

## Building Safety Bill

### Supplementary memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee

1. This supplementary memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Building Safety Bill (“the Bill”). The Bill was introduced in the House of Commons on 5 July 2021 and brought to the House of Lords on 20 January 2022. A delegated powers memorandum was published by the Department on 20 January 2022. This memorandum is supplementary to that memorandum.
2. This memorandum identifies the Government amendments being tabled to the Bill at Committee stage in the House of Lords that confer or amend powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

#### **Clause 57: Levy on applications for building control approval in respect of higher-risk buildings – new s105C(1), (5), (7A) and (8) of the Building Act 1984: “Levy on applications for building control approval in respect of higher-risk buildings”**

*Power conferred on:* Secretary of State  
*Power exercised by:* Regulations made by statutory instrument  
*Parliamentary procedure:* Affirmative procedure

#### Purpose and context

3. The Secretary of State on 10 February 2021 announced that a levy will be introduced as part of the Building Safety Bill. Clause 57 provides a power for the Secretary of State to impose a levy in relation to applications for building control approval for higher-risk building work. These amendments to clause 57 extend the Secretary of State’s powers to enable the levy to be imposed on applications or notices relating to building work other than higher-risk building work, on residential buildings.
4. New subsection (7A) sets out the applications or notices in relation to which the levy may be applied, namely an application for building control approval, an initial notice, an amendment notice or a public body’s notice. The amendment to section 105C(8) defines the buildings to which the extended levy power applies, namely a building in England containing one or more dwellings or other accommodation.

#### Justification for delegation

5. As explained in the original memorandum in relation to clause 57, the design and delivery of the levy, e.g. setting amounts that must be paid (and when), which developments/developers are excluded from levy charges, and the detailed administrative arrangements for the levy, may need to be varied with time. This would not be practicable by primary legislation. Enabling the provisions for the levy to be set out in regulations also makes it easier to adapt these in line with any changes in the way in which public authorities should set fees and charges, consistent with the principles of Managing Public Money (in England).
6. It is particularly important now the building work in relation to which the levy may be imposed has been extended for the Department to be able to consult with the sector before the detailed provisions and procedures in relation to the levy are finalised. Such a consultation will take place before the regulations in relation to the levy are made.

Justification for procedure selected

7. Regulations under section 105C of the Building Act 1984 (inserted by clause 57) are already subject to the affirmative resolution procedure in both Houses of Parliament. We are maintaining this procedure for the delegated powers, as amended by this amendment. The Government recognises the need for Parliament to scrutinise regulations imposing a levy on industry closely.

**New Clause before clause 117 – subsection (2)(c): “Meaning of “relevant building”**

**New Clause before clause 117 – subsection (1): Remediation orders**

**New Schedule before Schedule 9 – paragraphs 4(2), 12 and 13: Remediation costs under qualifying leases**

*Power conferred on:* Secretary of State  
*Power exercised by:* Regulations made by statutory instrument  
*Parliamentary procedure:* Affirmative procedure

Purpose and context

8. These new clauses (combined with other new clauses tabled at the same time) give protections for leaseholders in relation to remediation and other associated costs for certain defects which give rise to a building safety risk.
9. New clause (meaning of “relevant building”) defines the buildings to which the leaseholder protections apply. The power in subsection (2)(c) of the new clause gives the Secretary of State the power to add, in Regulations, descriptions of additional buildings which are relevant buildings.
10. New clause (remediation orders) provides that the Secretary of State may make provision, in Regulations, as to remediation orders. A remediation order is an order made by the First-tier Tribunal requiring a relevant landlord to remedy

specified defects to a building. The Regulations can also prescribe which persons (in addition to the regulator, a local authority and a fire and rescue authority) may apply to the First-tier Tribunal for a remediation order.

