will be implemented. It is expected that these regulations will be available in draft shortly.



Why is the Building Safety Act so important?

The BSA is one of the most extensive legal reforms the industry has seen in many years. It has widespread implications, in particular for developers, owners, and occupiers. As an overview, the BSA introduces:

Regulatory reform for *higher risk buildings* (as defined in the next section). This will create new roles and additional duties and responsibilities, as well as introduce a number of procedural requirements during the building's construction and occupation. This will affect procurement strategies, impact on the delivery of projects in terms of time and cost, and create new project management duties.

New liabilities in relation to extending existing rights of recourse under the Defective Premises Act 1972 (**the DPA**) for dwellings that are unfit for habitation. The BSA also gives the courts additional powers to impose orders requiring remediation works and/or financial contributions for mid-rise buildings that pose a safety risk.

Wider classification of liable parties where the courts have the power to "pierce the corporate veil", so that group companies or companies associated with the original party can be made liable if rights can no longer be enforced against the original party (for example if they are insolvent, or an SPV).

Extended limitation periods (i.e. the time limit the parties have in which to make a claim) beyond the usual contractual time limits. Construction contracts are typically by deed and have a limitation period of 12 years. However for certain rights under the BSA and the DPA, the BSA has extended the limitation period, so that existing building safety defects have a limitation period of 30 years, whereas new building safety defects have a 15 year liability period.



New regulatory regime for building safety

Higher Risk Buildings

The regulatory reform focuses primarily on higher risk buildings, which are defined as buildings in England that are at least 18 metres high or have at least 7 storeys, and contain at least 2 residential units. The BSA makes provision for Wales, Scotland and Northern Ireland to determine their own definition and requirements within separate regulations.

There will be limited exclusions to this definition. Previous draft regulations excluded hospitals, secure residential institutions (such as prisons, young offenders institutions, detention centres etc), temporary leisure establishments (such as hotels or anywhere that provides overnight accommodation for leisure); and military premises. Updated regulations are awaited to confirm the scope of the definition. It is likely that the definition will include mixed use buildings with a residential element and is expected to extend to student accommodation and educational accommodation.

Building Safety Regulator

A Building Safety Regulator (**BSR**) will be appointed within the Health and Safety Executive and will be under a general duty to secure the safety of people in buildings and improve the standard of buildings. It will also be the building control authority for higher risk buildings.

The BSR will set up and maintain a Building Advisory Committee, to give advice and information relating to building safety, and a Committee of Industry Competence to improve standards within the built industry environment. It will also establish a Residents' Panel where residents of higher risk buildings can give advice about the BSR's functions and be consulted about new guidance proposed by the BSR.

Gateway regime for new build higher risk buildings

The construction of higher risk buildings will be managed and overseen by the BSR within a new "gateway regime". The detail relating to this will be introduced by secondary legislation. There will be three stages to the gateway regime as follows:

- a **planning gateway**, whereby issues on fire safety are incorporated at the planning stage for a higher risk building;
- a **pre-construction gateway**, where dutyholders have to submit key information to the BSR to gain approval, before construction work can begin, that the design meets the functional requirements of the building regulations; and
- a **completion gateway** where the BSR undertakes final inspections of the completed works to assess whether the works have been carried out in accordance with building regulations. If satisfied, the BSR will issue a completion certificate on approval. It is a criminal offence to allow occupation of a higher risk building without this completion certificate.

The stages within the gateway regime could create delay and disruption in the progress of the works. This will impact upon procurement structures, the timing of financing, the allocation of responsibility for delay, the criteria for practical completion, and arrangements for partial possession.

Golden thread of information for higher risk buildings

In relation to higher risk buildings, the Accountable Person (as defined later) must keep and maintain information relevant to the management and reduction of fire safety risks throughout the building's lifespan (for both new build and existing higher risk buildings). This is colloquially known as the "golden thread of information". Details on the nature of this information and the format in which it should be stored will be available in secondary legislation.

Construction Products Regulations

The BSA proposes new regulations concerning the marketing, sale and labelling of construction products, to update the current framework that is derived from EU law. The new regulations should place all construction products available in the UK under the same regulatory regime, so that the same standards of product performance are imposed. The BSA also prescribes that there is a statutory list of safety critical construction products.





