

ADDLESHAW GODDARD ON THE BUILDING SAFETY ACT 2022

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MORE IMAGINATION **MORE IMPACT**



HOW DID WE GET HERE?

- 01 Aftermath of the Grenfell Tower tragedy
- 02 Exposed serious failings across the system of building and managing high-rise buildings
- 03 Independent review of building regulations and fire safety, led by Dame Judith Hackitt
- 04 Found that major reform was required to ensure that the regulatory system was “fit for purpose”
- 05 Phase 1 Grenfell Public Inquiry Report findings and its recommendations
- 06 Phase 2 report awaited



As the review has progressed, it has become clear that the whole system of regulation, covering what is written down and the way in which it is enacted in practice, is not fit for purpose.

Dame Judith Hackitt, December 2017

CHANGE IS HERE



FIRE SAFETY ACT (FSA)

- In force, tightens the requirements and clarifying the scope of the FSO in regard to multi-occupied residential buildings of all heights.
- Further obligations on 'Responsible Persons' for such buildings relating to:
 - The structure and external walls of the building, including cladding, balconies and windows; and
 - Entrance doors to individual flats that open into common parts.



BUILDING SAFETY ACT (BSA)

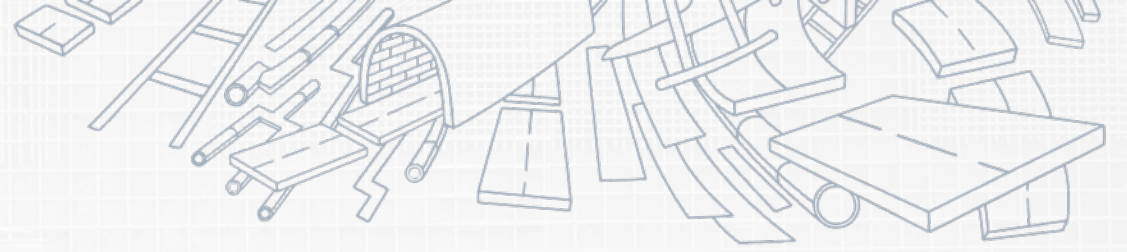
- Received Royal Assent on 28 April 2022.
- Main provisions likely to bite in 2023, but certain key provisions apply from 28 June 2022.
- You need to act now.
- Criminal sanctions for failing to act.



A once in a generation opportunity for legislative change.

Robert Jenrick MP, MHCLG

FIRE SAFETY ORDER



- 1 October 2006 there was a significant development in fire safety legislation when the Regulatory Reform (Fire Safety) Order 2005 (**FSO**) was introduced.
- The FSO fundamentally changed the way in which fire safety management for businesses is carried out and enforced, providing for a risk-based approach in non-domestic premises and allowing more efficient and effective enforcement by the Fire and Rescue Service.
- FSO applies to all building other than individual private homes.
- The FSO places a responsibility on the 'Responsible Person', including obligations to carry out a Fire Risk Assessment, produce a policy, develop procedures, provide staff with training and carry out fire drills. They must also provide and maintain clear means of escape, signs, notices, emergency lighting, fire detection, alarms and extinguishers.
- Anyone else who has any degree of control over premises must also comply with the majority of the obligations under the FSO (Arts 5(3) and (4)).
- New regulations to be introduced on 23 Jan 2023 to create new obligations including to provide building information to Local Fire and Rescue services and to carry out checks with further guidance later this year – see [factsheet](#) and [Regulations](#).



THE FIRE SAFETY ACT

- The Fire Safety Act (**FSA**) was made law on 29 April 2021 in Wales and fully transitioned into law in England on 16 May 2022.
- The FSA tightens the requirements and clarifies the scope of the FSO for multi-occupied residential buildings, regardless of height.
- The FSA also clarifies the identification of Responsible Persons, making it easier for enforcement action and prosecution in the event of breaches. Penalties for committing an offence under fire safety legislation include unlimited fines and/or imprisonment for senior individuals within a business.

ALL RESPONSIBLE PERSONS FOR MULTI-OCCUPIED RESIDENTIAL BUILDINGS MUST MANAGE AND REDUCE THE RISK OF FIRE FOR:

- The structure and external walls of the building, including cladding, balconies and windows; and
- Entrance doors to individual flats that open into common parts.

ENFORCEMENT AND COMPENSATION

ENFORCEMENT

- The clarification provided under the FSA means the Fire and Rescue Services can now better identify the Responsible Person for the relevant exterior parts.
- This will provide a clearer path for enforcement action and prosecution against any Responsible Person who fails to comply with its obligations under the FSO.
- Penalties for committing an offence under fire safety legislation include unlimited fines and/or imprisonment for senior individuals within a business.

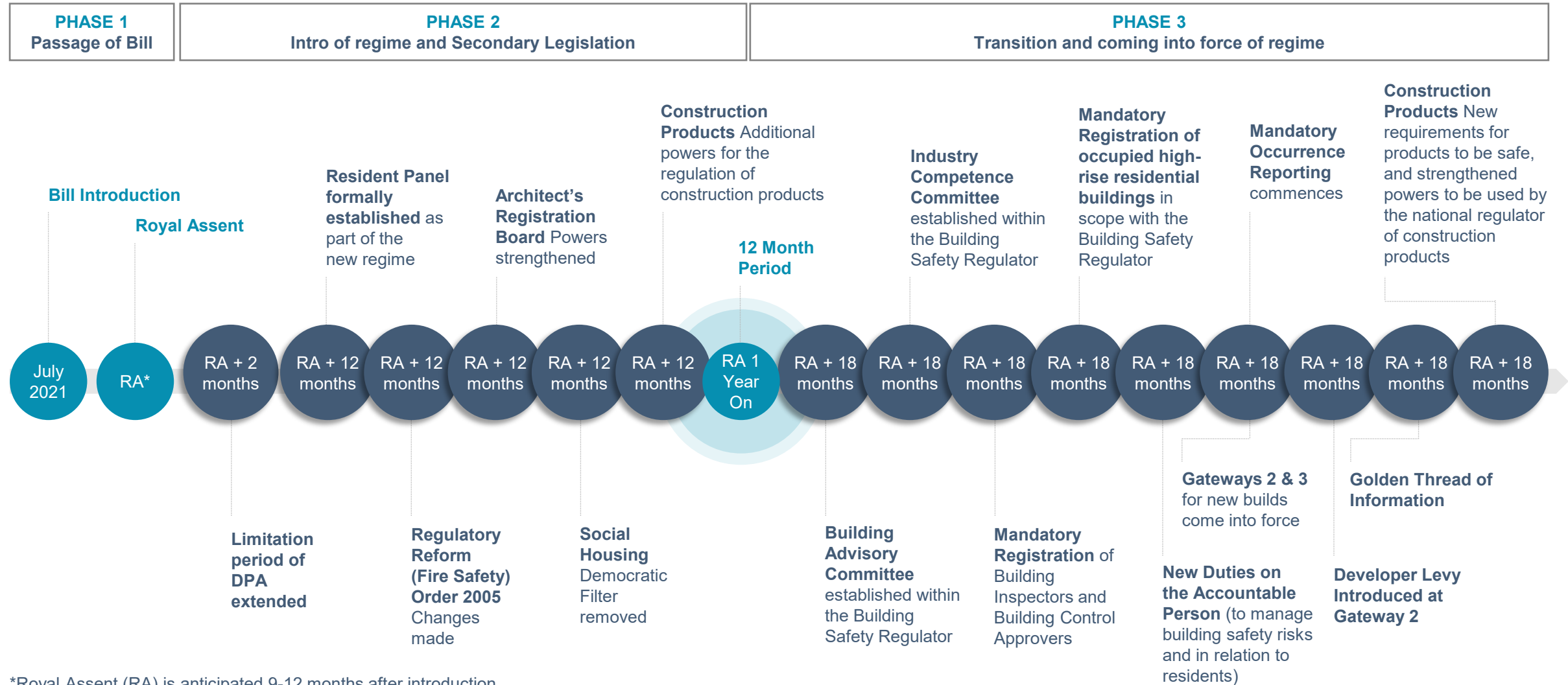
COMPENSATION

- The Government is extending the Building Safety Fund - leaseholders in high-rise buildings above 18m will (in theory) bear no costs for replacing dangerous cladding.
- The Building Safety Fund encompasses £5.1bn funding for cladding in high rise buildings over 18m/6 storeys and a long-term, low interest loan for buildings between 4 and 6 storeys. However, the cost of remedying fire safety issues has been estimated to be as much as £15bn.
- No provision to cover the other fire safety costs, such as internal compartmentation, insurance, etc.

