

New Bill aims to accelerate unsafe cladding remediation

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The Government has published the Building Safety (Remediation of Unsafe Cladding etc) Bill (the Bill), containing a range of new safety measures relating to building safety. As well as a new duty to remediate unsafe cladding, the Bill contains a requirement to register medium height buildings and to provide beneficial ownership information for these buildings. The context to the Bill is the Government's desire to speed up the remediation of cladding – it is estimated that between 4000 and 5400 buildings over 11 metres still have not completed cladding remediation repairs.

The Bill's objectives are to create certainty over which buildings require cladding remediation and to what standard, give regulators stronger powers against those blocking progress, make construction product manufacturers contribute to the cost of remediation, and ensure all residents have a route to remediation. This briefing examines key elements of the Bill and relates to the position in England only.

Key issues

- 1 New legal duty on *Responsible Entities* to assess, mitigate and remediate unsafe cladding in residential buildings over 11 metres (or five storeys) completed before 28 June 2022.
- 2 A fire risk assessment, and an external walls assessment, where recommended, must be completed within 10 months after the relevant provisions come into force.
- 3 A *Remediation Compliance Plan* setting out the required steps and timetable must be prepared within 13 months, subject to a possible extension of up to three months.
- 4 New criminal offences and financial penalties would apply to non-compliance, including obstruction. Group liability may arise in the most serious cases.
- 5 A new registration duty would apply to medium-rise residential buildings of 11 to 18 metres, or five or six storeys.
- 6 New powers allow regulators to demand building ownership information to identify who is responsible for fire and safety compliance.

Legal duty to assess, mitigate and remediate risks

The Bill introduces a new duty to assess, mitigate and remediate fire safety risks related to external walls of residential buildings (see box). This duty has been proposed due to a lack of a clear and direct duty in law to remediate when unsafe cladding has been identified.

What buildings does the new duty apply to?

A building (or part of a building*) is covered if it satisfies all of the following:

- It is either: (1) a self-contained building, meaning a structurally detached building; or (2) a vertically divided part of a building that could be developed independently and whose services are, or could readily be, provided separately from those serving the rest of the building.
- It is over 11 metres high or has at least five storeys. This includes taller buildings within the higher-risk building (HRB) regime under the Building Safety Act 2022 (BSA).
- It contains at least two dwellings.
- It was completed before 28 June 2022.
- It is not covered by the Government's Self-Remediation Contract, also known as the developer remediation contract.

* If part of a building satisfies these conditions, the Bill would apply to that part separately. It is unclear whether the remaining part must then be considered separately. This could be significant where, for example, the remaining part contains no dwellings and would therefore fall outside the new duties. It is also unclear whether a single Responsible Entity could comply on a whole-building basis instead of treating each part separately.

The duty is placed on the 'Responsible Entity' which is the person with repair or maintenance responsibilities for the external walls under a lease or statutory requirement. In a Higher Risk Building (HRB) under the Building Safety Act 2022 (BSA), this may or may not be the same person as the Accountable Person. The existing provisions of Schedule 8 BSA and relevant lease provisions will apply to prevent or limit the costs of assessment or remedial work etc from being recovered from qualifying residential tenants.

There is likely to be considerable cross-over between the new duty and enforcement mechanisms already available under other legislation, e.g. Regulatory Reform (Fire Safety) Order 2005 (FSO) enforcement notices, or compliance notices and Remediation Orders under the BSA. For this reason, the new duty is disappplied where those enforcement mechanisms

are being used and works that would lead to appropriate remediation are carried out.

Fire risk assessment and possible FRAEW

The Responsible Entity will have to carry out:

- A fire risk assessment that complies with the FSO.
- Where the fire risk assessment recommends one, the Responsible Entity must also obtain a fire risk appraisal of external walls (FRAEW) using the PAS 9980 methodology.

Assessments must be completed within 10 months after the relevant provisions come into force. However:

- a fire risk assessment carried out on or after 16 May 2022 will qualify if it complied with the requirements of the FSO; and
- a FRAEW carried out after 16 May 2022 will qualify if it would have complied with the applicable requirements had it been carried out after the commencement date. This assessment must take account of the September 2026 update to PAS 9980.