Clearer roles and responsibilities

Accountable Person for higher risk buildings

The Accountable Person is someone who has either a legal estate in, or a repairing obligation for, the common parts of a higher risk building (i.e. the structure and exterior and any common parts for the use of residential tenants). The Accountable Person may be an individual, partnership or corporate body and there may be more than one Accountable Person for a building. If there is more than one Accountable Person, the BSA requires one of them to be nominated as a Principal Accountable Person to take the lead. Under the BSA the Accountable Person is responsible for complying with a long list of statutory obligations, such as:

- assessing the building safety risks for the parts of the building for which they are responsible;
- managing and preventing risks, including preventing risks from materialising;
- preparing safety case reports, which are to be notified to the regulator upon request;
- maintaining and updating the golden thread of information and responding to requests for prescribed information from tenants;
- preparing and keeping under review a residents' engagement strategy to promote the participation of relevant persons in making building safety decisions; and
- setting up a system for the investigation of complaints.

Dutyholder regime

There will be a new regulatory regime to hold to account those involved in the design and construction of new buildings and the refurbishment of existing buildings. This will apply to those commissioning and undertaking work as well as those controlling or managing the work (who are together known as "dutyholders").

In England it is proposed that the client will certify that existing dutyholders under the Construction (Design and Management) Regulations 2015 will in addition have the appropriate skills, knowledge, experience and behaviours to undertake their role under the building regulations. The inclusion of "behaviours" in the list of requirements is new and shows that dutyholders are required to practically demonstrate responsible action (as well as be appropriately qualified).

Additional professional standards for architects

There are new requirements for architects to undertake continuous professional development and to exhibit the skills, knowledge, experience and behaviours required for a person to practice as an architect. Architects can be removed from the register of architects if they fail to comply.

New competency requirements for prescribed persons

The BSA makes provision for the building regulations to prescribe competency requirements on the principal designer, principal contractor and any other prescribed persons, relating to their skills, knowledge, experience and behaviour.

Building control approvers and building inspectors

There will be a new register of building inspectors and building control approvers, to improve competence levels and accountability in the building control sector. The register will be maintained by the BSR. Building control approvers and building inspectors will have to meet minimum standard criteria before they can be noted on the register.

Industry committee

The BSR's Committee on Industry Competence will give advice about sector specific competence frameworks.





Rights of redress for residents

The Defective Premises Act 1972

The DPA already provides a statutory duty upon those undertaking works in the provision of a new dwelling to act according to proper workmanship and professional standards so that the dwelling is fit for habitation. Those who procured the works or acquire an interest in the dwelling are able to claim compensation for breach of this statutory duty. The BSA proposes to extend the provisions of the DPA so that:

- compensation can also be claimed in respect of refurbishment works to an existing dwelling;
- all new works and refurbishment works have a limitation period of 15 years from their date of completion, if those works complete after 28 June 2022;
- works to provide new build dwellings that have completed before 28 June 2022 shall have a limitation period of 30 years (which will be applied retrospectively); and where the time period for such a claim is about to expire the limitation period shall have an additional year from 28 June 2022 for a claim to be made.

Remediation Orders and Remediation Contribution Orders

From 28 June 2022, a tribunal can impose an obligation on a relevant landlord to remedy a relevant defect in a relevant building (by way of a **Remediation Order**); and a requirement on a specified party to meet the cost of remedying relevant defects (**Remediation Contribution Order**) if it considers it just and equitable.

These powers apply to:

- a **relevant building**, which is defined as a building that contains at least two dwellings, is at least 11 metres high and has at least 5 storeys;
- to a **relevant defect**, which is anything that has been done in the past 30 years (ending when this provision comes into force) that causes a building safety risk; and
- a **relevant landlord**, which means a landlord under a lease of the relevant building or any part of it who is required under the lease or by virtue of an enactment to repair or maintain anything relating to the relevant defect.

Remediation Contribution Orders have been introduced with the intention to make some party responsible for covering the cost of defects – even if the Landlord is not capable of dealing with it. No further guidance or regulations are available yet on who the courts can “specify” to impose this liability on.

An application for these orders can be made by an **interested person**, which means the regulator, a local authority, a fire and rescue authority, a person with a legal or equitable interest in the relevant building or any part of it, or any other person prescribed by the regulations and in relation to a Remediation Contribution Order also the Secretary of State.

The government is due to provide some more guidance on the application of these provisions, as the potential implications are considerable.

