

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

1. This second 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. A supplementary memorandum was prepared for the Government amendments tabled for Lords Committee on 14 February.
2. This memorandum identifies the Government amendments being tabled to the Bill at Report 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 12: Committees: power to amend or repeal**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary procedure: Affirmative procedure*

#### *Purpose and context*

3. In its report (published 10 February 2022) the Delegated Powers and Regulatory Reform Committee recommended that the exercise of the delegated power in clause 12 of the Bill (committees: power to amend or repeal) should not allow for repeal of clauses 9 to 11 by statutory instrument, even an affirmative one.
4. The Government has now brought forward amendments for Lords Report stage of the Bill to constrain the power in clause 12 such that repeal of sections 9, 10 or 11 is only possible under the power where the Building Safety Regulator has made that proposal to the Secretary of State.

#### *Justification for delegation*

5. As explained in the original delegated powers memorandum these three committees have been established on the face of the Bill to ensure that the recommendations of the Independent Review are met and the Building Safety Regulator has the benefit of expert advice and information related to its building functions and the standards of buildings and industry competence, and that residents have a strong voice in the work of the Building Safety Regulator.
6. However, over time the role and function of these committees and the Building Safety Regulator itself could change, for example if the scope of the more stringent regulatory regime changes or industry’s approach to competence

matures. It is appropriate that we reflect this and provide sufficient flexibility for the Building Safety Regulator to be able to adapt its committee structure to changing circumstances.

7. The Government has relied on the expert advice and experience of the Health and Safety Executive (HSE), as the future Building Safety Regulator, when developing clause 12. HSE has over forty years' experience delivering regulation at an appropriate distance from Government. HSE's advice has consistently been that this delegated power is needed to enable the committee structure to adapt and improve over time. Since 1974, HSE has witnessed major changes in both the profile of British industry and its own governance. This in turn has meant changes to HSE's 'industry' and 'subject' advisory committees reflecting industrial, technical, legal, and administrative developments. The committees on which the Health and Safety Executive can now call represent a rich mix of advisory and stakeholder-led bodies.
8. The amendment brought forward by the Government at Report stage ensures that the power to repeal a committee can only be used on the initiative of HSE, as the Building Safety Regulator. This is intended to provide reassurance that this power will only be used as intended, ie to adapt and improve the way the regulator engages stakeholders and experts over time.

#### Justification for procedure selected

9. Any regulations under clause 12 will remain subject to the affirmative procedure, including those for the repeal of a committee. This means that there are multiple safeguards in place to ensure that committee provisions can only be repealed as part of adapting and improving how the regulator engages experts and stakeholders. First, only the regulator may propose such a repeal, following consultation; second, this change will only be brought before Parliament if Ministers agree with the regulator that the change would be of benefit and lay the necessary regulations; and third, both Houses of Parliament must agree through the affirmative procedure.

### **Clauses 79 to 86: provisions relating to building safety managers**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

10. The purpose of the amendments to clauses 4, 60, 79 to 86, 112, 115, 116 and 118 and Schedule 7 is to remove references to building safety managers from the in-occupation regime. The Government has reflected on the concerns that it is not proportionate to require a building safety manager to be appointed for each higher-risk building. The amendments to these clauses will remove that requirement and make necessary consequential amendments. This will give Accountable Persons flexibility to ensure their arrangements are most suitable to their building and residents.

11. The delegated powers to make regulations as respects building safety managers have been removed from the Bill ie in clause 79(1)(a), 80(5)(a), 81(1), 83, 85 and 86.

### **Clauses 95(1), (4) and (6): residents engagement strategy**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary procedure: Negative procedure*

#### *Purpose and context*

12. The purpose of clause 95 is to give residents a stronger voice in relation to the safe management of their homes. As explained in the original Delegated Powers Memorandum the clause requires that the Principal Accountable Person produce a Residents' Engagement Strategy for promoting the participation of residents in building safety decisions made about their building.

13. The amendments to clause 95 give the Secretary of State the power by regulations to set out the circumstances where the principal accountable person must consult residents, owners and other persons on the strategy (and the power to prescribe any additional persons to be consulted beyond the residents and owners of the higher-risk building).

14. The amendments also allow the Secretary of State to prescribe further persons who should receive a copy of the Strategy (beyond residents and owners), to make further provision in relation to consultation on it and to make provision about its preparation, review or revision in circumstances where there is more than one Accountable Person in the building. Regulations made under these powers will be subject to the negative procedure.