11. Paragraph 4(2) of the new schedule (remediation costs under qualifying leases) provides that no service charge is payable under a qualifying lease where prescribed conditions relating to the relevant landlord or the value of the qualifying lease are met. The paragraph gives the Secretary of State the power to prescribe, in Regulations, the conditions which are to be qualifying conditions. As regards the relevant landlord, it is intended that the powers will be used to set out the circumstances in which landlords are unable to pass remediation costs to leaseholders because they can afford to meet the costs themselves. Regulations will set out the circumstances in which landlords will be prevented from passing on costs and how the ability of the landlord to fund remediation costs will be determined. As regards the values of qualifying leases, it is intended that the powers will be used to set out a lower bound leasehold value below which no costs can be passed on to leaseholders.
12. Paragraph 12(1) of the new schedule (remediation costs under qualifying leases) gives the Secretary of State the power, in Regulations, to make provision as to the recovery from a landlord (including a superior landlord) of any amount not recoverable under a lease due to the provisions of the new schedule.
13. Paragraph 13 of the new schedule (remediation costs under qualifying leases) gives the Secretary of State the power, in Regulations, to require a tenant under a qualifying lease to provide prescribed information or documents to the landlord or a superior landlord. It is intended that these powers will be used to set out the details as to how a landlord is to determine whether a leaseholder in a relevant building has a qualifying lease.

#### Justification for delegation

14. The power in subsection (2)(c) of new clause (meaning of “relevant building”) allows for descriptions of additional relevant buildings to be added. Subsections (2)(a) and (2)(b) set out that a relevant building is one containing at least two dwellings that is at least 11 metres in height or has at least five storeys. The power is needed to retain the flexibility of bringing additional buildings into scope that are below 11 metres or have fewer than five storeys should it become apparent that this is necessary. The Department does not consider at this point in time that it is necessary to bring additional buildings into scope but wishes to retain the flexibility to expand the policy should the need materialise. Providing a power for these details to be set out in secondary legislation will also enable the Department to engage with the sector before provisions are made.
15. The power in subsection (1) of new clause (remediation orders) is to make provisions relating to remediation orders; these will be detailed administrative arrangements and may need to be varied with time. It would not be practicable to include such details in primary legislation. The Department does not consider it is appropriate for the detailed provision relating to such orders to be set out in

primary legislation. Providing a power for these details to be set out in secondary legislation will also enable the Department to engage with relevant stakeholders before provisions are made.

16. The power in paragraph 4(2) of the new schedule (remediation costs under qualifying leases) is to set out prescribed conditions where no service charge is payable, both as regards qualifying leases and relevant landlords. Providing powers for these detailed provisions to be set out in secondary legislation will also enable the Department to engage with relevant stakeholders before provisions are made.

17. The powers in paragraphs 12(1) and 13 of the new schedule (remediation costs under qualifying leases) are mainly technical and procedural in nature and may need to be varied with time. It would not be practicable to include such details in primary legislation. Providing powers for these detailed provisions to be set out in secondary legislation will also enable the Department to engage with relevant stakeholders before provisions are made.

#### Justification for procedure selected

18. Regulations under this new clause will be subject to the affirmative resolution procedure in both Houses of Parliament as the Government recognises the need for Parliament to scrutinise closely regulations introducing such important provisions relating to leaseholder protections.

**New Clause before clause 117 – subsection (7): “Meaning of “relevant building”**

**New Clause before clause 117 – subsection (4)(a): Meaning of “relevant defect”**

**New Schedule before Schedule 9 – paragraphs 6(6), 7(1) and 8(2): Protection from remediation costs**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by statutory instrument*

*Parliamentary procedure: Negative procedure*

#### Purpose and context

19. As mentioned above these new clauses (combined with other new clauses tabled at the same time) give protections for leaseholders in relation to remediation costs for certain defects.

20. New clause (meaning of “relevant building”) defines the buildings to which the leaseholder protections apply. The power in subsection (7) of the new clause allows the Secretary of State, in Regulations, to supplement the new clause by defining “storey” and setting out how the height of a building is to be determined.