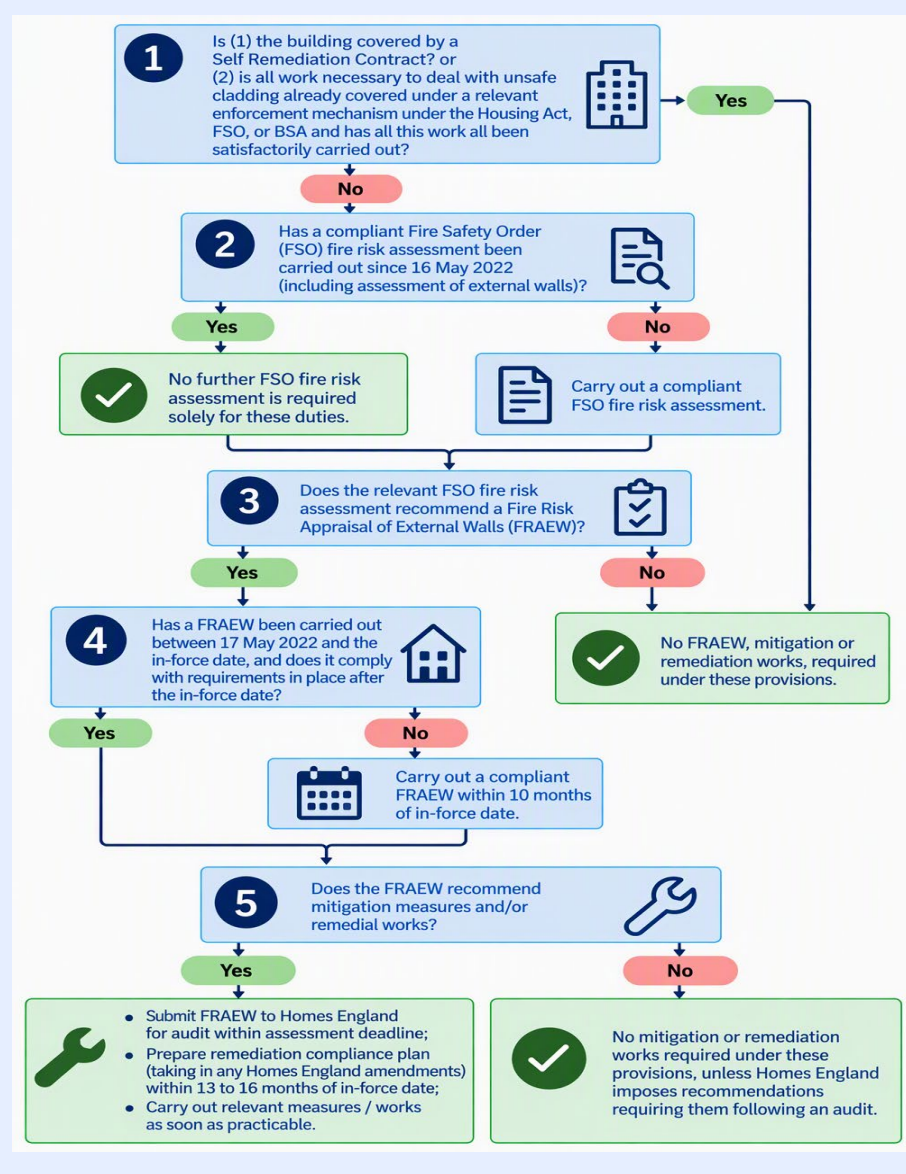
Homes England audit and Remediation Compliance Plan

Where an assessment recommends mitigation (interim measures) or remediation works, the Responsible Entity must send it by the assessment deadline to Homes England (formerly known as the Homes and Communities Agency) for audit. Homes England can also audit a proportion of assessments that conclude no work is needed. This audit might result in alternative recommendations which will have to be implemented.

The Responsible Entity must also prepare and distribute a Remediation Compliance Plan (RCP) within 13 months of the provisions coming into force (extended by up to 3 months in case alternative recommendations are received or the Responsible Entity changes). This must contain details of interim measures, remediation steps and timetable, the director/s responsible for ensuring mitigation and remediation works take place; it must also identify the group structure and members and beneficial owners of the Responsible Entity and each member of the group. For these purposes, beneficial owner has the same meaning as under the Trust Registration Service regime (this is broadly tied to ownership of more than 25% of the shares or voting rights or otherwise controlling the company with the control test following the People with Significant Control regime under the Companies Act 2006). This beneficial ownership disclosure is in addition to the new power for regulators to request building ownership information which has a separate test and can be requested at any time (see the Building ownership information section below).

What will building owners / lessees who are Responsible Entities have to do in practice?

