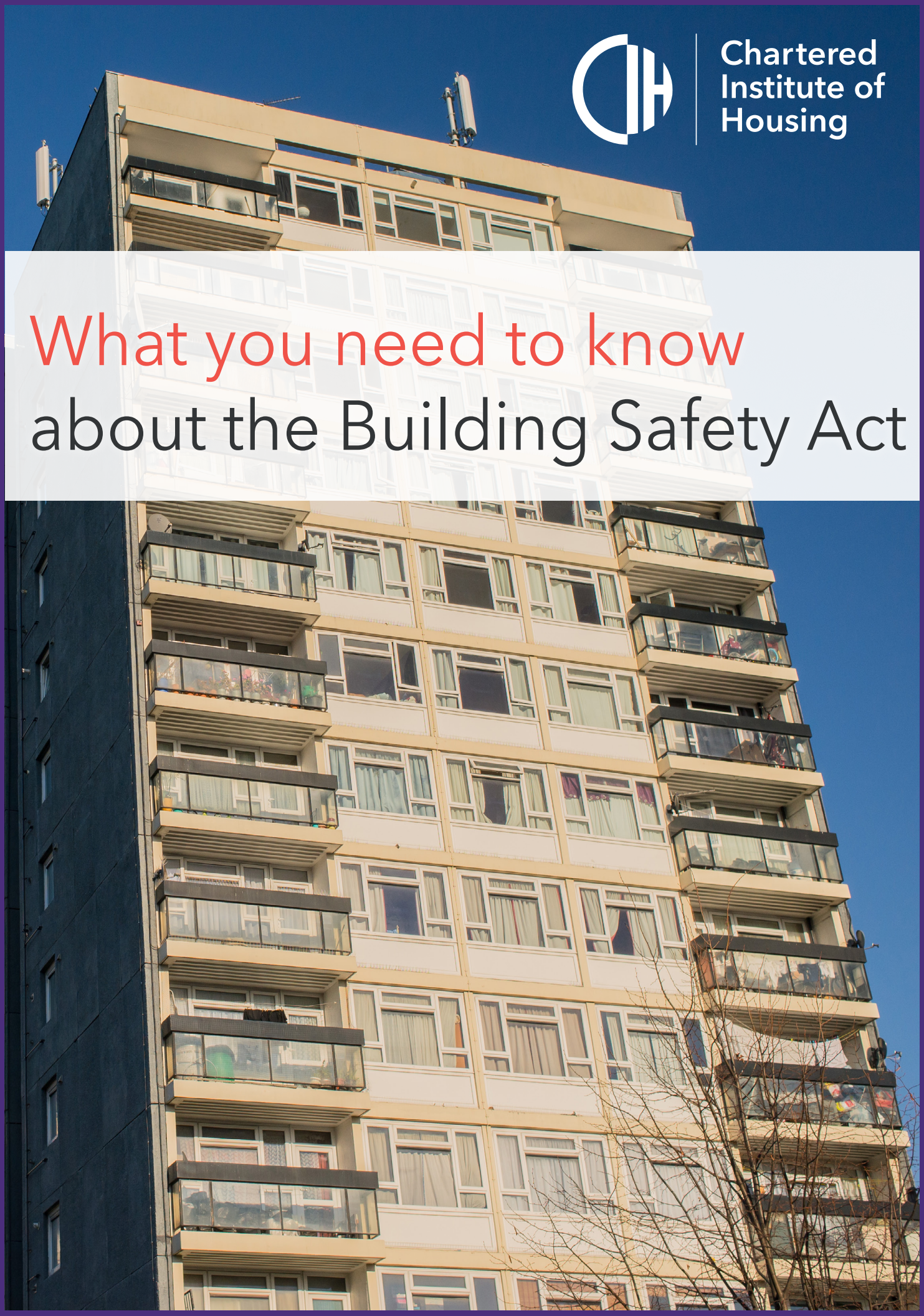

Chartered Institute of Housing

What you need to know about the Building Safety Act

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Introduction

Concerns over building safety standards have been rising since the Grenfell Tower fire on 14 June 2017, in which 72 people died. Investigations confirmed that unsafe Aluminium Composite Material (ACM) cladding contributed to the spread of the fire. Similar cladding was identified in over 400 other high-rise residential blocks. Then larger numbers of buildings were found to have different unsafe cladding materials alongside a range of other fire safety issues, including defective fire doors, inadequate compartmentalisation, and combustible balconies. These defects have left thousands of residents trapped in unsafe buildings, particularly leaseholders as it became increasingly difficult to sell flats in affected blocks. It was clear that fundamental changes were required to building safety regulations to ensure the safety of people in their own homes.

The government appointed Dame Judith Hackitt to conduct an Independent Review of Building Regulations and Fire Safety. The review's final report was published in May 2018, identifying several issues with the current system including:

- guidance, roles and responsibilities were unclear
- residents needed a better way to raise fire safety concerns
- methods for testing, certification and marketing of constructions products were also unclear.

The government aimed to address these issues through the Building Safety Act. It received Royal Assent on 28 April 2022 and will come into full effect over the next 18 months, as significant amounts of secondary legislation are still required to realise all of the proposed changes.

Key points

Building Safety Regulator and the new regime for higher-risk buildings

The Act creates a new Building Safety Regulator as part of the Health and Safety Executive. The Regulator will oversee a more stringent safety regime for higher-risk buildings, both new and existing stock, defined as buildings taller than 18 metres or at least seven storeys high. This regime should be fully in force within 18 months, by October 2023. It will introduce a new "Gateway" system which will require building safety to be considered at three key stages: planning, design, and completion. Works will not be able to progress unless each stage is passed satisfactorily. This will create a golden thread of safety information about higher-risk buildings, to ensure that the right people have the right information at the right time to ensure buildings are safe.