#### *Justification for delegation*

15. The new regulation-making powers under subsection (1)(c), 4(c) and (6) will be used to provide additional requirements for consultations on a Residents' Engagement Strategy. This will require a level of detail, that would not be suitable for inclusion in primary legislation. In addition, the regulations might need to be updated over time to adjust to evidence from experience and emerging issues from across the sector.

#### *Justification for procedure selected*

16. For these powers, our intention is that any regulations will be developed in consultation with building residents, managers and owners. The regulations might need to be updated over time to adjust to evidence from experience and emerging issues from across the sector or to take account of evolving good practice. Given our intention that any regulations would be developed in consultation with a wide range of stakeholders, it is unlikely that any changes will

be controversial, therefore we consider the negative procedure is appropriate for these provisions.

### **New clause after Clause 114: Directors of resident management companies**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary procedure: Negative procedure*

#### *Purpose and context*

17. The new clause (directors of resident management companies) provides that the Secretary of State may, by regulations, provide that the articles of association of a resident management company (as defined in regulations) have effect as if they include provision set out in the regulations in relation to appointing a director for the company for the purpose of supporting the resident management company in complying with their duties under Part 4 and related regulations, the eligibility of a person for such an appointment and the remuneration and removal of that director. There is also a power for the regulations to define which companies are resident management companies. The purpose of the new clause is to ensure that every resident management company has the legal power to appoint a director to support the company to comply with the duties of the accountable person under Part 4 of the Bill. The regulations are subject to the negative procedure.

#### *Justification for delegation*

18. The delegated powers have been included as it is considered more appropriate for the technical detail of the articles of association of such resident management companies to be set out in secondary legislation. Also it would not be appropriate to set out the form of the articles of association of such companies on the face of the Bill without first consulting with the sector. Further, setting out detail of this nature on the face of the Bill would mean the regime would not be flexible enough to respond to issues which arise. In relation to the definition of resident management company this is a detailed technical provision which is more appropriate to include in secondary legislation than on the face of the Bill.

#### *Justification for procedure selected*

19. The delegated power in the new clause is technical and procedural and we consider it is appropriate they are subject to the negative procedure in both Houses of Parliament.

### **Clauses 115: implied terms in leases and recovery of safety related costs – section 30D(7) to (9) of the Landlord and Tenant Act 1985**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*  
*Parliamentary procedure: Affirmative procedure*

*Purpose and context*

20. The amendments to clause 115 remove the building safety charge as a separate charge and instead provides that building safety costs for building safety measures form part of the service charge. The list of ‘building safety measures’ in new subsection (5B) are those steps or actions required of the Accountable Person pursuant to the duties under Part 4 of the Bill, the cost of which can be passed onto leaseholders via the service charge. These are management or running costs connected to the new regime.
21. New subsections (7) to (9) which are inserted into section 30D of the Landlord and Tenant Act 1985 give the Secretary of State the power, in regulations, to amend the definition in section 30D(5B) of “building safety measures” to add, remove or modify a measure. These regulations are subject to the affirmative procedure in both Houses of Parliament. A power equivalent to the above power was previously included in Schedule 8 to the Bill (Schedule 8, which related to the building safety charge, has now been omitted).

*Justification for delegation*

22. The detailed list of building safety measures has been included on the face of the Bill to demonstrate that they relate to the management costs of the new regime and will not include the cost of remediation works. It may become apparent, once the regime is in operation, that there are additional measures which should be included or measures which need to be clarified, to ensure workability. It is desirable that the ability to make any necessary adjustments through regulations is established, to help ensure the smooth-running of the regime.

*Justification for procedure selected*

23. Regulations under new section 30D(7) of the Landlord and Tenant Act 1985 will be subject to the affirmative procedure in both Houses of Parliament. This is considered appropriate as, whilst changes made under the regulations are likely to be technical and uncontroversial, the regulations will amend provisions contained in primary legislation.

## **Clauses 115: implied terms in leases and recovery of safety related costs – section 20F(3)(d) of the Landlord and Tenant Act 1985**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary procedure: Negative procedure*

### *Purpose and context*

24. The purpose of clause 115 is to imply terms into leases related to building safety and make provision about the costs to leaseholders of complying with the new regime. The amendments to clause 115 remove the building safety charge as a separate charge and instead provide that building safety costs for building safety measures form part of the service charge. The amendment inserts section 20F into the Landlord and Tenant Act 1985 which provides that certain costs may not be taken into account in calculating service charges, including penalties imposed on the landlord by the regulator.