Prohibition Orders

New prohibitions can be imposed by the Secretary of State on prescribed persons to prevent them from carrying out development works on land in England and from obtaining building control. **Prescribed persons** are those who are eligible to join the building industry scheme, as established under the BSA, but do not do so. At present there is no criteria available on who is eligible to join such a scheme or what the scheme will entail. It is expected that this information will be available separately under regulations. These prohibitions will be imposed to secure the safety of people in or about buildings in relation to risks arising from buildings, or to improve the standard of buildings.

Building Liability Orders

The High Court has the power to make a Building Liability Order under which the relevant liability of body corporate A can also be imposed on a specified body corporate B, which is associated with body corporate A. For the purposes of this provision:

- **relevant liability** is one that is incurred under the DPA, section 38 Building Act 1984, or as a result of a building safety risk;
- **associated** means if one body corporate controls the other, or if both are controlled by a third body corporate; and
- **control** has a specified meaning in the BSA, but generally relates to one body corporate owning or entitled to at least half of the other body corporate's share capital, voting rights, dividends, or assets upon winding up.

The High Court can make the bodies jointly and severally liable for the specified liability. A Building Liability order can be granted even when body corporate A no longer exists. Further explanation on the operation of this provision is expected within separate regulations.

Order for associated entities upon insolvency of the landlord

The court has a new power, on the application of an insolvency practitioner, to require an **associated body** to make remediation contributions if an insolvent landlord has liabilities in relation to the remediation of **relevant defects** at a **relevant building** (as such terms have been defined above).

New build home warranties

Developers are required to provide a warranty for all new build dwellings and conversions of/into dwellings when sold and for any common parts for a period of at least 15 years. This applies when a developer carries out a development in England that results in the creation of one or more dwellings and for contracts of sale entered into after this section of the BSA and its regulations commence. The Secretary of State can set a penalty for non-compliance which will be up to 10% of the sale value of the property or £10,000, whichever is greater. There are additional penalties and interest payments for non-compliance.

Liability for construction products

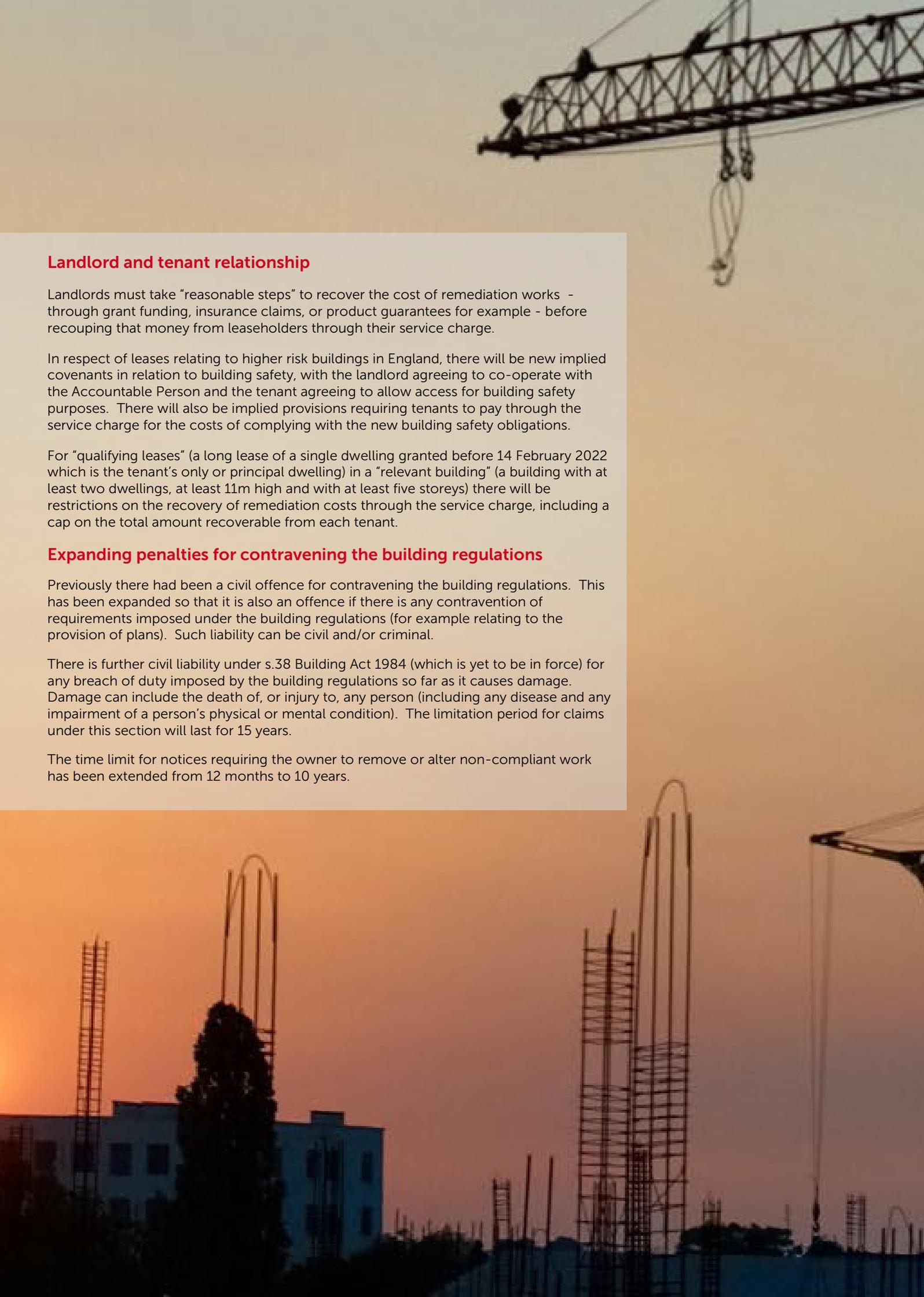
There is a new cause of action against manufacturers and suppliers where a breach of construction product regulations causes, or is a factor in, a relevant building becoming unfit for habitation. A relevant building in this context means a building which consists of a dwelling or contains two or more dwellings. This has a limitation period of 15 years from the date on which the right of action accrued.