Furthermore, any structural and fire safety issues identified in new and existing stock must be reported to the Regulator. Those which cause a significant risk to life safety in higher-risk buildings must be reported through a Mandatory Occurrence Reporting system, while lower-level issues can be reported through a voluntary system, to increase awareness of problems across the sector.

The Act introduces the new role of an Accountable Person for each occupied high-risk building. The Accountable Person, typically the landlord or freeholder, must meet legal requirements to ensure that the fire and structural safety of their buildings is properly managed. These legal requirements include:

- registering the building with the Building Safety Regulator
- assessing and addressing fire and structural safety risks
- preparing a Residents' Engagement Strategy and providing residents with safety information.

Accountable Persons must determine for themselves how best to meet these duties; there is no longer a requirement to appoint a Building Safety Manager for each high-rise building. If an Accountable Person fails to comply with their statutory duties, the Building Safety Regulator would be able to appoint a special measures manager to take over their functions. Further information is available in the government's factsheet on Accountable Persons.

Additionally, a regulatory framework will be established for construction products, to increase oversight of their safety and quality.

Funding of remediation works

There have been a series of announcements from the government setting out how the costs of remediation works will be covered. Secretary of State Michael Gove has guaranteed that "no leaseholder living in their own flat will have to pay a penny to fix unsafe cladding,". However, there is no such commitment that leaseholders will pay nothing towards works to address other fire safety risks.

The Building Safety Act has introduced a "waterfall" mechanism which is designed to ensure that developers pay to fix building safety defects for which they are responsible. Michael Gove has made an agreement with major developers that they will collectively pay over £2 billion to fix all "life-critical fire safety issues" in buildings over 11 metres tall which they have had a role in developing over the last 30 years. This includes both cladding and other necessary works. Gove is seeking to reach a similar arrangement with cladding and insulation manufacturers.

Under the waterfall mechanism, costs will only be passed on to others if developers cannot be traced or forced by law to pay. This likely will occur for some buildings, particularly "orphan blocks" where the responsible developer can no longer be identified. If costs cannot be reclaimed from developers, building owners are subsequently responsible for meeting costs. The ways that they can do this vary depending on what type of safety defect is in question and how tall the building is.