25. New subsection (3)(d) of section 20F of the Landlord and Tenant Act 1985 gives the Secretary of State the power, in regulations, to add further items into the list of costs which may not be taken into account in calculating service charges. These regulations are subject to the negative procedure in both Houses of Parliament. A power equivalent to the above power was previously included in Schedule 8 to the Bill (Schedule 8, which related to the building safety charge, has now been omitted).

### *Justification for delegation*

26. In the event of the operation of the new regime revealing that there is a category of costs which ought not in fairness to be passed on to leaseholders, the power to prescribe in section 20F(3)(d) of the Landlord and Tenant Act 1985 will enable the Secretary of State to be responsive to the issue.

### *Justification for procedure selected*

27. Regulations under section 20F(3)(d) of the Landlord and Tenant Act 1985 will be subject to the negative procedure in both Houses of Parliament. This is considered appropriate: any changes will be in accordance with review of and feedback on the operation of the regime, and are unlikely to be controversial.

## **Clauses 120(3), 123(10) and 126(5) and (6) and paragraphs 3A(4) and (6), 6(6A), 10(4), 12A, 12B and 13A of Schedule 9: provisions relating to leaseholder protections**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary procedure: Negative procedure*

Purpose and context

28. Through these amendments the Government has moved more detail in relation to leaseholder protections onto the face of the Bill and consequently it has been possible to remove the following delegated powers to make regulations from the Bill: clause 120(2)(c), 120(7) and 122(4).
29. The effect of the amendment to clause 120(3) provides that “relevant building” does not include a building which is leaseholder owned, and the provision provides that “leaseholder owned” will be defined in regulations. The inclusion of a new subsection (10) in clause 123 (associated persons) allows the Secretary of State, by regulations, to modify how the provisions on associates in subsections (2), (2A) and (3) have effect in relation to clauses 124 to 127 and Schedule 9 in certain cases. An amendment to clause 126(5) (remediation contribution orders) allows the Secretary of State, by regulations, to add to who may be an “interested person” and therefore be able to make an application to the First-tier Tribunal for a remediation contribution order. The inclusion of new subsection (6) in clause 126 gives the Secretary of State the power, by regulations, to apply (with or without modifications) clause 126 to buildings that are not relevant buildings because of clause 120(3) i.e. self-contained buildings or self-contained parts of buildings which have collectively enfranchised or are commonhold.
30. We are inserting a new paragraph 3A into Schedule 9 (remediation costs under qualifying leases). Paragraph 3A provides that no service charge is payable under a qualifying lease in respect of a relevant measure (defined in paragraph 1 of the Schedule e.g. measures taken to remedy a relevant defect as defined in clause 120) if the net worth of landlord and any associated companies is more than the amount specified in paragraph 3A(2). There is a power in paragraph 3A(4)(b) for the Secretary of State to set out in regulations how net worth of a landlord’s group is to be determined and a power in paragraph 3A(6)(c) disapply the provision where the relevant landlord is a prescribed person.
31. We are inserting a new sub-paragraph (6A) into paragraph 6 of Schedule 9. Paragraph 6 is supplementary to paragraph 5 which provides that a service charge is only payable if the service charge does not exceed the permitted maximum. Paragraph 6 sets out the permitted maximum amounts by reference to the value of the lease in question. Paragraph 6(6) provides that the Secretary of State may by regulations make provision as to how the value of a lease is calculated. New paragraph 6(6A) provides that those regulations may in particular provide that the value is to be determined by ascertaining the purchase price paid on the most recent purchase updated in accordance with the regulations, for example by using a house price index.
32. We are inserting a new sub-paragraph (4) into paragraph 10 of Schedule 9. Paragraph 10 is supplementary on the rest of Schedule 9. The new power in paragraph 10(4), is consequential on new paragraph 2(A1) (which is inserted by another Government amendment, and allows the Secretary of State, by regulations, to make provision as to application of the provisions of Schedule 9 to premises within a relevant building which do not include a dwelling i.e. the commercial part of such a building.