COMMENCEMENT AND TRANSITIONAL PROVISIONS

KEY SECTION	DESCRIPTION	EFFECTIVE FROM
61-70	Part 4: Higher-risk buildings, key definitions.	Date of Royal Assent (28 April 2022).
116 – 125 (and Schedule 8)	Part 5: Remediation of certain defects (Meaning of “relevant defects”, Associated Persons, Remediation costs under qualifying leases, Remediation orders, Remediation contribution orders).	2 months from the date of Royal Assent (28 June 2022).
134	Duties relating to work to dwellings (DPA).	2 months from the date of Royal Assent (28 June 2022).
135	Limitation periods (s.1 & s.2A DPA, and s.38 BA).	2 months from the date of Royal Assent (28 June 2022).
147 to 155	Liability relating to construction products (s.148 is prospective liability, s.149 is historic liability).	2 months from the date of Royal Assent (28 June 2022).

TIMELINE FOR IMPLEMENTATION



*Royal Assent (RA) is anticipated 9-12 months after introduction.
We intend for provisions marked RA + 12 months to come into force within six to twelve months of Royal Assent.
We intend for provisions marked RA + 18 months to come into force within twelve to eighteen months of Royal Assent.

Building Safety Bill & Transition

THE BUILDING SAFETY ACT

- The Building Safety Act (**BSA**) received Royal Assent on 28 April 2022.
- BSA focuses on accountability for building owners and giving a voice to residents.
- Applies to the design, construction, occupation and refurbishment of 'higher-risk buildings'.
- 'Higher-risk building' means a building in England that:
 - (a) Is at least 18m in height or has at least 7 storeys; and
 - (b) Contains at least 2 residential units.
- The definition does not currently include temporary accommodation such as hotels. It is however proposed to apply to care homes and hospitals which meet the height threshold for the purposes of the Building Regs.
- The BSA retains flexibility as to the definition of buildings within scope and the Secretary of State can by way of regulation add buildings into the definition of a 'higher-risk building' or change the definition of a higher-risk building. We expect the definition to be broadened in future to incorporate other types of building as well as buildings under the 18m/7 storey threshold.



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for legislative change.**

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THE BUILDING SAFETY ACT

BSA ESTABLISHES A NEW REGULATOR – THE BUILDING SAFETY REGULATOR (BSR):

- The BSR is part of the Health and Safety Executive (**HSE**).
- 3 main functions. These include: overseeing the safety and performance of buildings, helping and encouraging the built environment industry and building control professional to improve their competence and leading implementation of the new regulatory framework for higher-risk buildings.
- Increased enforcement and sanction powers (and will work closely with existing regulators to exercise these).

OVERVIEW OF THE BSR'S PLANNED WORK:

- Provide independent, expert building safety advice to industry, government, duty holders, landlords and residents.
- Establish a national register of buildings.
- Establish committees to assist it in carrying out its work.
- Ensure that safety complaints made by residents are investigated and dealt with quickly.
- Host centres of excellence to:
 - Strengthen enforcement (especially the prosecution of complex cases); and
 - Develop best practice on resident engagement.

THE BUILDING SAFETY ACT

‘Gateways’ will be used to enable to BSR to oversee the design and construction of new higher-risk buildings.

GATEWAY 1 PLANNING	GATEWAY 2 PRE-CONSTRUCTION	GATEWAY 3 PRACTICAL COMPLETION
<ul style="list-style-type: none">● Gateway 1 ensures the consideration of fire safety matters as they relate to land use planning are incorporated at the planning stage for schemes involving a relevant high-rise residential building.● The BSR is a consultee during any application for planning permission to build a higher-risk building. Building developer required to submit a fire statement.	<ul style="list-style-type: none">● Gateway 2 will replace the building control deposit of plans stage, before building work starts, for higher-risk buildings.● Construction cannot begin until the BSR is satisfied that the duty holder's design meets the functional requirements of the Building Regulations and does not contain unrealistic safety expectations.● The Building Safety Levy will also need to be paid by developers to the Government, with funds going towards rectification of historic fire safety defects.● The BSR will have strong enforcement tools where building work commences without first obtaining building control approval.	<ul style="list-style-type: none">● Gateway 3 will occur at the current completion / final certificate stage when higher-risk building work is complete.● The golden thread must be handed to the Accountable Person.● Duty holders must give the BSR all prescribed documents and information on the final as-built building.● Once the BSR is satisfied, it will issue a completion certificate.● Allowing occupation of a residential unit in a higher-risk building before the building is registered will be a criminal offence.

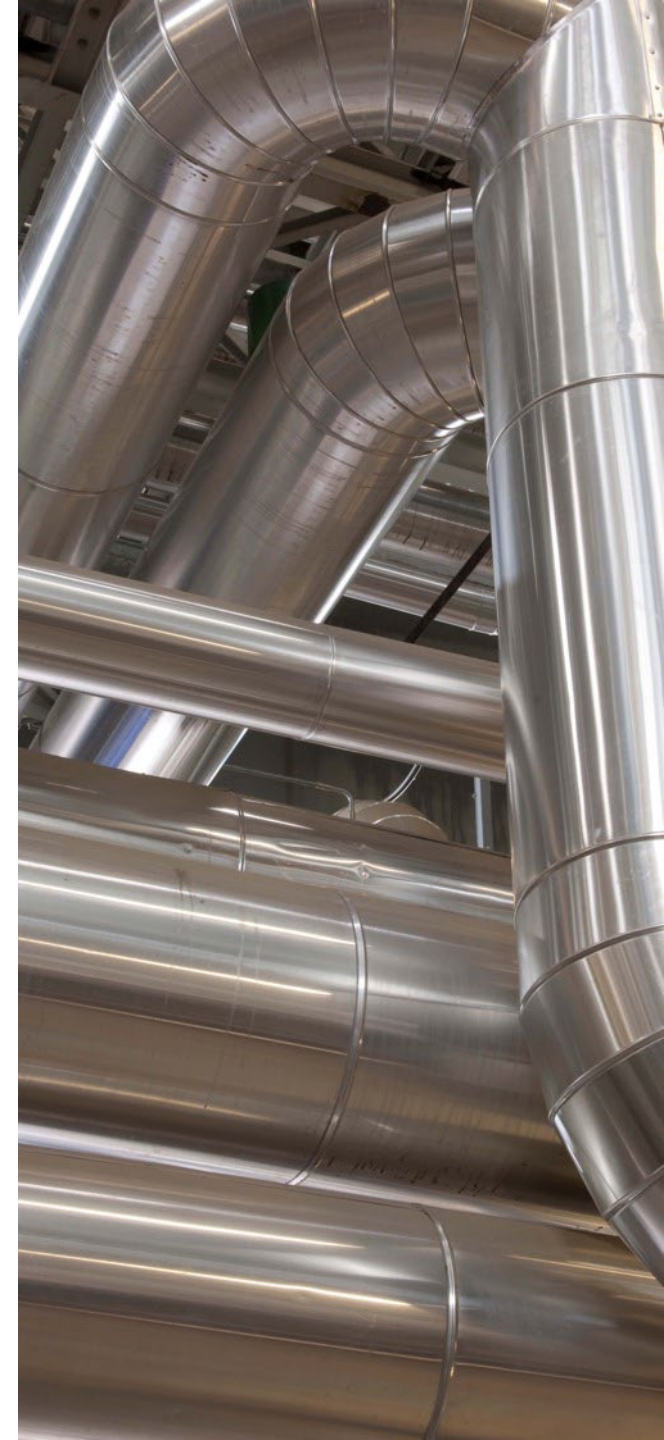
THE BUILDING SAFETY ACT

DUTYHOLDERS:

- Ensure those responsible for creating building safety risks are also responsible for managing them.
- Dutyholders (defined in similar terms to CDM) will have formal responsibilities for compliance with building regulations.
- All those involved in building and design work will have competence requirements, including an obligation to state when they are no longer competent.
- Dutyholder roles can be fulfilled by individuals or organisations.
- Must inform BSR of structural and fire safety issues that could cause a significant threat to life (Mandatory Occurrence Reporting).
- **There is currently an ongoing consultation around the above issues.**

THE 'GOLDEN THREAD':

- Industry criticised for poor sharing of information between parties.
- Central digital store of documents regarding the design and construction of a building.
- Important parties will have access.
- Will be updated during the lifetime of the building, as changes are made.



