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## **BUILDING SAFETY ACT 2022: THE IMPACT ON HEALTHCARE FACILITIES**



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Following the tragic events at Grenfell, the construction sector has come under increased scrutiny. One of the various legal ramifications of the Grenfell disaster has been the introduction of the Building Safety Act 2022 (“BSA”), which sets out a regime overseen by a new regulator, the Building Safety Regulator, with a particular emphasis on “high risk buildings” during their design, construction and occupation.

Under the BSA a “high risk building” is defined as a building which is 18 metres tall or higher or at least 7 storeys with two or more residential units. Although the primary focus of the BSA is on residential buildings certain provisions of the BSA do apply to healthcare facilities by virtue of secondary legislation which is now in force The Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023. These regulations confirm that healthcare facilities which are at least 18 metres high or which consist of at least 7 storeys will need to comply with the new stringent higher-risk buildings regime during the design and construction phase of the project.

However healthcare facilities will not need to comply with the occupational phase duties imposed by the BSA.

### **THE NEW APPROVALS REGIME**

The most significant change brought about by the BSA which will impact the healthcare industry is the new approval regime. The BSA amends the Building Act 1984 to permit the

creation of a three-stage Gateway approval system. Secondary legislation which will enforce Gateway 2 and Gateway 3 of the new approval regime which will come into force in October of this year.

The intention of the Gateways is to strengthen regulatory oversight before building work commences, but also throughout construction including before major changes are made, and before a building is occupied. It will also provide assurance to the Building Safety Regulator that the higher-risk building complies with the Building Regulations and promote the requirement to maintain a golden thread of information which is discussed further below.

Once the secondary legislation is enacted there will be three distinct points during the design and construction process which will be the following:

### 1 GATEWAY 1

By virtue of the Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2021 ("Country Planning Order"), Gateway 1 is already in force. The Country Planning Order provides that fire safety matters must be considered at the planning stage for projects involving higher-risk buildings. The Building Safety Regulator will be a consultee and submission of fire statements will be required when seeking planning approval.

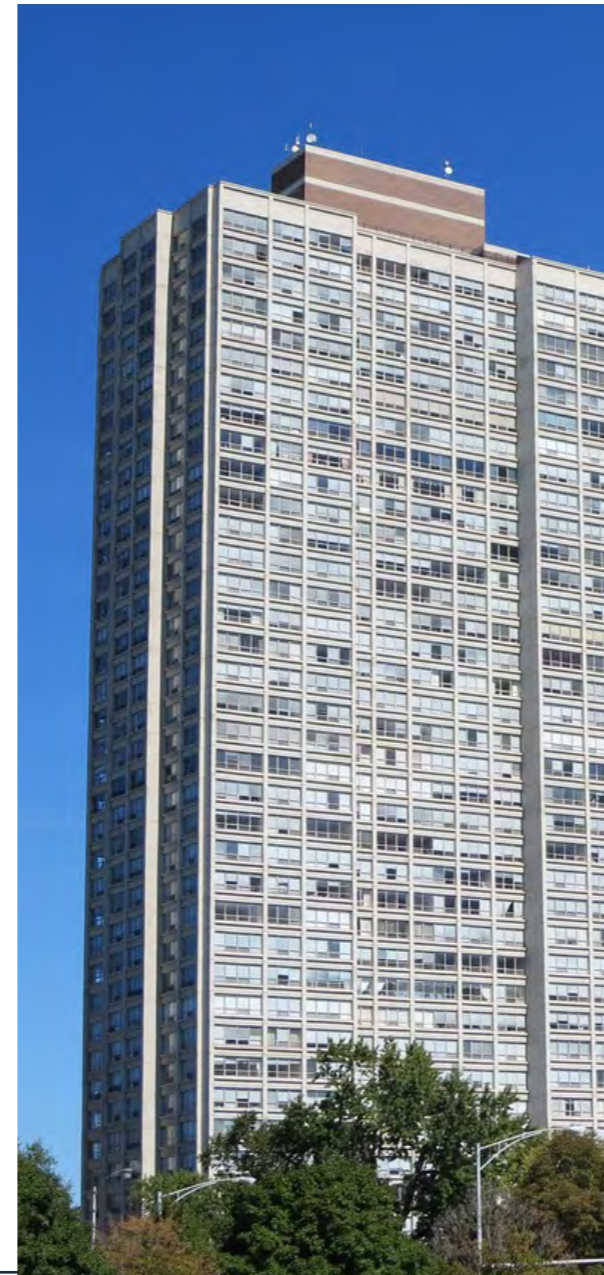
Since Gateway 1 came into force on 1 August 2022 and as of October 2022 the Building Safety Regulator had already flagged concerns in 60% of all planning applications. This highlights the importance of seriously considering fire safety matters at the inception of a project involving a higher-risk building.

### 2 GATEWAY 2

Before construction works can commence, the Building Safety Regulator's approval must first be obtained. This will replace the building control deposit of plans stage and will be a stop/go point before building works can commence.

Gateway 2 applications must demonstrate how the proposals comply with building regulations requirements. Building regulations should be considered holistically with an outcome focused approach which includes appropriate consideration of building safety.

Following the submission of the relevant information the Building Safety



Regulator will have a period of 12 weeks within which to approve or reject the application. Although the secondary legislation is silent on what happens when the 12 week period expires and the Building Safety Regulator has not made a decision, the Building Safety Regulator's approval is required prior to the commencement of the works. It therefore cannot be assumed that the Building Safety Regulator's failure to make a decision will amount to approval by default.

In addition the Building Safety Regulator may approve the application subject to certain conditions or requirements. The Building Safety Regulator will have strong enforcement tools where building work commences without first obtaining building control approval.