21. New clause (meaning of “relevant defect”) defines what amounts to a relevant defect as a defect as regards a building that arises as a result of anything done (or not done) in connection with relevant works and causes a building safety risk. Subsection (3) sets out that “relevant works” are those carried out prior to completion or works that are carried out by or on behalf of a landlord or management company. Subsection (4) gives the Secretary of State the power to define, in Regulations, what amounts to “completion” for these purposes, and to define what is meant by a “management company”.
22. New Schedule (remediation costs under qualifying leases) sets out a number of circumstances where no service charge is payable. Paragraph 5 sets out “the permitted maximum” in relation to a qualifying lease.
23. Paragraph 6 of the new schedule explains, for the purposes of paragraph 5, what amounts to the permitted maximum in relation to a qualifying lease. Paragraph 6(6) gives the Secretary of State the power to set out, in Regulations, how the value of a qualifying lease is to be determined.
24. Paragraph 7 of the new schedule gives the Secretary of State the power to make provision, in Regulations, for service charges to be limited to one fifth of the permitted maximum in a 12-month period. For example, where the permitted maximum is £10k, a maximum of £2k would be able to be charged in a given 12-month period.
25. Paragraph 8 of the new schedule provides also that no service charge is payable for cladding remediation where tenant is resident at the qualifying time. Paragraph 8(2) gives the Secretary of State the power, in Regulations, to define cladding remediation. This delivers on the Secretary of State’s commitment that no leaseholder living in their own home in a building above 11 metres will be required to pay for cladding remediation.

#### Justification for delegation

26. The powers in subsection (7) of new clause (meaning of “relevant building”) allow Regulations to be made setting out how a “storey” is to be defined and how the height of a building is to be measured. These provisions will be technical in nature. The Department does not consider it is necessary to include these detailed provisions in primary legislation. Secondary legislation is appropriate for this type of technical provision.
27. The power in new clause subsection (4) of new clause (meaning of “relevant defect”) is a power to define what amounts to completion and the meaning of “management company”. This will be a detailed and technical provision and may need to be varied with time. It would not be practicable to include such details in primary legislation. Providing a power for these details to be set out in secondary legislation will also enable the Department to engage with relevant stakeholders before provisions are made.
28. The powers in paragraphs 6(6), 7(1) and 8(2) of the new Schedule (remediation costs under qualifying leases) are technical in nature and may need to be varied

with time. It is not necessary to include such details in primary legislation. Providing powers for these detailed provisions to be set out in secondary legislation will also enable the Department to engage with relevant stakeholders before provisions are made.

#### Justification for procedure selected

29. Regulations under this new clause will be subject to the negative resolution procedure. These provisions will be of a detailed and technical nature and the Government considers it is appropriate they are subject to the negative resolution procedure.

#### **New Clause before clause 117: Building industry schemes**

#### **New Clause before clause 117: Building industry schemes: supplementary**

*Power conferred on:* Secretary of State  
*Power exercised by:* Regulations made by statutory instrument  
*Parliamentary procedure:* Negative procedure

#### Purpose and context

30. The Secretary of State announced on 10 January that industry had a responsibility to resolve the issues with unsafe cladding, through companies committing to remediate buildings with which they are associated and to contribute towards funding the remediation of other unsafe buildings. This clause will grant the Secretary of State powers to distinguish between industry actors that have and have not committed to act responsibly. Those actors who are considered 'responsible' will be those who have committed to rectifying building safety issues and are engaging positively in our ongoing talks with them to take accountability for making buildings safe. The clause will give the Secretary of State the power, in Regulations, to establish a building industry scheme (or schemes) and make provision for such a scheme, and subsection (2) of the new clauses provides that the Secretary of State must, in Regulations, set out the description of persons in the building industry who may be members of the scheme. Other new clauses laid at the same time (see below) set out in law the consequences which may be applied where someone eligible for membership of such a scheme refuses to join or having joined subsequently leaves or is removed from the scheme for failing to meet their commitments.