DUTYHOLDERS

ACCOUNTABLE PERSON (AP)	PRINCIPAL ACCOUNTABLE PERSON (PAP)
<p>In guidance - <i>An AP is a legal person responsible for the building e.g. the individual, partnership or body corporate with the right to receive funds through service charges.</i></p> <p>In law – <i>person who holds a legal estate in possession in any part of the common parts or does not hold a legal estate in any part of the building but who is under a relevant repairing obligation in relation to any part of the common parts.</i></p>	<p>In guidance - <i>A PAP is either the sole AP or, where there are multiple APs, the owner or the person responsible for maintaining the exterior.</i></p> <p>In law - <i>where there is more than one AP the AP who holds a legal estate in possession in the relevant parts of the structure and exterior of the building, or has a relevant repairing obligation in relation to the relevant parts of the structure and exterior of the building.</i></p>
AN AP MUST:	A PAP MUST (FURTHER TO THOSE OF BEING AN AP):
Produce the 'golden thread' of documents – inc. collection of information.	Register the building with the BSR, and obtain a Building Assurance Certificate.
Undertake Fire Risk Assessments.	Produce and maintain a 'safety case' – includes information on management of fire risk and structural safety.
Must comply with obligations to residents (engagement, complaint handling, and the provision of information).	Submit a 'safety case report' to the BSR – summarises the safety case, identifies any major fire and structural hazards, and states how these are managed.
Failure of duties may result in prosecution, conviction, and an unlimited fine and/or up to 2 years' imprisonment.	Failure of duties may result in prosecution, conviction, and an unlimited fine and/or up to 2 years' imprisonment.

CONSTRUCTION PRODUCT REGULATIONS

- The BSA will enable the Secretary of State to strengthen regulations for the marketing and supply of construction products in the UK.
- The BSA will strengthen the market surveillance and enforcement regime, so that compliance can be monitored and enforcement action taken where necessary. This includes actions against false statements or other misleading or inaccurate claims made about the performance of a construction product.

THE BSA WILL CREATE POWERS TO MAKE REGULATIONS, THE DRAFT REGS (NOW WITHDRAWN) INDICATED THEY WOULD:

- Require construction products to be safe before they can be placed on the UK market; and
- Create a statutory list of 'safety critical' construction product standards.

NEW HOMES OMBUDSMAN SCHEME

- The scheme will provide dispute resolution for, and determine complaints by, buyers of new build homes against developers.
- Developers will be required to become and remain members of the scheme.
- A relevant owner of a new build home can complain to the ombudsman about the scheme's members.
- Complaints can be made about the scheme's members within two years of the first acquisition of a new-build home from the person who developed it. This could include complaints about the conduct and the quality of work of the developer.
- If a developer breaches the requirement to be a member of the scheme, the provisions create powers for an enforcement framework to be set out in regulations, including about investigations and the imposition of civil sanctions for such a breach.

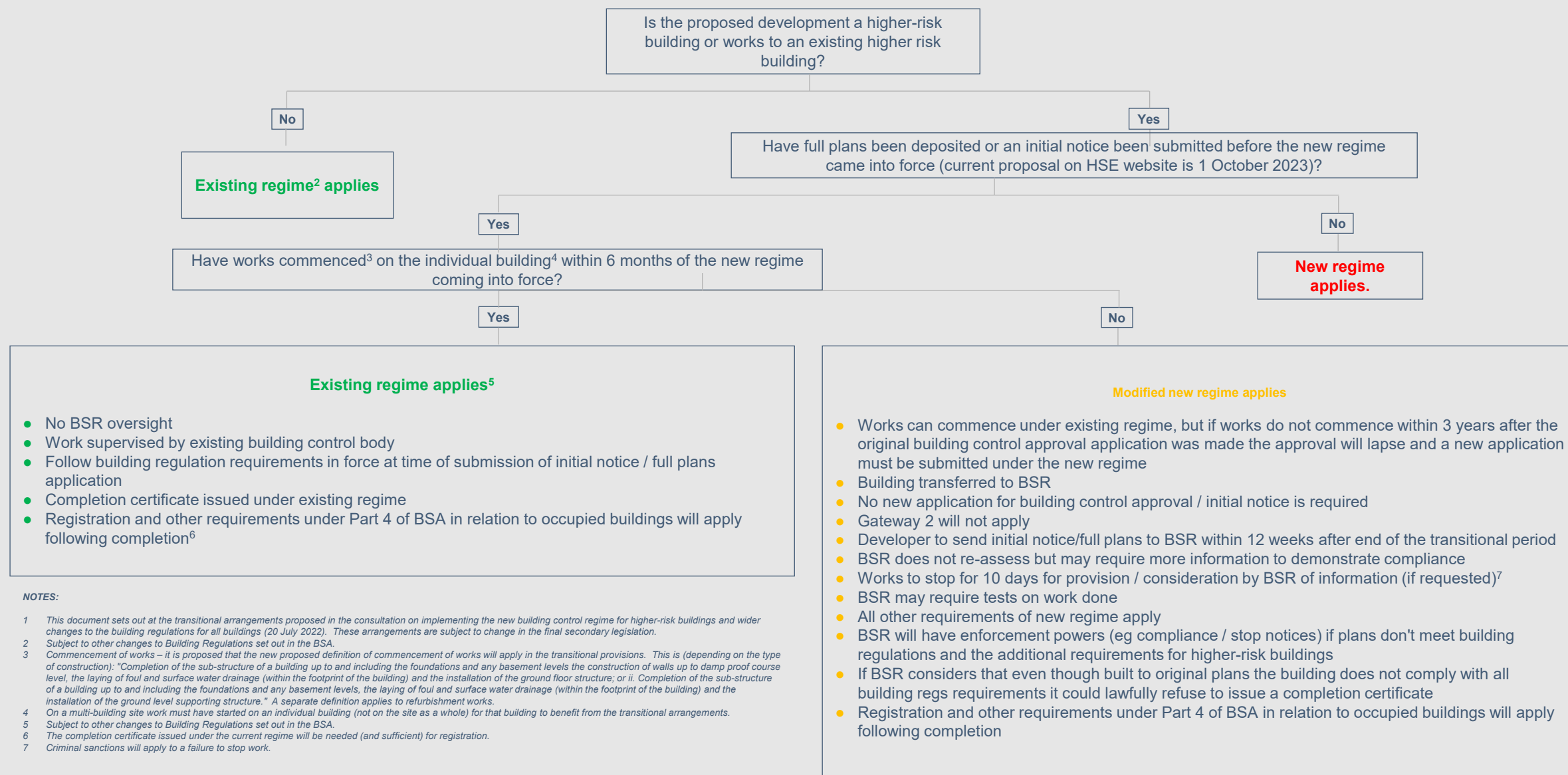


ENFORCEMENT OF BUILDING SAFETY ACT

- The new authority will work on a 'full costs recovery basis' - costs will be recovered through fees charged either at Gateway points (based on current draft regulations) when intervening. There is another consultation underway on this issue.
- **Compliance Notice:** Requires the AP to take specified steps or to generally remedy any breach of the rules / duties imposed by the BSA.
- **Special Measures Order:** Allows the BSR to appoint a manager (a "special measures manager") to take over the functions of the AP. The tribunal may only give such an order if there has been a "serious failure or failure on two or more occasions to comply with a duty".
- **Conditions:** The addition of conditions to the Building Assessment Certificate.
- **Residents:** Actions may be taken against residents by BSR.
- **Penalties for committing an offence:** Up to 2 years in prison, a fine, or both (but varies).
- **Offences committed by corporate entities:** An offence is committed with the "consent or connivance of any director, manager, secretary or other similar officer or any person purporting to act in that capacity" or is "attributable to the neglect of that person", then that person as well as the body corporate commits the offence and may be prosecuted accordingly.



TRANSITIONAL PROVISIONS FOR IMPLEMENTATION OF NEW BUILDING CONTROL REGIME FOR HIGHER-RISK BUILDINGS IN ENGLAND (FROM CONSULTATION DATED 20 JULY 2022)¹



LEGAL DRAFTING OF CONSTRUCTION CONTRACTS: PROJECT MANAGEMENT CONSIDERATIONS

New obligations / competence requirements for clients, Principal Designer and Principal Contractor as part of the new dutyholder regime.