In addition there is a new cause of action against manufacturers where historical defects relating to cladding products cause or are a factor in a relevant building becoming unfit for habitation. This has a limitation period of 15 years if the right of action accrued after 28 June 2022, or 30 years if the right of action accrued before then.

It is also proposed by way of new regulations that the court can impose a **cost contribution order** requiring a defaulting party to pay a person with an interest in a building or dwelling a sum of money that is just and equitable in respect of costs that the person has incurred in making the building or dwelling fit for habitation. These orders can be made against a party that is convicted of an offence in failing to comply with a construction product requirement, as set out in further regulations.

Creation of a new homes ombudsman scheme

There will be the creation of a new homes ombudsman scheme, which is intended to allow owners of new build homes to escalate complaints. Developers of new homes are required to become and remain members of the scheme and to make information about the scheme available to their homebuyers. A list of members to the scheme is to be maintained for public inspection. The scheme enables those homeowners to raise complaints about a developer and to have their work investigated and determined by an independent individual. There are also plans that the ombudsman will issue a code of practice about the standards of conduct and quality of work expected from its members.



Landlord and tenant relationship

Landlords must take “reasonable steps” to recover the cost of remediation works - through grant funding, insurance claims, or product guarantees for example - before recouping that money from leaseholders through their service charge.

In respect of leases relating to higher risk buildings in England, there will be new implied covenants in relation to building safety, with the landlord agreeing to co-operate with the Accountable Person and the tenant agreeing to allow access for building safety purposes. There will also be implied provisions requiring tenants to pay through the service charge for the costs of complying with the new building safety obligations.

For “qualifying leases” (a long lease of a single dwelling granted before 14 February 2022 which is the tenant’s only or principal dwelling) in a “relevant building” (a building with at least two dwellings, at least 11m high and with at least five storeys) there will be restrictions on the recovery of remediation costs through the service charge, including a cap on the total amount recoverable from each tenant.

Expanding penalties for contravening the building regulations

Previously there had been a civil offence for contravening the building regulations. This has been expanded so that it is also an offence if there is any contravention of requirements imposed under the building regulations (for example relating to the provision of plans). Such liability can be civil and/or criminal.

There is further civil liability under s.38 Building Act 1984 (which is yet to be in force) for any breach of duty imposed by the building regulations so far as it causes damage. Damage can include the death of, or injury to, any person (including any disease and any impairment of a person’s physical or mental condition). The limitation period for claims under this section will last for 15 years.

The time limit for notices requiring the owner to remove or alter non-compliant work has been extended from 12 months to 10 years.



What's next?