Building owners with a net worth valued at over £2 million per affected building will need to pay any costs not met by developers in full. No costs can be passed on to leaseholders for cladding works. In the case that building owners cannot pay for outstanding remediation costs, there are two further sources of funding. The government's Building Safety Fund will cover outstanding costs for cladding remediation in buildings over 18 metres tall, and the Act introduces a Building Safety Levy to cover costs in buildings taller than 11 metres. The levy can be used to cover the cost of fixing any life-critical fire safety issue, not just cladding remediation.

The Building Safety Levy will be charged to developers on all new buildings of any size before they can gain building control approval. There will be some exclusions from the levy, which should include affordable housing developments. The government has stated that SME developers will be "protected" and the Levelling Up, Housing and Communities Committee has said that social landlords must be exempt, but to date there has been no confirmation on these points from the government and no official response to a consultation on the design of the levy.

If at the end of the waterfall building owners do not have the means to pay for non-cladding defects, they can pass on some costs to leaseholders. This is capped at a limit of £10,000 (£15,000 in London) per leaseholder for most properties but can go up to £100,000 for the most expensive properties valued above £2 million. Shared owners will have a cap proportional to their equity in the building, for example a London shared owner with 50% equity would have a cap of £7,500. Leaseholders in flats worth less than £175,000 outside London and £325,000 inside cannot be required to pay anything for non-cladding costs.

Several groups are not helped by this waterfall mechanism, including: leaseholders in buildings under 11 metres tall; landlords who own more than three buy-to-let properties, and leaseholders who own or manage their own blocks (although the government has promised a consultation on this final group). It will also not help leaseholders who have already paid for remediation works. The government has said it will assess on a "case by case" basis whether remediation work on buildings under 11 metres tall is necessary and should be covered by these funding arrangements, arguing that there is "no systemic fire risk" in these buildings.

The Act also introduces a building safety charge which can be added to residents' service charges in all buildings over 18 metres tall to cover the ongoing costs of the new regulatory regime. This would not cover costs of remedial works, so is separate to the waterfall mechanism.

Resident engagement and residents' duties

The Hackitt review emphasised the need for residents to have more effective ways to raise concerns about fire safety. To achieve this, the Act commits the Building Safety Regulator to establishing a Residents' Panel made up of residents living in higher-risk buildings. It must include representation of disabled residents.

As noted above, Accountable Persons must prepare and keep under review a Resident Engagement Strategy. This must promote resident participation in making building safety decisions. The Accountable Person must also set up a system for investigating and responding to residents' complaints and provide building safety information to residents.

Under the Act, residents will also have some duties to ensure building safety. Residents must not act in a way that creates a significant risk of a building safety issue materialising and must respond to requests made by an Accountable Person which are necessary to assess and manage building safety risks. For example, residents will have to allow access for gas boiler checks.

Methods for seeking redress

The Act makes several changes to methods of seeking redress for building safety issues. First, the limitation period for making a claim for compensation under the Defective Premises Act will be extended, to 30 years for historic buildings and 15 years for buildings yet to be completed. Claims can only be made where building works result in a property being "not fit for habitation". This change should be made within the next two months, by June 2022. It is not clear how widely used this new method will be; the bar for a building to be considered not fit for habitation is quite high, and in many cases it may be easier to seek redress by claiming a breach of contract.

Secondly, a New Homes Ombudsman will be established to provide a dispute resolution mechanism for buyers of new build homes to resolve disputes with developers. Developers will be required to become and remain members of the scheme.

Finally, and more broadly, the Act will remove the "democratic filter" for social housing tenants seeking to escalate a complaint to the Housing Ombudsman after exhausting their landlord's complaints process. This required tenants to make their complaint via a designated person (e.g. an MP, councillor or recognised tenant panel) before escalating to the Housing Ombudsman, which caused unnecessary delays. This should be removed within the next year, by April 2023

What happens next?