Additional dutyholder requirements for higher risk buildings – “serious infractions”.

Construction products regulations

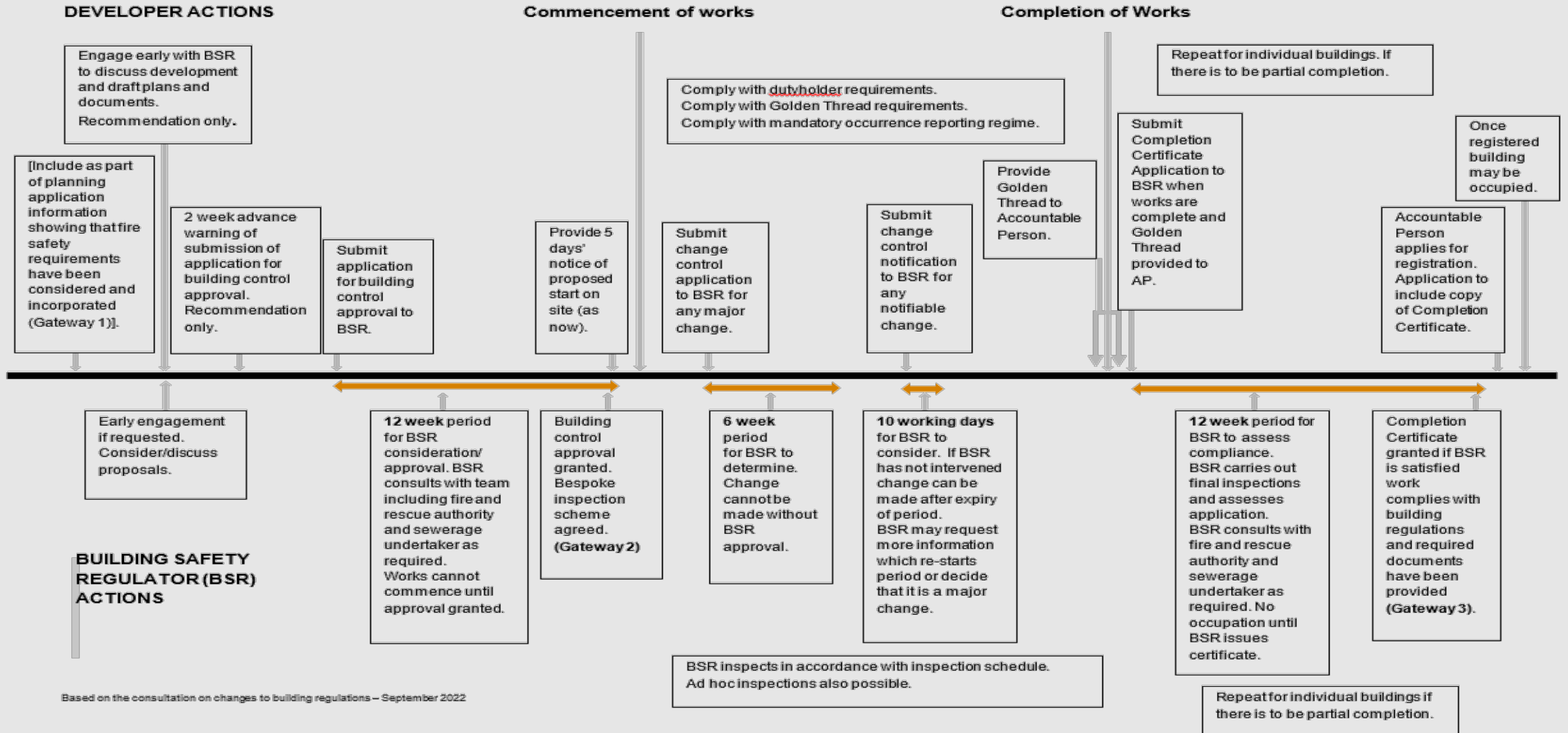
Notification of changes / variations during construction of higher risk buildings – BSR approval required

Obtaining building control approval from BSR at Gateway 2 for higher risk buildings and timing implications – “stop-go” process

Golden thread of information / record keeping for higher risk buildings – use of BIM and digital information management systems

Securing a Gateway 3 completion certificate for a higher risk building – timing implications and pre-condition to occupation

TIMELINE FOR PROPOSED NEW REGIME FOR HIGHER RISK BUILDINGS



LEGAL DRAFTING OF CONSTRUCTION CONTRACTS: LIKELY AMENDMENTS RESULTING FROM THE BSA

Impact of the extension of limitation period to 15 years for claims under s1 & 2A Defective Premises Act and s38 Building Act; keep under review but no amends now.

Protection / redress afforded by Civil Liability (Contribution Act) 1978 when liable for “same damage” in terms of Defective Premises Act and s38 Building Act.

Requirement to maintain professional indemnity insurance.

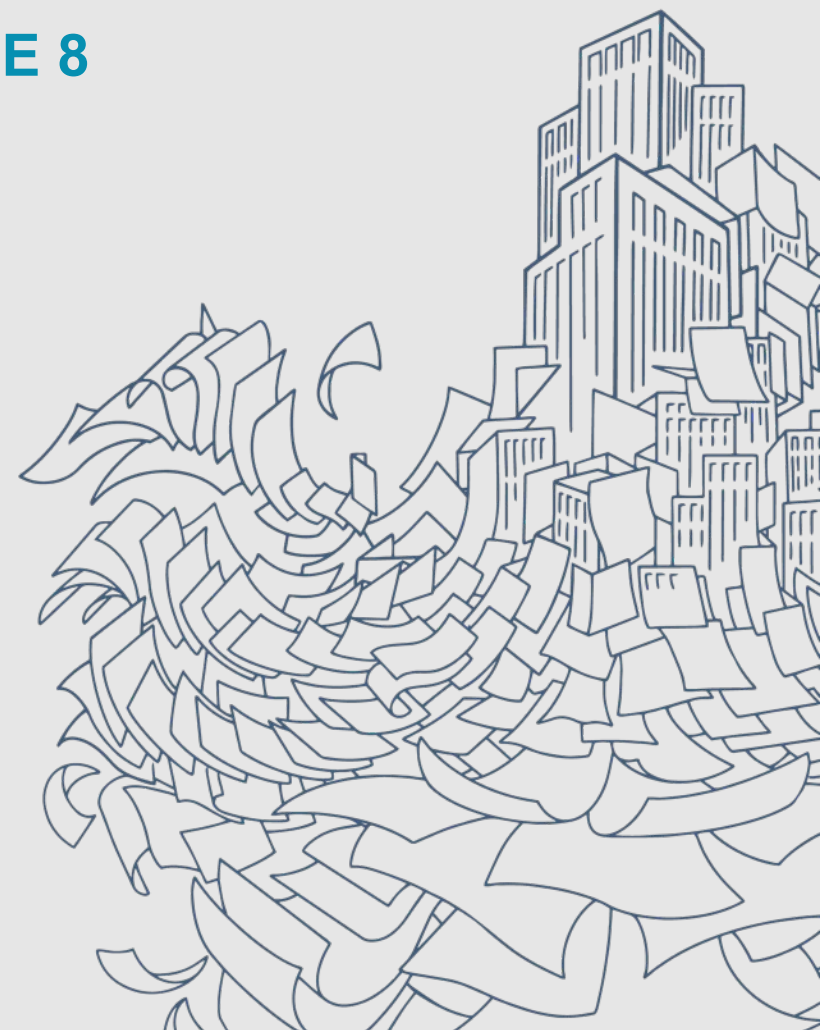
For higher-risk buildings, amendments arising from the new Gateways 2 and 3 and notification of changes.

Provision and storage of information / key documentation and the Golden Thread for Higher-Risk Buildings.

Amendments arising from new dutyholder regime and new services.

SERVICE CHARGES: SECTIONS 116 TO 122 AND SCHEDULE 8

- The position before the Act: Landlord & Tenant Act 1985 and consultation
- Meaning of relevant building: sections 117 & 118
- Qualifying leases: section 119
- Meaning of relevant defect: section 120
- Fundamental changes brought about by Schedule 8
 - **No service charge** is payable under a qualifying lease for cladding remediation (paragraph 8). NB this now extends to non-residential
 - **No service charge** is payable under **any** lease in respect of a relevant measure relating to a relevant defect if the landlord is responsible for the defect or associated with a person responsible for the defect (paragraph 2)
 - Service charges payable in respect of qualifying leases are otherwise restricted by
 - the landlord group's net worth (paragraph 3)
 - the value of the flat (paragraph 4)
 - amount of the service charge (paragraphs 5 & 6)



SERVICE CHARGES: SECTIONS 116 TO 122 AND SCHEDULE 8 CONT...