In many cases Responsible Entities will have already carried out the necessary assessments for their building since May 2022 (when the express requirement to assess external walls under The Fire Safety Act 2021 took effect). Some Responsible Entities may already be under other compliance regimes which disapply the Bill's provisions. All Responsible Entities should check whether they have to comply with these new duties, even those responsible for buildings covered under the HRB Regime, or those who have previously carried out remediation works - it is possible in theory that Homes England could require additional remediation, as part of its audit process, where works were not carried out under one of the relevant enforcement mechanisms. See the flow chart below.



Mitigation (interim measures) and remediation

Responsible Entities must carry out recommended remedial work, and carry out mitigation / interim measures if needed, as soon as reasonably practicable following sign-off from Homes England. Remediation work must be carried out to remove risks or reduce them to a "tolerable" level. Significantly, interim measures such as a waking watch, or decanting residents, do not on their own count as properly remediating a building. There is likely to be a rush of assessments submitted for audit around the 10 month assessment deadline. There is a significant risk of bottlenecks within Homes England delaying sign-offs and consequent remediation work, if it does not have sufficient resourcing for this new audit task.

Because different entities might have different levels of control or responsibility under various the regimes, duties to co-operate are placed on Responsible Entities, Responsible Persons (under the Fire Safety Order), and Accountable Persons (under the Building Safety Act 2022) Significant penalties may apply for non-compliance, as discussed below.

Where remediation work is not carried out, default powers allow the remediation authority (local housing authority or Homes England) to carry out the work and recoup payment from the "person responsible for the compliance failure" (defaulting person). While this is likely to be the Responsible Entity in many cases, in theory, a director of the Responsible Entity or a beneficial owner could be held to be a defaulting person, where they contributed to the non-compliance. Amounts due will also be local land charges, secured on any interest in the land of the defaulting person (and this might be recoverable in priority to any mortgage). This Remediation Management Order power might also be available when failures to comply are identified under other enforcement regimes, such as breaches of FSO enforcement notices, or compliance notices / Remediation Orders under the BSA.

Enforcement

Local housing authorities, fire and rescue authorities and for HRBs, the Building Safety Regulator are all regulators for the purposes of enforcing these duties. The duties are backed up by criminal offences and sanctions (fines and up to two years' imprisonment) for breach of the requirements. These can be imposed on the offending companies, but also on any director where particular fault can be attributed to them individually. In addition, it will be an offence to intentionally obstruct anyone carrying out required assessment and remediation works without reasonable excuse. The Government suggests that this could include, for example, delaying access to the building or refusing to grant third-party permissions to carry out works. There may be a fine line between acting on legitimate concerns and unreasonable obstruction, and this is likely to be the subject of significant debate and potential disputes. Organisations that occupy or hold interests or rights in or over relevant buildings should take note that this offence could apply even if they have no other clear responsibility in relation to fire risks or building safety for the building.

Breach of the duties could also lead to regulator-imposed financial penalties ranging from up to **£14,000** (for failures relating to an RCP) to up

to **£500,000** (for failure to carry out risk assessments). Daily default penalties of **£500** for continuing breaches can also apply. Certain breaches could lead to financial penalties of up to **5% of global group revenue** where the offending company is part of a group. These include failure to co-operate with Homes England on an audit, or to provide relevant information upon regulatory investigation, or failure to comply with the duty of co-operation, or obstructing the carrying out of works. The Government suggests that enforcement will be aimed at those guilty of "deliberate inaction or poor behaviour" rather than those people "acting in good faith to progress remediation", such as volunteer-led right to manage companies and resident management companies.

Group liability

Regulators can also impose civil penalties (and the costs of work carried out by a remediation authority) on other group members jointly with the offending company in certain circumstances where parent undertakings or other group undertakings (each as defined under the Section 1162 of the Companies Act) respectively have particular control rights or bear some responsibility for the offending conduct. This is a considerably reduced set of circumstances than those applied under the concepts Associated Companies or Associates used for determining liability under Remediation Orders and Building Liability Orders (respectively) under the BSA. The Government intends that these powers would only be used in the most serious cases, where "it is clear that serving a notice only on the responsible entity would fail to capture those who were responsible for a failure to remediate." Regulators' use of this group liability mechanism will be further elaborated in guidance.

Registration of medium-rise buildings

The Bill extends the registration duty under the HRB Regime to medium-rise residential buildings, i.e. building between 11 metres and 18m in height (or with five or six storeys), containing two or more residential units. The provisions in the Bill initially only apply to buildings occupied before the provisions come into force. The Government intends that future regulations would determine any transitional provisions (including any registration deadline) and how the registration duties would apply to buildings occupied after the in-force date.