The BSA has passed into law, but the implementation of its provisions have been staggered. The following provisions will be in force two months from the date the BSA was passed (i.e. from 28 June 2022):

- Remediation Orders
- Remediation Contribution Orders
- Remediation costs under qualifying leases
- s.2A DPA (new offence for refurbishment works that are unfit for habitation)
- Extended limitation periods under the DPA
- Construction product regulations
- Construction product liability
- Architects disciplinary and professional requirements

It is clear that those provisions that give occupiers a legal right of redress have been fast tracked. Other regulatory reforms, which are dependent on the necessary infrastructure first being in place and further details as specified in separate regulations, have been earmarked for a later implementation date. The government's transition plan provides notional guidance on when these provisions will come into effect.

The new legal provisions and extended limitation periods are likely to give rise to a number of claims within the industry. It is prudent for landlords and developers to conduct an audit in order to assess their liabilities. Such audits should include a review of their corporate and contractual structures, as well as a review of historic liabilities, in order to fully capture the potential exposure to claims as proposed by the scale of the BSA.

The preservation and collation of data is going to be increasingly important, both in managing claims, and also in fulfilling regulatory duties in relation to higher risk buildings (such as documenting design changes, and providing such information to the Accountable Person). It will be necessary for those working in construction to review their document retention policies and to consider investment in a suitable document storage and retrieval system.

The new regulatory reforms will require all those working in the industry to upskill into their new roles and responsibilities. This is particularly important due to the new competency requirements that have been proposed and the central role of the Accountable Person.

As it currently stands the BSA provides a clear framework of the cultural changes that will take place not just in relation to higher risk buildings, but across the industry as a whole. The BSA addresses the problems identified within the various inquiries following Grenfell to provide greater regulation and more defined responsibilities for those working in construction. Those in the industry will need to keep a watching brief to ensure that they will be able to comply with the changes, as additional requirements are likely to be added within supplementary (and as yet unpublished) legislation.



Key contacts



Simon Chamberlain
Partner, Construction and Engineering
T: +44 161 831 8295
M: +44 776 734 2750
simonchamberlain@eversheds-sutherland.com



Tom Douglas
Partner, Construction and Engineering
T: +44 1473 284 604
M: +44 782 460 5239
thomasdouglas@eversheds-sutherland.com



Tim Hill
Partner, Health and Safety
T: +44 191 241 6473
M: +44 774 015 7416
timhill@eversheds-sutherland.com



Steve Manson
Consultant, Real Estate
T: +44 20 7919 4662
M: +44 777 022 0922
stephenmanson@eversheds-sutherland.com



Dave Newstone
Legal Director, Real Estate
T: +44 20 7919 4720
M: +44 779 624 3262
davidnewstone@eversheds-sutherland.com



Caroline Andresier
Legal Director, Real Estate
T: +44 20 7919 0831
M: +44 734 150 6276
carolineandresier@eversheds-sutherland.com



Gemma Irving
Principal Associate, Construction and Engineering
T: +44 113 200 4622
M: +44 755 110 9292
gemmairving@eversheds-sutherland.com



Anna Bevan-Jones
Principal Associate, Real Estate Litigation
T: +44 29 2047 7229
M: +44 750 097 7021
annabevan-jones@eversheds-sutherland.com



Victoria Groves
Principal Associate, Corporate
T: +44 20 7919 4788
victoriagroves@eversheds-sutherland.com



Nicola Woods
Principal Associate, Real Estate
T: +44 121 232 1364
M: +44 782 790 3212
nicolawoods@eversheds-sutherland.com

Disclaimer:

This briefing is correct as of 8 June 2022. It is intended as general guidance and is not a substitute for detailed advice in specific circumstances.

Data protection: Your information will be held by Eversheds Sutherland LLP ("Eversheds Sutherland") in accordance with the Data Protection Act 1998, and added to our marketing databases. It may be used for internal statistical analysis, to fulfil any requests from you for further information and services and, unless you have asked us not to, to contract you about other services or events offered by Eversheds Sutherland or our associated offices. We may pass your details to our associated offices (some of which are outside the EEA), but we will only allow their use for the purposes mentioned above. We may also transfer your details to any successor to our business (or a relevant part of it). An up to date list of our associated offices and their locations can be found on our website at eversheds-sutherland.com. This privacy statement applies to all information that we hold about you.

If you do not want your information to be used in this way or your information is incorrect, please call: +44 121 232 1000 and we will assist you with your queries.

This briefing covers the jurisdiction of England unless otherwise stated.

eversheds-sutherland.com

© Eversheds Sutherland 2022. All rights reserved.
Eversheds Sutherland (International) LLP and Eversheds Sutherland (US) LLP are part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.