- Note the different treatment of qualifying leases and non-qualifying leases
- Regulations made dealing with some of the above issues. Key points include:
 - How to calculate landlord group's net worth
 - The (onerous) requirement upon a landlord to serve a certificate upon leaseholders in various situations with certain prescribed information
 - How to determine the value of a flat
 - Recovery by RTM companies against landlords (without the need to seek recourse against any other party)
 - Process for determining whether a lease is a qualifying lease



REMEDATION ORDERS/REMEDICATION CONTRIBUTION ORDERS

- **Remediation Order:** an order requiring the landlord to remedy specified relevant defects (section 123)
- **Remediation contribution order:** an order requiring a specified body corporate to make a contribution to the cost of remedying relevant defects (section 124). The specified body corporate includes a landlord of any part of the building, the developer or any person associated with either of them. “Associated” has a wide meaning
- **Meeting remediation costs of insolvent landlord:** an order requiring an associated company of an insolvent landlord to contribute to the cost of remedying relevant defects (section 125)



REDRESS



PAS 9980

Prohibitions on (i) development and
(ii) building control

Section 38 of the
Building Act 1984

The new section 2A cause of action
in the Defective Premises
Act 1972

The "eye catching" changes to the
Limitation Act 1980

Adjudication under
collateral warranties?

MULTI-STOREY AND MULTI-OCCUPIED RESIDENTIAL DEVELOPMENTS CLADDING AND FIRE SAFETY: FROM "COMPLIANCE" BASED APPROACH TO "RISK" BASED APPROACH

HM GOVT CONSOLIDATED ADVICE NOTE WAS WITHDRAWN IN JANUARY 2022. IN SUMMARY:

- PAS 9980 provides new guidance on how to identify, assess and mitigate, via an holistic and fact-based assessment of the fire risk of an external wall of an existing multi-storey, multi-occupied residential building.
- Where a detailed fire risk assessment of an external wall of an existing multi-storey, multi-occupied residential building is required, PAS 9980 should now be used.
- It does not contain 'off the peg' solutions to specific wall types and materials but is intended to enable a consistent risk based approach to evaluating the fire risk.
- Deals with non-compliant / potentially unsafe residential buildings built before the Building (Amendment) Regulations 2018.
- Holistic and fact-based assessment of the fire risk, less of a binary decision with an ability to retain combustible materials in an existing building reducing the size of the remedial works problem necessitated by the binary compliance based approach of the Consolidated Advice Note. Residual fire risk?
- PAS 9980 interaction with Regulatory Reform (Fire Safety) Order 2005 (RRO) and Fire Safety Act 2021: Fire Risk Assessment of External Walls (FRAEW) will be included in the Fire Risk Assessment (FRA) where necessary; "Responsible Person" obligations; what the external façade is made up of and the risk and that will be included in the FRA; compliance with the RRO is not height sensitive.
- PAS 9980 reliance on the competence of assessors: a multiple skill set and variability; will take time to develop the skill set; no pro forma reporting; risk of inconsistencies; insurance challenge for the assessors.



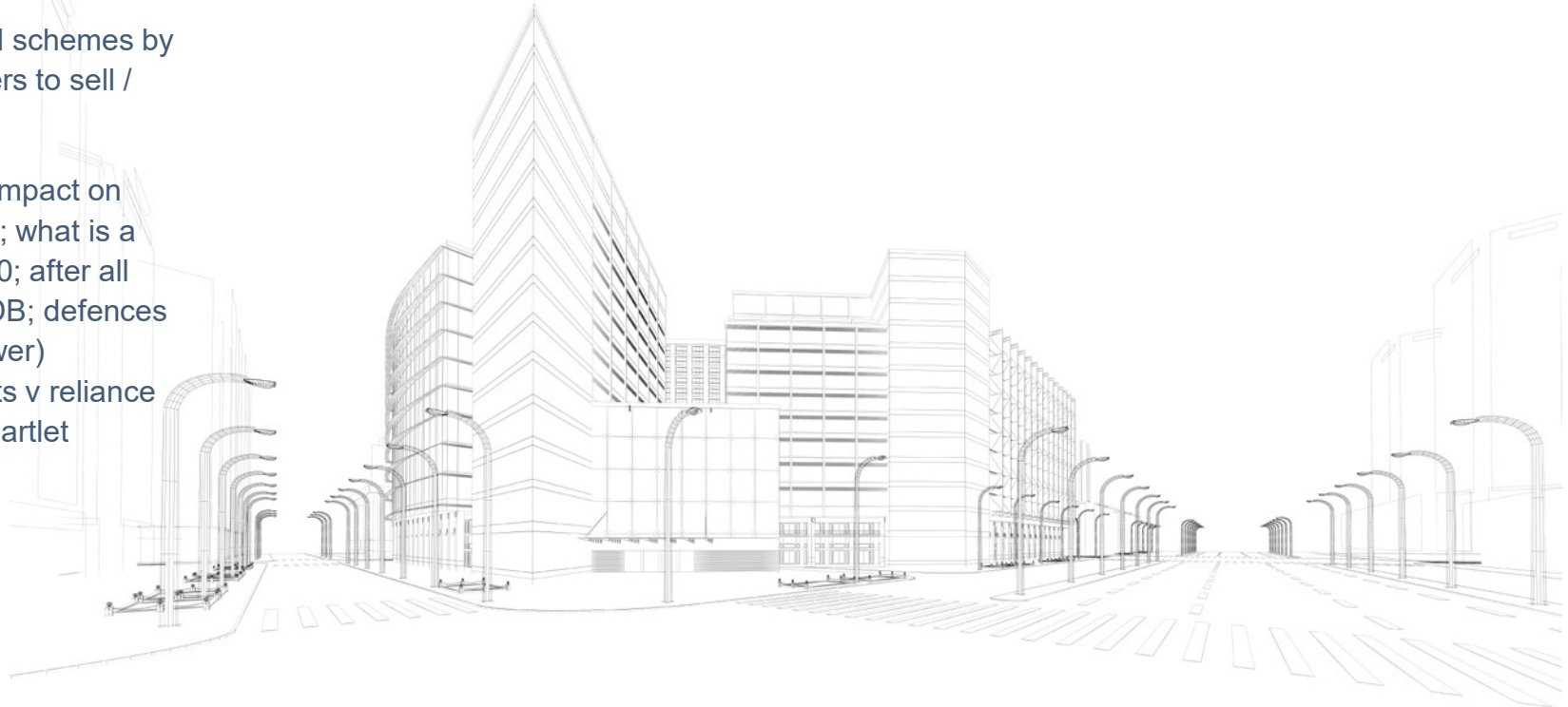


PAS 9980: WIDER IMPLICATIONS (1)

- FRAEW will not confirm compliance with Building Regulations.
 - Circular point in terms of fire safety engineering in reality from the operational / life safety perspective?
- Is it really a change at all when "fire safety engineering" was a route to compliance under ADB (alongside following ADB Guidance / linear route and demonstration by BR135/BS8414 fire test); this is the better / new "disciplined analytical framework" (see para 0.30 of ADB 2006); an introduction of guidance for **retrospective** fire engineering.
- Over 18M residential; Building Safety Fund should pay v 11-18M residential where industry is being asked to pay but on either basis PAS 9980 should reduce the number / scope of remedial schemes and therefore cost when compared with a strict compliance linear based ADB approach which has been advocated by some fire engineers and approved under the Building Safety Fund (BSF) prior to PAS9980 introduction.
- BSF applications; likely greater scrutiny of scope of required remedial work because BSF prospectus now aligned with PAS9980 requirement.