31. The new clause (building industry schemes: supplementary) provides further powers in respect of a building industry scheme. In particular, that the Secretary of State may maintain the scheme or may designate another person to maintain it. Regulations may also make provision as to applications for joining or renewing membership of a scheme, for suspension or termination of membership, for fees and for appeals in relation to a scheme.

#### Justification for delegation

32. The Secretary of State is currently engaged in talks with industry to seek to agree voluntary commitments to resolve the current building safety crisis. The provisions regarding a statutory scheme, together with use of the building and planning control measures discussed below, will remain under review through the course of these discussions. The purpose of any statutory industry scheme may be to lend weight to any industry agreement and the details of any scheme may therefore reflect the terms of any agreement which industry has committed to. It is therefore important that flexibility regarding the form of any scheme is retained whilst the talks are ongoing. It is therefore appropriate that certain matters are dealt with in Regulations. Further, the technical and procedural aspects of establishing a building industry scheme e.g. application procedures, time limits, fees, appeal procedures etc will be detailed administrative arrangements and may need to be varied with time. It would not be practicable to include such details in primary legislation. The Department does not consider it is appropriate for the technical and procedural details relating to such a scheme to be set out in primary legislation, it will also enable the scheme to be set up more quickly after Royal Assent. Providing a power for them to be set out in secondary legislation will also enable the Department to engage with the sector before provisions are made.

Justification for procedure selected

33. Regulations made under these new clauses will be subject to the negative resolution procedure in both Houses of Parliament. The Regulations will set out the technical and procedural rules in relation to such a scheme, such as the application procedures, fees and appeal procedures. We consider it is appropriate for provisions of a technical and procedural nature to be subject to the negative resolution procedure in Parliament.

**New Clause before clause 117: Prohibition on development for prescribed persons**

*Power conferred on:* Secretary of State  
*Power exercised by:* Regulations made by statutory instrument  
*Parliamentary procedure:* Negative procedure

Purpose and context

34. The Secretary of State announced on 10 January that industry had a responsibility to resolve the issues with unsafe cladding, through companies committing to remediate buildings with which they are associated and contribute towards funding the remediation of other unsafe buildings.

35. The Secretary of State explained that he was prepared to take all steps necessary to make this happen, including the use of planning powers.

36. This new clause provides a power to prohibit certain developers from carrying out relevant development where they are eligible to join a relevant scheme but have elected not to join, have been removed from or have left the scheme.

37. In particular the delegated powers allow the Secretary of State to set out in regulations:

- a. the class of persons to whom the prohibition applies;
- b. the description of development to which the prohibition applies;
- c. provision that a prescribed certificate under the Town and Country Planning Act 1990 may not be granted in certain cases, for example a Lawful Development Certificate under section 191 of that Act;
- d. requirements in relation to notification of commencement of development;
- e. the exceptions which may apply;
- f. matters in relation to enforcement.

#### Justification for delegation

38. The legislative framework for controlling development in the Town and Country Planning Act 1990 is complex, with considerable use of secondary legislation. Provisions to prohibit developers from carrying out development activity will necessarily also be complex. For this reason it is necessary to take powers to make these provisions in secondary legislation. This will also give the Department the opportunity to engage with the sector as to the form and content of the proposed legislative provisions before they are made. Taking delegated powers will also allow the legislative provisions to be amended in light of practical experience of operating them.

#### Justification for procedure selected

39. Regulations under this new clause will be subject to the negative resolution procedure in both Houses of Parliament as the provisions are detailed, complex and mostly technical and procedural in nature. The Government considers this is the appropriate level of scrutiny for provisions of this nature and it mirrors the existing procedure for secondary legislation made under powers in the Town and Country Planning Act 1990 in relation to technical and procedural requirements such as those specified in the Town and Country (Development Management Procedure) Order SI 2015/595 made under section 59 of that Act.