Many of the key details for implementing the Building Safety Act are still yet to be determined. Secondary legislation will be required to enact various measures in the Act, which will take up to a year to complete, and the full regime is unlikely to come into force for at least 18 months. The government has shared an outline transition plan which sets out its expected timeline.

What should housing providers be doing now?

Many details of this bill have been available for quite a while, so most housing providers should have progressed in their preparations. All landlords at this point should know the extent of building safety concerns across their stock, particularly in higher-risk buildings. Almost all of the necessary work to remove unsafe ACM cladding has now been completed or at least begun. Landlords must ensure that all other critical safety issues are identified and addressed as well, including buildings with other unsafe cladding materials such as high-pressure laminates.

Landlords with high-risk buildings must be prepared to meet all of the duties of an Accountable Person under the Act. Landlords must develop and maintain systems which will ensure that they always have a complete and detailed understanding of building safety concerns across their stock, including the assessments required of high-risk buildings. This will require adequately skilled staff to conduct regular stock condition surveys and ensure that safety features such as fire doors are being properly used; landlords must identify and address any skills gaps quickly.

The Act introduces new duties in relation to resident engagement in higher-risk buildings. Landlords will need to develop a residents' engagement strategy and develop effective ways to provide residents with relevant safety information about the building. Landlords may need to combine several approaches to ensure that their communications effectively reach all residents in each high-rise block. The Act does not introduce a requirement to develop personal emergency evacuation plans for disabled people in high-rise buildings, despite this being a recommendation from the Grenfell Tower inquiry. However, to protect the safety of residents, landlords should still consider what they could to do ensure disabled residents can safely leave high-rise buildings in the event of a fire. The starting point would be to ensure they have current details of residents living in high-risk buildings.

Finally, landlords will of course need to consider how the costs of remediation work will be met. The precise details of how the waterfall mechanism will work in practice are not yet clear, but for now landlords should be in contact with any developers which bear primary responsibility for remediation work in their buildings. All reasonable steps should be taken before passing on costs for non-cladding remediation to leaseholders. Social landlords in particular will need to carefully consider how much residents should pay under the building safety charge to meet ongoing costs of the new building safety regime, given the pressures of the cost of living crisis.

What does CIH think?

The enhanced safety measures brought in by the Building Safety Act are critically needed and long overdue. We must do all we can to prevent another tragedy like the fire in Grenfell Tower happening again. People living in tall tower blocks should not feel any less safe than people living in other types of housing across the country and the enhanced regulatory regime should move towards achieving that.

However, we are concerned about some of the gaps and omissions in this Act. There seems little reason to restrict protections and funding to buildings of a certain height when unsafe building practices and materials can mean fires would spread quickly regardless of building size. The government's promise to assess buildings under 11 metres tall on a 'case by case' basis will not do much to reassure residents in shorter multi-storey blocks where fire safety issues have been identified.

We are also concerned that the Act does not guarantee sufficient protection for social landlords. Any money spent by social landlords in rectifying building safety defects that they did not create will ultimately be drawn from rental income, in effect meaning that tenants will pay. Increased spend on building safety works has already meant that many social landlords are building fewer desperately needed new affordable homes. We would urge the government to ensure that its waterfall mechanism does not leave social landlords covering costs where building developers and manufacturers fail to pay.

Critically, this legislation does not completely protect leaseholders from having to pay to address building safety defects for which they bear no responsibility. Leaseholders are no more responsible for other safety issues than they are for unsafe cladding, so there is no justifiable rationale for allowing the costs of non-cladding remediation work to fall onto leaseholders. We applaud the additional protections which were added during the Act's progress through parliament, but they are not sufficient to protect all leaseholders.

CIH is committed to keeping a watching brief on this crucial issue and will continue to liaise with government. We welcome feedback from CIH members on the issues and practical problems that arise. To share any comments or questions, please contact our policy team at policyandpractice@cih.org