PAS 9980: WIDER IMPLICATIONS (2)

- Residential development asset value / sales impact; the RICS has updated its External Wall Systems 1 (EWS1) form with the agreement of lending bodies to reflect the risk based PAS 9980 fire safety guidance backed by the HM Government (RICS 16 March 2022 announcement). Some developments will still be in need of remedial works; absence of cavity barriers / combinations of combustible materials (PAS 9980 Annex K; fire performance risk factors; "Positive / Neutral / Negative").
- Greater clarity and consistency on need for remedial schemes by freeholders / owners; allowing residential leaseholders to sell / refinance apartments.
- Claims for remedial costs against third parties; real impact on claims for non-compliance with Building Regulations; what is a reasonable remedial scheme in the light of PAS 9980; after all fire safety engineering route to compliance under ADB; defences to claims using PAS 9980 as the reasonable (but lower) standard; strict contractual specification requirements v reliance on compliance with "statutory requirements" (note Martlet decision was pre PAS 9980).
- Impact on asset value / institutional quality developments; residual diminution in value / betterment arguments where desire to remove all combustible materials / achieve ADB linear route.
- The "Pledge" HM Govt pressure on developers to sign up to this; new developer / DLUHC remediation draft contract – remedial works basis is PAS 9980 but what about older approved BSF funded schemes? Excess cost / risk.



MARTLET HOMES LTD V MULALLEY & CO LTD

- Recent case law on remedial external wall costs.
- Martlet undertook remedial works to four towers over 18m which included an external wall insulation system.
- The contractor argued that Martlet did not need to do both insulation works and replace the cladding.
- Court decided contractor in breach of building contract obligations both as to installation and specification (contract included additional specification over and above statutory requirements).
- Breach of Building Regulations and ADB 2002 (Note not ADB 2006; effective April 2007).
- Majority of Claimant's replacement (as opposed to repair) scheme awarded, together with a portion of waking watch costs.
- Note this case related to a claim in respect of remedial works instructed prior to PAS9980 therefore it was not considered in terms of alternative remedial measures.



BUILDING SAFETY ACT 2022



“This Act makes ground-breaking reforms to give residents and homeowners more rights, powers, and protections – so homes across the country are safer.

It delivers far-reaching protections for qualifying leaseholders from the costs associated with remediating historical building safety defects, and an ambitious toolkit of measures that will allow those responsible for building safety defects to be held to account.

It overhauls existing regulations, creating lasting change and makes clear how residential buildings should be constructed, maintained and made safe.

The Act creates three new bodies to provide effective oversight of the new regime: the Building Safety Regulator, the National Regulator of Construction Products and the New Homes Ombudsman.

Together these changes mean owners will manage their buildings better, and the home-building industry has the clear, proportionate framework it needs to deliver more, and better, high-quality homes.

Many of the detailed provisions in the Act will be implemented over the next two years through a programme of secondary legislation –
[https://www.gov.uk/guidance/the-building-safety-act-secondary-legislation.](https://www.gov.uk/guidance/the-building-safety-act-secondary-legislation)”

Building Safety Act – Guidance published 25 July 2022
<https://www.gov.uk/guidance/the-building-safety-act>

- The BSA has resulted in key changes being made to **Defective Premises Act 1972** and **section 38 of the Building Act 1984**.

SECTION 38 OF THE BUILDING ACT (1)

"Section 38 Civil liability

(1) Subject to this section —

(a) Breach of a duty imposed by building regulations, so far as it causes damage, is actionable, except in so far as the regulations provide otherwise, and

(b) As regards such a duty, building regulations may provide for a prescribed defence to be available in an action for breach of that duty brought by virtue of this subsection.

(2) Subsection (1) above, and any defence provided for in regulations made by virtue of it, do not apply in the case of a breach of such a duty in connection with a building erected before the date on which that subsection comes into force unless the regulations imposing the duty apply to or in connection with the building by virtue of section 2(2) above or paragraph 8 of Schedule 1 to this Act.

(3) This section does not affect the extent (if any) to which breach of —

(a) A duty imposed by or arising in connection with this Part of this Act or any other enactment relating to building regulations, or

(b) A duty imposed by building regulations in a case to which subsection (1) above does not apply, is actionable, or prejudice a right of action that exists apart from the enactments relating to building regulations.

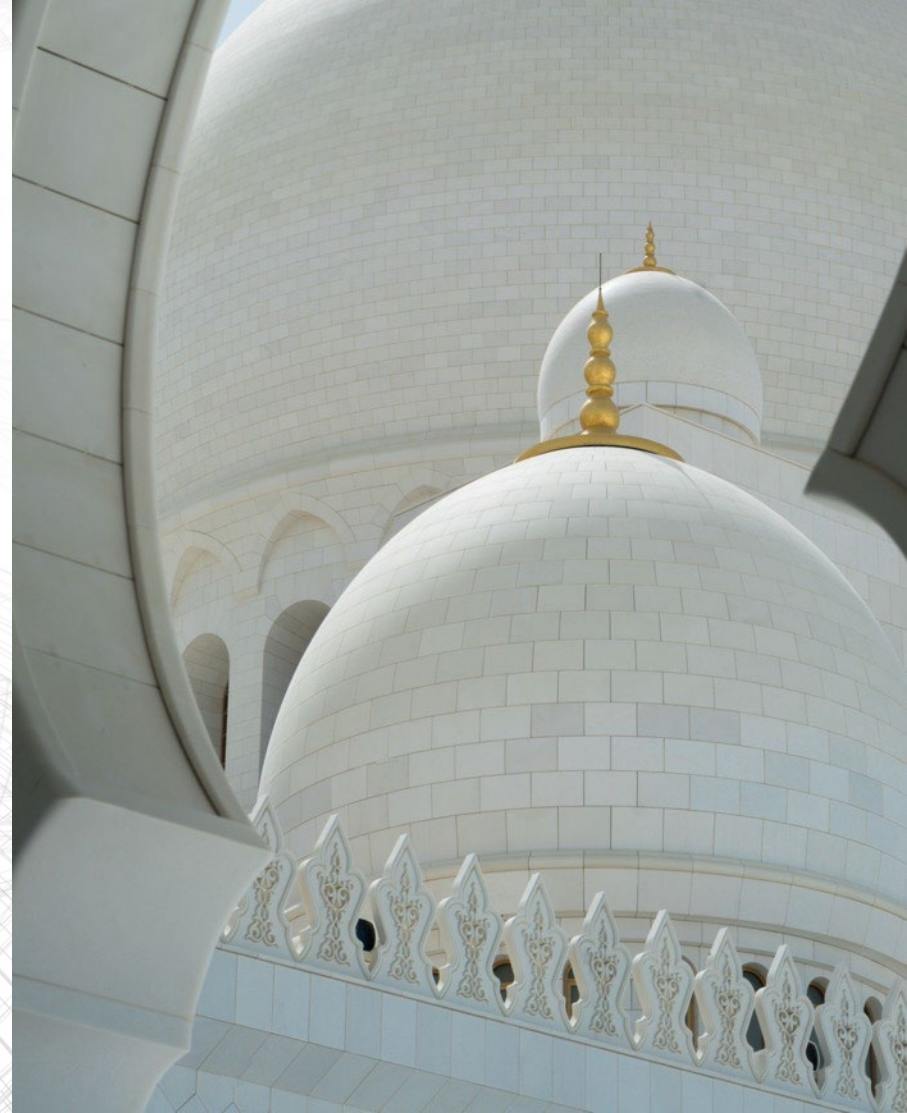
(4) In this section, “damage” includes the death of, or injury to, any person (including any disease and any impairment of a person’s physical or mental condition)."



SECTION 38 OF THE BUILDING ACT (2)

- Not strictly new and not introduced by the Act.
- Civil claim for compensation for breach of a duty imposed by building regulations, so far as it causes damage – physical damage to the building and/or to the person.
- In so far as the breach of duty is in connection with a building erected after the date on which the section comes into force – only applies prospectively.
- Who can claim - the person who has suffered the damage as a result of the breach.
- Who can compensation be claimed from – the person whose breach caused the damage. In practice will vary depending on the facts but could include, for example, designers, developers, contractors, subcontractors.
- Which buildings does this apply to - all buildings in England and Wales.

"...allows an action to be brought for damages where a breach of building regulations in respect of any building, not just domestic premises, has caused damage".





THE DEFECTIVE PREMISES ACT 1972 (1)

“1 Duty to build dwellings properly

(1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—

(a) If the dwelling is provided to the order of any person, to that person; and

(b) Without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;

To see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.”