### **New Clause before clause 117: Building control prohibitions**

*Power conferred on:* Secretary of State  
*Power exercised by:* Regulations made by statutory instrument  
*Parliamentary procedure:* Negative procedure

#### Purpose and context



40. The context for this new clause is the same as that for the new clause (prohibition on development for prescribed persons).
41. This new clause creates building control prohibitions in respect of buildings or proposed buildings relating to persons of a prescribed description. In effect certain building control steps would be prohibited in relation to developers falling within the prescribed description. Under this new clause those developers would not be able to obtain building control approvals in relation to particular buildings or proposed buildings where they are eligible to join a relevant scheme but have elected not to join, have been removed from or have left the scheme.
42. A building control prohibition, in relation to a person, prohibits:
- a. the person from applying for building control approval or from depositing plans;
  - b. the person from giving an initial notice etc;
  - c. the granting of building control approval to the person;
  - d. the passing of plans deposited by the person;
  - e. the acceptance of an initial notice etc given by the person; or
  - f. the giving final certificate etc in relation to the works;
  - g. the person from giving a prescribed document (for example a completion certificate);
  - h. the giving of a prescribed document to the person or in respect of works carried out by the person;
  - i. the acceptance of any prescribed document given by the person or in respect of works carried out by the person.
43. In particular, the delegated powers allow the Secretary of State to set out in regulations:
- a. the prescribed class of persons to which the prohibition applies;
  - b. any prescribed document a person may be prohibited from giving or a local authority may not accept;
  - c. exceptions which apply;
  - d. the effect of doing something in contravention of a prohibition.

#### Justification for delegation

44. The legislative scheme in the Building Act 1984 and related secondary legislation is complex and provisions to prohibit developers from using the building control regimes in relation to their developments will necessarily also be complex. For these reasons it is necessary to take powers to make these provisions in secondary legislation. This will give the Department the opportunity to engage with the sector as to the form and content of the proposed legislative provisions before they are made. Taking delegated powers will also allow the legislative provisions to be amended in light of practical experience of operating them.

#### Justification for procedure selected

45. Regulations under this new clause will be subject to the negative procedure as they are technical and complex in nature. Much of legislation relating to building control is to be found in secondary legislation due to its technical and detailed nature. The Government considers that the appropriate level of scrutiny for these delegated powers is the negative resolution procedure.

#### **Clause 122(9)(d) and (10A): New homes ombudsman**

*Power conferred on:* Northern Ireland department and Executive Office in Northern Ireland  
*Power exercised by:* Regulations made by statutory Rule  
*Parliamentary procedure:* Affirmative procedure

#### *Purpose and context*

46. The purpose of the amendment to clause 122(9) is to give the appropriate Northern Ireland department the power to make Regulations about who is a “developer”. That department is to be selected by the First Minister and deputy First Minister, acting jointly. New subsection (10A) of clause 122 is to ensure that the Secretary of State, Welsh Ministers and Scottish Ministers will still be able to make such regulations for their own jurisdictions even if there is no Northern Ireland department designated in this way for the purposes of making regulations for homes in Northern Ireland, since they will be able to consult the Executive Office in Northern Ireland instead to fulfil the clause 122(10) requirement for prior consultation with each other “relevant national authority”. Amendments to clause 123 make provision for the procedure in relation to such regulations made by a Northern Ireland department.

#### *Justification for delegation*

47. As explained in the original memorandum there may be circumstances in which, once the scheme has been operating for a period, and the UK Government or a devolved administration has experience of the impact of the legislation, it becomes apparent that another category of legal person, such as a connected person to a developer, should properly be viewed as a developer and should be answerable under the scheme. This power is therefore designed to enable each relevant national authority to add to the definition of developer set out in the primary legislation to capture other persons who should be in scope and who should provide redress to consumers. There may be circumstances in future where the legislation does not work as intended in the context of a new person described as a developer without some further consequential, supplementary, incidental, transitional or saving provision, or for different provision to be made for different purposes.

48. The amendments to clauses 122 and 123 extend the delegated power in clause 122 to a Northern Ireland department to be nominated by the First Minister and deputy First Minister, acting jointly. It is clearly appropriate that the relevant body in Northern Ireland should have the same delegated powers as the other devolved administrations.