The person legally responsible for repairing the common parts of the building would be responsible for registration (in this regard, the Bill adopts the test for determining the Accountable Person under the HRB Regime, see our [Primer Briefing](#)). The duty-holder will need to ensure that registration is maintained at all times the building is occupied (the registrar may de-register a building if it is empty during any period). If the duty-holder changes, it must notify the registrar accordingly.

Local housing authorities will enforce the registration provisions. They will be able to impose civil penalties of up to **£7,000** for failure to register. Where failure to register continues more than 28 days after the initial penalty was imposed, an offence will be committed (punishable by a fine) and an additional **£40,000** civil penalty could also be imposed by the

regulator. Similarly to the HRB Regime, the costs of complying with the registration obligation will be recoverable through tenants' service charges.

Building ownership information

A new power is given to local housing authorities, fire and rescue authorities, Homes England and, for HRBs, the Building Safety Regulator, to demand building ownership information from anyone they believe may hold or have access to such information. It can be used for any self-contained buildings (or parts) containing two or more dwellings and is separate from the disclosure of beneficial owners in RCPs. The purpose is to make it easier for these authorities to identify persons who may have duties under fire and building safety legislation and take enforcement action against them. The authorities do so by issuing formal notices specifying the information required and a deadline for responding. Notices are not limited to being served on building owners and the Government envisages notices will be served on others who may have access to such information, for example, managing agents. Once obtained, the building ownership information can be shared between the regulators and used for their building safety functions.

The building ownership information the relevant authorities can request includes:

- Whether the legal owners of any freehold or leasehold interests in the whole or part of the building (the primary owners) are body corporates, partnerships or trusts;
- The identity of the beneficial owners of the primary owners; and
- The identity of any persons associated with the primary owner and/or its beneficial owners, and their relationship with the building.

The beneficial owner test mirrors that used for the RCPs. The associated person test mirrors that for Remediation Contribution Orders but without the concepts of a qualifying period or relevant time.

Enforcement

Both failure to respond to a building information notice without reasonable excuse and knowingly or recklessly providing false or misleading information will be criminal offences. Such actions can also lead to regulator-imposed financial penalties of up to **£40,000**.

Overall, this new power is a broader information gathering power than the beneficial ownership disclosure in the RCP. It can be used at any time; goes beyond the beneficial owners of the Responsible Entity and its group companies to encompass those who could potentially be in scope of a Remediation Contribution Order; and must be complied with by anyone who holds relevant information including external service providers such as property managers. It is designed to give regulators an easy way to ascertain and understand the corporate holding structures (including

nominee and trust arrangements) being used and target their enforcement actions against the relevant parties.

***Building Ownership Information examples from the Bill's
Explanatory Notes***

1. To support its building safety enforcement duties under the Fire Safety Order 2005, a fire and rescue authority issues a building ownership information notice to a property management company because it has reasonable grounds to believe that the company has, or can access, information about the ownership structure of a residential block. The notice specifies the information required, how it must be provided, and the deadline for complying.
2. A relevant authority is seeking to understand who ultimately owns a residential block in order to apply to the First-tier Tribunal for a Remediation Contribution Order under Section 124 of the Building Safety Act 2022. The legal owner of the freehold is a company, but the company is owned by trustees acting under a trust arrangement. Information about the company, the trust, the beneficial owners of the trust, and persons associated with those beneficial owners may all be "building ownership information" if it appears to the authority to be useful for identifying those persons and understanding their relationship to the block.

Other reforms

The Bill makes other key reforms to building safety law. These include:

- Tightening up the BSA construction product liability provisions to ensure product manufacturers and suppliers can be liable to pay damages where unsafe products or misleading conduct have contributed to dwellings being unfit for habitation and requiring remediation.
- Confirming that no limitation period under the Limitation Act 1980 applies to applications for Remediation Orders, Remediation Contribution Orders or Building Liability Orders under the BSA.
- Introducing framework powers to introduce new civil financial penalties of up to £500,000, enforceable by the First-tier Tribunal, for landlords who fail to comply with a Remediation Order. This new penalty regime does not extend to failure to comply with Remediation Contribution Orders or Building Liability Orders.
- Requiring sums secured through Remediation Contribution Orders to be held on trust, to protect remediation funds if a landlord becomes insolvent.

- Imposing various notification requirements on insolvency practitioners in relation to their appointment and in cases where they seek to disclaim onerous properties.

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