THE DEFECTIVE PREMISES ACT 1972 (2)

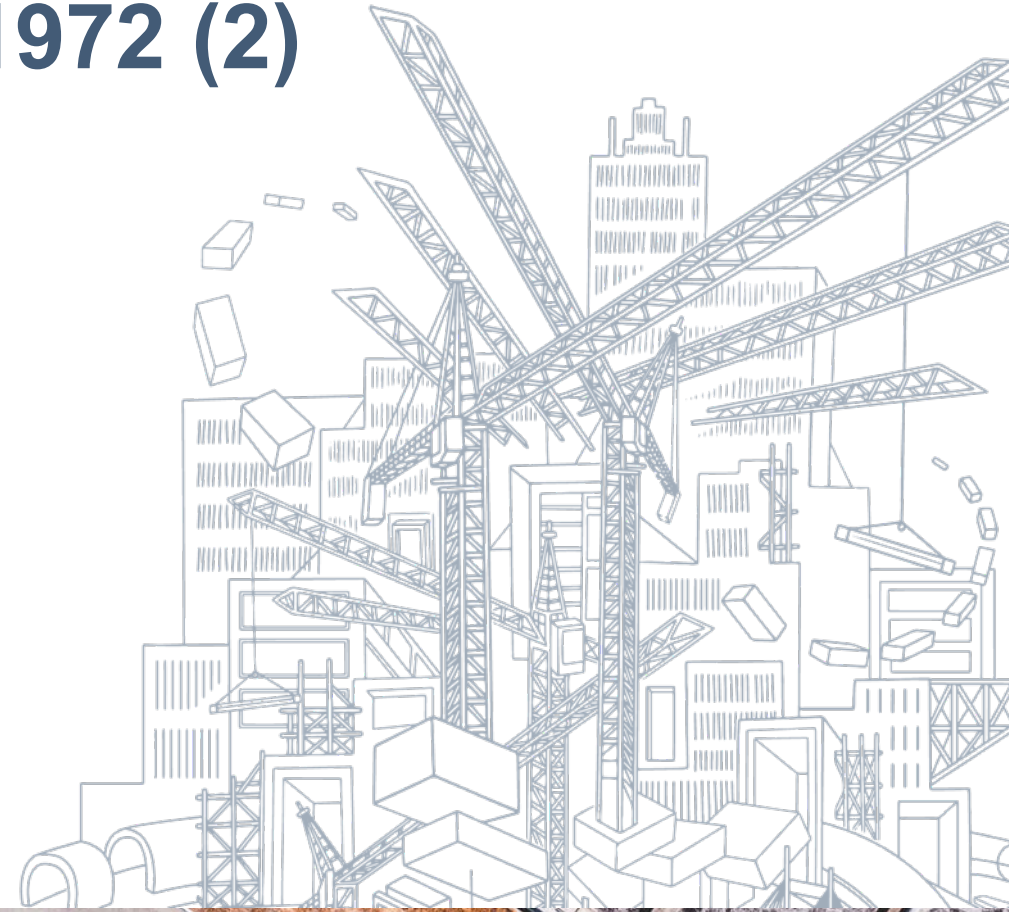
PERSON: Not limited to just the builder or the contractor, wider and could be a consultant or developer.

PROVISION OF A DWELLING: Original 'construction of' or 'conversion to' a dwelling and not any subsequent works.

OWES A DUTY: who can bring a claim.

- The person who commissioned the “provision”.
- Those who acquire a legal or equitable interest.

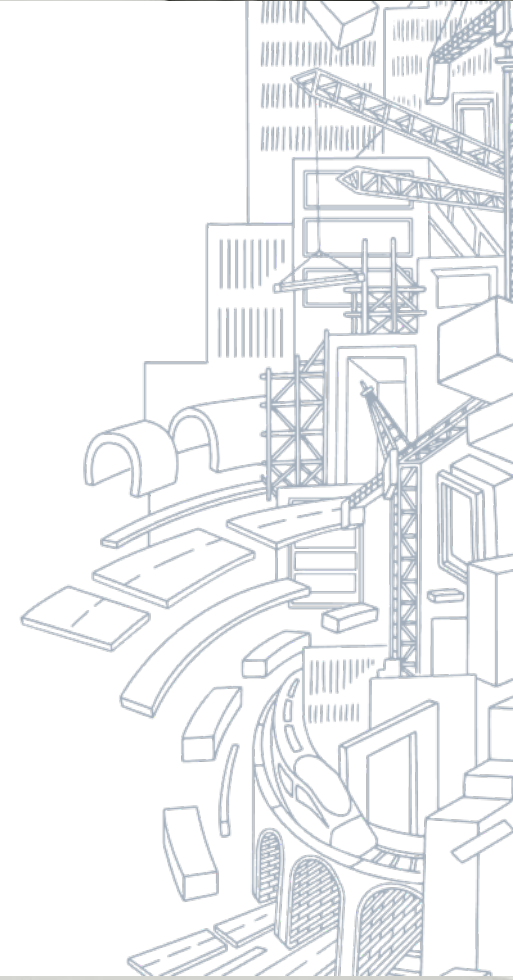
FIT FOR HABITATION.



THE DEFECTIVE PREMISES ACT 1972 (3): NEW CAUSE OF ACTION

Section 2A *"where a person, in the course of a business, takes on work in relation to any part of a relevant building ... to see that the work is done in a workmanlike or ... professional manner, with proper materials and so that as regards that work, the dwelling will be fit for habitation when completed"*.

- Extends the scope from new build / new conversion to work to existing buildings i.e. refurbishment.
- The cause of action arises when (i) the "work" is completed or (ii) in relation to rectification works, when the rectification works are completed.
- Will only apply prospectively.



WHAT DOES “*FIT FOR HABITATION*” MEAN? (1)

- The meaning of ‘*fit for habitation*’ was examined in *Rendlesham Estates v Barr Ltd* [2014]. The Court determined that:
- “...for a dwelling to be fit for habitation within the meaning of the Act, it must on completion (without any remedial works being carried out):
 - (a) Be capable of occupation for a reasonable time without risk to the health or safety of the occupants...” and
 - (b) “Be capable of occupation for a reasonable time without undue inconvenience or discomfort to the occupants”. (paragraph 68)



WHAT DOES “*FIT FOR HABITATION*” MEAN? (2)

HEADS OF LOSS CLAIMABLE UNDER THE DEFECTIVE PREMISES ACT:

- Cost of repairs to the common parts of the building – enforceable on one occasion only against the defendant.
- Blight – any decrease in value in the property can be claimed against the defendant insofar as the decrease in value has been caused by the defendant’s breach of the Act.
- Distress and inconvenience – damages should be “modest” and usually subject to a maximum annual rate of £3,000 per affected party.
- Expenses already incurred rectifying defects for which the Defendant is liable under the Act.
- Legal, planning and building regulation fees.
- Other costs (alternative accommodation, removal, storage etc.)



MORE TIME TO BRING, OR BE THE RECIPIENT OF, CLAIMS (1)

AMENDMENTS

Section 38 of the Building Act

Section 1 of the Defective Premises Act 1972

Section 2A of the Defective Premises Act 1972

EYE CATCHING CHANGES





MORE TIME TO BRING, OR BE THE RECIPIENT OF, CLAIMS (2)

- **Section 38 of the Building Act:** a prospective 15 year limitation period (rather than the normal 6 year limitation period).
- **Section 1 of the Defective Premises Act:**
 - If the cause of action arose pre the commencement date of the Bill becoming an Act, a retrospective 30 year limitation period (rather than the normal 6 year limitation period).
 - If the cause of action arose post the commencement date of the Bill becoming an Act, a prospective 15 year limitation period (rather than the normal 6 year limitation period).
- **Section 2A of the Defective Premises Act:** a prospective 15 year limitation period (rather than the normal 6 year limitation period).