Justification for procedure selected

49. The amendment to clause 123 provides for the procedure for the regulations under clause 122 to be the affirmative procedure in the Northern Ireland Assembly.

50. If exercised, this power would impact on the legislative regime by adding to the categories of persons who may be developers and therefore required to become and remain members of the scheme for the relevant national authority which makes the regulations. Consequently, it is considered that the use of the power should be subject to the affirmative resolution procedure in the Northern Ireland Assembly.

**New Clause after clause 128: Costs contribution notices**

**New Schedule after Schedule 11: Costs contribution notices**

*Power conferred on:* Secretary of State  
*Power exercised by:* Regulations made by statutory instrument  
*Parliamentary procedure:* Negative procedure

Purpose and context

51. The purpose of the new clause is to allow the Secretary of State, through Regulations, to impose costs contribution requirements on certain persons in relation to construction products. It must be imposed via a notice.

52. The regulations may also specify other conditions which must be met before a costs contribution requirement is imposed on a person.

53. The new Schedule makes further provision as to the content of the Regulations including that they may make provision:

- a. for persons to apply to the Secretary of State for a costs contribution requirement to be made and the application procedures and time limits which will apply, and other procedural matters such as form of notices and methods of service;
- b. as to the appointment of persons to assess, for example, whether the conditions for imposition of a costs contribution requirement have been met;
- c. requiring persons to provide information to an assessor and to create criminal offences for failure to provide information or obstruct an assessor;

- d. for a person to pay for the costs of the assessor;
- e. as to the matters which the Secretary of State must take into account in determining, for example, whether to impose a costs contribution requirement;
- f. as to review of, and appeal against, the Secretary of State's decisions and enforcement of costs contribution requirements.

#### Justification for delegation

54. The legislative scheme for constructions products is to be set out in regulations made under Schedule 11 to this Bill. These Regulations have not yet been made and so it is not possible, in advance of those regulations being made, to know precisely what they will contain. As the provisions for costs contribution requirements necessarily interact with provision for construction products regulations it is necessary to take powers in secondary legislation. This will also give the Department the opportunity to engage with the sector as to the form and content of the proposed legislative provisions before they are made. Taking delegated powers will also allow the legislative provisions to be amended in light of practical experience of operating them.

#### Justification for procedure selected

55. Regulations under this new clause and new Schedule will be subject to negative resolution procedure as the provisions are of a procedural and technical nature. The provisions mainly set out the administrative arrangements relating to the costs contribution notices. The Government considers it is appropriate for powers of this nature to be subject to the negative resolution procedure.

### **New Clause after clause 128: Liability relating to cladding products**

*Power conferred on:* Secretary of State  
*Power exercised by:* Regulations made by statutory instrument  
*Parliamentary procedure:* Negative procedure

#### Purpose and context

56. New clause (liability relating to cladding products) provides, among other matters, that where a person who markets or supplies a cladding product makes a misleading statement, sells the product in breach of construction product regulations, or the product is inherently defective and that product is later attached to or included in the external wall of a relevant building and as a result the building becomes unfit for habitation (whether wholly or partly), then that person could be found liable to pay damages to a person with a relevant interest for personal injury, damage to property or economic loss suffered by them.

Subsection (8) of the new clause includes a power for the Secretary of State, by Regulations, to set out what amounts to a misleading statement.

*Justification for delegation*

57. The definition of misleading statement is likely to be complex and technical and the Government does not consider it is appropriate to include this level of detail in the primary legislation. Providing for the definition to be set out in secondary legislation will give the Department the opportunity to engage with the sector in relation to this defined term.

*Justification for procedure selected*

58. The power in subsection (8) of the new clause is subject to the negative resolution procedure in both Houses of Parliament. The definition of misleading statement will be technical in nature which the Government considers it is more appropriate to apply the negative resolution procedure to.

**Department for Levelling Up, Housing and Communities**

**14 February 2022**