### 3 BETWEEN GATEWAYS 2 & 3

During construction, those involved in the design and construction process will be subject to ongoing requirements which clients and dutyholders must comply with, such as the reporting of safety occurrences, the notification of changes to the Building Safety Regulator and a change of client, principal contractor or principal dutyholder, amongst other requirements.

### 4 GATEWAY 3

Gateway 3 will occur when the relevant building works are complete. The Building Safety Regulator's approval will need to be obtained before registering and commencing occupation of the higher-risk building. The applications will have to demonstrate how the building work complies with building regulations requirements to provide assurance that buildings are safe to occupy and will need to include plans and documents that reflect the 'as-built' building (this will form part of the 'golden thread' of information). The information must be handed over to the building owner to help them manage building safety risks when the building is in use by ensuring they have accurate, good quality, up to date information on the building.

The information and documents required through the gateways will form part of the golden thread of information which will be held digitally and should be established at the start of the construction cycle.

### HOW WILL THIS IMPACT EXISTING HIGHER-RISK BUILDINGS?

Under the BSA and secondary legislation, those who wish to carry out works to existing HRBs will also be required to submit an application to the Building Safety

Regulator. An application will not need to be submitted only in the limited scenario where the works are exempt from the regulations (such as emergency repairs, self certification works and other exempt works listed in the regulations). In the case of a Healthcare Facility, as an example, the reconfiguration of wards will likely require approval from the Building Safety Regulator.

## GOLDEN THREAD

Once the regulations which relate to the Golden Thread come into force, they will govern the way in which documents are collected and maintained during the life-cycle of the building to ensure that a building is safe and to keep those who occupy the building informed. The client along with the relevant duty holders will be responsible for collating and maintain the Golden Thread. It will therefore be vital for the client to ensure that their contracts with dutyholders effectively enshrine the obligations which are caught by the regulations once introduced to ensure compliance.

## THE ROLE OF ACCOUNTABLE PERSONS

The BSA has introduced the role of the Accountable Person which will be required in all occupied higher-risk buildings. New guidance which has been issued by the Government suggests that an Accountable Person will be the individual or organisation that owns or has a legal obligation to repair any common parts of a higher-risk building. Where there is more than one Accountable Person, the Principal Accountable Person will be the party who owns the structure and exterior of the building. The Accountable Person will be responsible for ensuring that the fire and structural safety is properly managed for the whole building.

The provisions which relate to Accountable Persons will not apply to healthcare facilities as they only apply to higher-risk buildings in occupation. However the Responsible Person under the Regulatory Reform (Fire Safety) Order 2005 (“RRO”) will be responsible for maintaining the Golden Thread for healthcare facilities. The Responsible Person under the RRO is defined as, in relation to workplaces, the employer, which in the case of the NHS would be the NHS Trust, the Board and the Chief Executive.

## DUTY HOLDERS & DUTYHOLDERS COMPETENCY

The BSA also introduces new duties for dutyholders participating in the construction, refurbishment and maintenance of high risk buildings.

The new regulations place duties on the dutyholders to plan, manage and monitor the design work and the building work, ensure they cooperate and communicate with each other,

coordinate their work and have systems in place to ensure that building work, including design work, complies with all relevant building regulations.

There is also a requirement for anyone carrying out any design or building work will need to be competent for their roles. Those who appoint dutyholders will need to take reasonable steps to ensure that the people they appoint meet this requirement. Contracts and appointments will need to clearly mention the requirement for dutyholders to comply with the competency requirements.

## FIRE SAFETY REGULATIONS

Although the in occupation elements of the BSA does not apply to healthcare facilities, the Government has expressed that this is due to the fact that healthcare facilities are in constant waking occupation and are required to comply with current fire safety regulations including the RRO. The RRO provides a framework for regulating fire safety in all non-domestic premises including workplaces and the parts of multi-occupied residential buildings used in common.

The managers of healthcare facilities must therefore ensure that they are aware of and complying with their obligations under the RRO.

## FIRE SAFETY ACT 2021

The Fire Safety Act 2021 (“FSA”) extends the scope of the RRO to now include risks posed by the structure and external walls (including cladding and balconies). The Responsible Person will need to ensure that fire risk assessments and fire risk strategies are updated to ensure that these additional parts are considered. Failure by the Responsible Person to follow risk-based guidance will be relied upon to establish the Responsible Persons failure to comply with the RRO.

An offence under the FSA or the RRO may be liable to pay an unlimited fine and/or imprisonment (for a term not exceeding two years).



## HEALTHCARE FACILITIES

Those in the public sector and private companies who are involved in the design, construction and operation of healthcare facilities should ensure that they are aware of the changes brought about by the BSA. Private companies and those in the public sector will need to be aware of the impending approval regime for higher-risk buildings, dutyholder obligations and the Golden Thread requirements as well as the updated requirements under existing regulations to ensure that they are in a position to comply with the legislation once it is enacted.

It is also prudent to note that although the new approval regime relates to healthcare facilities at least 18 metres high or with at least 7 storeys works is defined broadly under the BSA and will include major works but may also include refurbishment works. Healthcare providers will therefore need to consider the application of the BSA to existing higher risk buildings where they intend to undertake refurbishment works.

Please follow the link to access Clarion Solicitors' other blogs, webinars and podcast on the Building Safety Act.

<https://www.clarionsolicitors.com/hubs/building-safety-act-2022>

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- **NEC3/ 4 ECC Compensation Events: the events, notification & assessment**

## DGA CONTACT INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebrief please contact DGA Group through the contact details below or at [DGAGroup@dga-group.com](mailto:DGAGroup@dga-group.com)

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