ADJUDICATION UNDER COLLATERAL WARRANTIES; QUICK REDRESS

Collateral warranties now
“construction contracts” for
purposes of adjudication regime
Abbey Healthcare (Mill Hill)
Limited v Simply Construct (UK)
LLP [2022] EWCA CIV 823

Quick, sometimes rough
justice (typically 35 days
beginning to end)

Binding until overturned by
litigation / arbitration; pay
now argue later

SUMMARY OF RIGHTS / LIABILITIES

STATUTORY PROVISION	APPLIES TO	WHO CAN CLAIM	WHO IS LIABLE	LIMITATION	WHAT CAN BE CLAIMED	CIVIL LIABILITY (CONTRIBUTION) ACT 1972
S.38 Building Act	All buildings in England & Wales.	Any person who has suffered damage (<u>injury or damage to property</u>) as a result of the breach of building regulations.	The person whose breach of building regulations caused the damage. This will vary from case to case, but could include developers.	15 years from completion of the relevant building work. Applies prospectively.	Physical damage (injury or damage to property) caused by a breach of building regulations. No provision for purely economic loss.	Can be used by the defendant to seek a contribution from any person liable in respect of the same damage.
S.1 Defective Premises Act	All residential premises ("dwellings") in England & Wales.	The person who originally commissioned the work, or any person with a ' <i>legal or equitable interest</i> ' in the dwelling, i.e. freeholders and leaseholders.	A person taking on work for or in connection with the provision of a dwelling, i.e. a contractor, sub-contractor, designer and/or a developer.	If the cause of action arose <u>prior</u> to the Building Safety Act becoming law, 30 years from completion of the relevant building work. If the cause of action arose <u>after</u> the Act became law, 15 years from completion of the relevant building work.	<ul style="list-style-type: none"> • Cost of repairs • Blight (decrease in property value) • Distress and inconvenience • Expenses already incurred • Legal, planning and building regulation fees • Other costs (alternative accommodation, etc.) See <i>Rendlesham Estates</i> case.	As s.38 BA.
S.2 Defective Premises Act	As s.1 DPA.	As s.1 DPA.	As s.1 DPA.	15 years from completion of the relevant building work. Applies prospectively.	As s.1 DPA.	As s.38 BA.

FURTHER RELEVANT PROVISIONS OF THE ACT (1)

SECTION	COMMENTARY
s.120(2) – Meaning of ‘relevant defect’	Defines “Relevant defect” as a defect which “(a) <i>arises as a result of anything done (or not done) or anything used (or not used), in connection with the relevant works, and (b) causes a <u>building safety risk</u>.</i> ”
s.120(5) – Meaning of ‘relevant defect’	Defines “building safety risk” as a “a risk to the safety of people in or about the building arising from – (a) <i>The spread of <u>fire</u>, or</i> (b) <i>The <u>collapse</u> of the building or any part of it...</i> ”
s.121 – Associated Persons	Sets out the test for determining whether a partnership or body corporate is associated with another person for the purposes of the Act. The test will be satisfied where: (a) at any time in the relevant period (5 years ending at the qualifying time) a person was a director of both body corporates, or (b) At the qualifying time, one body corporate controlled the other, or a third corporate body controlled both of them.
s.124 – Remediation contribution orders	<p>Grants authority to First-tier Tribunals (not the High Court!) upon the application of an interested person, to order “a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedy relevant defects.... “</p> <p>Developers are expressly listed as a potential specified body corporate or partnership (see s.124(3)(c)). The Act defines developers as “a person who undertook or commissioned the construction or conversion of the building (or part of the building) with a view to granting or disposing of interest in the building or parts of it” (s.124(5)).</p> <p>Additionally, any person associated with a developer in relation to the relevant building may be ordered to make a payment under the Act.</p>
s.128 – Prohibition on development for prescribed persons	Grants authority to the Secretary of State to prohibit specified persons from carrying out development of land in England.

FURTHER RELEVANT PROVISIONS OF THE ACT (2)

SECTION	COMMENTARY
s.129 – Building control prohibitions	Grants authority to the Secretary of State to impose building control prohibitions on buildings, or proposed buildings in relation to prohibited persons under s.128.
s.130 – Building liability orders	<p>Grants the High Court the ability to make building liability orders, providing that any relevant liability of a body corporate relating to a specified building is also “2(a) <i>a liability of a specified body corporate, or (b) a joint and several liability of two or more specified bodies corporate</i>”.</p> <p>The effect of this section is to pierce ‘the corporate veil’, so as to extend potential liability beyond the original specified body corporate.</p>
s.130 – Building liability orders: associates	Confirms that a building liability order (see s.130) may be made against an associate of the original body corporate. The test for determining whether a company is narrower than the test at s.121 (associated persons).
s.132 – Order for information in connection with Building liability order	This provision allows applicants to obtain an information order which would require a body corporate to provide information and documents which could ultimately result in the applicant applying for a building liability order (see s.130) in the event that not enough information is provided by a potential defendant to fully assess ownership/group structure.

BUILDING LIABILITY ORDER / INFORMATION ORDER

Section 130 allows the High Court to issue a building liability order in respect of a liability that relates to a building incurred under either the DPA, section 38 of the Building Act or a building safety risk.

Risk to group companies
who are associated

No common director test but
see “indirect” control under
section 130(4)

Section 132 allows applicants to obtain an information order to require a body corporate to provide information and documents to allow the applicant to ultimately apply for a building liability order pursuant to section 130.

New concepts; likely to be case law and consideration of the just and equitable test.



POTENTIAL DEFENCES

- Section 135(5): *Where an action is brought that, but for subsection (3), [the provision which makes a section 1 DPA claim retrospective] would have been barred by the Limitation Act 1980, a court hearing the action must dismiss it in relation to any defendant if satisfied that it is necessary to do so to avoid a breach of the defendant's Convention rights."*
- Section 135(6): *Nothing in this section enables an action to be brought where the action was settled or finally determined ... before this section came into force."*



SOME CONSEQUENCES

ON EXISTING PROJECTS

- Will the warranty / insurance respond?
- Do you need to audit to understand risk?
- Developers / Contractors / Design Team potentially liable for 30 years for any defects which make the dwelling not fit for habitation compared to 6 years previously.
- Existing collateral warranties with Contractors / Design Team are generally for 12 years post practical completion so will the Developer have any recourse against others?
- How will the insurance market react?

ON FUTURE PROJECTS

- Will there be an increased cost to projects?
- Will the market accept the changes?
- Changes to the current standard form documents to reflect the changes.

BUILDING SAFETY ACT – KEY ACTIONS

CURRENT CONSIDERATIONS: FROM 28 JUNE 2022

Gateway 1 (Higher Risk Buildings (including refurbishment work))

Actions: Prepare, submit and obtain approval of information showing fire safety requirements have been considered and incorporated into proposals as part of planning application. Instruct additional consultants' services, if required.

Risks: Potential risk of delay.

Extension of limitation period for prospective claims under Defective Premises Act and extension of DPA to works to existing buildings to 15 years (Residential Projects only)

Actions: Consider whether amendments to building contracts, appointments and warranties can be agreed (where required) to extend contractual limitation periods; currently no amendments being made due to fall back position.

Fallback position: Potential for a claim (where others are liable for the same damage) under the Civil Liability (Contribution) Act.

Enactment of s38 Building Act with a 15 year limitation period for claims brought under it (All Projects)

Actions: Consider whether amendments to building contracts, appointments and warranties can be agreed (where required) to extend contractual limitation periods. Amend contracts to require retention of documents for 15 years; currently no amendments being made due to fall back position.

Fallback position: Potential for a claim (where others are liable for the same damage) under the Civil Liability (Contribution) Act.

Enactment of s.148 & s.149 of the Building Safety Act (liability relating to construction products/past defaults relating to cladding products)

Actions: Manufacturers' potential liability for claims. and potential for use of the Civil Liability (Contribution) Act.

FUTURE CONSIDERATIONS: 28.04.23 – 28.10.23

New dutyholder requirements re building regulations (Draft SI The Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations) (All Projects)

Actions: Client to check competence of and appoint duty holders – Principal Contractor, Principal Designer, contractors and designers. Certify in writing if CDM appointees will perform roles. Client to keep records of steps taken.

Gateways 2 and 3 (High Risk Buildings)

Actions: Gateway 2 - Make necessary applications. BSR must be satisfied the design meets Building Regulations before construction can commence. Gateway 3 - Obtain a completion certificate for the relevant part of a higher-risk residential building before a unit in that part can be occupied.

Risks: Potential risk of delay. Potential increased cost to projects.

Golden Thread of Information (High Risk Buildings)

Actions: Establish requirements for creation, maintenance, updating and storage of digital golden thread of information. Include in contract documents. Consider use of BIM etc.

Construction products regulations (All Projects)

Actions: Ensure compliance on projects with new construction products regulations. Consider necessary amendments to prohibited materials clauses in contracts.

Building safety levy (Dwellings or other accommodation)

Actions: Pay levy (levy intended to contribute to government building safety expenditure).

New build home 15 year warranties.

Actions: Make arrangements to enable new home build warranties which comply with statutory requirements to be issued on completion. New dwellings to comply with requirements of warranties.

QUESTIONS AND DISCUSSION



MORE IMAGINATION **MORE IMPACT**

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