33. We are inserting a new paragraph 12A into Schedule 9 (remediation costs under qualifying leases). Paragraph 12A provides that certain leases are taken to be qualifying leases unless certain steps are taken by the landlord of the lease to obtain a qualifying lease certificate from the tenant. Paragraph 12A(2)(a) provides that the Secretary of State, by regulations, may prescribe steps that must be taken by such a landlord and paragraph 12A(3) and (4) provide that regulations may set out any requirements a certificate must comply with. Paragraph 12B(1) provides that certain leases are taken to be qualifying leases unless steps are taken without a tenant providing a certificate and landlords are taken to have met the contribution condition unless they provide a certificate. There is a power in paragraph 12B(1) for the Secretary of State to prescribe in regulations the requirements for such certificates. Paragraph 12B(2) provides a power to prescribe, by regulations, that certain leases are taken to be qualifying leases in relation to paragraph 2(1) of Schedule 9, which relates to landlords responsible for defects.
34. We are inserting a new paragraph 13A into Schedule 9 as to the information which landlords must provide to specified persons. Paragraph 13A includes the power for the Secretary of State, by regulations, to require landlords to provide prescribed information or documents relating to any matter for which Schedule 9 is concerned to a relevant tenant or other prescribed persons. The regulations may set out the way in which the information is to be provided, and that certain costs may not be included in a service charge if a landlord does not comply with an information request. The regulations may also include provision as to application to the First-tier Tribunal for an order to determine whether a landlord has complied with the regulations and requiring the landlord to provide the information requested.

#### Justification for delegation

35. Through the amendments relating to leaseholder protections, we have added more detail onto the face of the Bill and removed some delegated powers.
36. In relation to the new delegated powers included in clauses 120, 123 and 126 and Schedule 9 it is considered more appropriate for the technical and procedural detail as to the interested persons; defining what is meant by leaseholder owned; the determination of net worth, how the value of lease is to be determined; how to modify the provisions of Schedule 9 in their application to commercial parts of buildings; the steps a landlord must take, the requirements as to certificates, and the provision of information by landlords to be set out in secondary legislation. Further, setting out detail of this nature on the face of the Bill would mean the regime would not be flexible enough to respond to issues which arise.

#### Justification for procedure selected

37. The new delegated powers in clauses 123 and 126 and paragraphs 3A(4) and (6), 6(6A), 10(4), 12A(2), 12B(1) and(2), and 13A of Schedule 9 are technical and procedural and we consider it is appropriate they are subject to the negative procedure in both Houses of Parliament.



## **Paragraph 3A(5) of Schedule 9: provisions relating to leaseholder protections**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary procedure: Affirmative procedure*

### *Purpose and context*

38. Through the amendments mentioned in the previous paragraphs the Government has moved more detail in relation to leaseholder protections onto the face of the Bill. Those amendments include inserting a new paragraph 3A into Schedule 9 (remediation costs under qualifying leases). Paragraph 3A provides that no service charge is payable under a qualifying lease in respect of a relevant measure if the net worth of landlord and any associated companies is more than the amount specified in paragraph 3A(2) i.e. £2,000,000 per relevant building. The power in paragraph 3A(5) provides that the Secretary of State may, by regulations, amend this amount.

### *Justification for delegation*

39. The Government considers that the ‘contribution condition’ set out by new paragraph 3A is important to include in primary legislation, as it sets out the circumstances in which building owners and landlords will be prevented from passing on costs to leaseholders. However, a degree of flexibility is needed to ensure that the £2,000,000 threshold is the correct one, and so we have taken this limited power to allow the amount to be amended.

### *Justification for procedure selected*

40. This power is a Henry VIII power which allows the Secretary of State to amend the amount specified in paragraph 3A(2). While the power is limited in that it can only be used to amend the amount specified, the Government acknowledges that Parliament will wish to scrutinise any new amount set under the new delegated power in paragraph 3A(5) of Schedule 9 and considers it is appropriate that the power is subject to the affirmative procedure in both Houses of Parliament.

## **Clauses 57 and 128 to 131: developer levy, building industry schemes, prohibition on development for prescribed persons and building control prohibitions**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary procedure: Affirmative procedure*

### *Purpose and context*

41. The purpose of clauses 128 to 131 as explained in the first supplementary delegated powers memorandum are to give the Secretary of State the power, in Regulations, to establish a building industry scheme (or schemes) and make provision for such a scheme (clauses 128 and 129). Clauses 130 and 131 set out in law the consequences which may be applied to persons of a prescribed description, which may in particular include someone eligible for membership of such a scheme who refuses to join or having joined subsequently leaves or is removed from the scheme for failing to meet their commitments. The Government has amended clause 158 to provide that the regulations made under clauses 128 to 131 are each subject to the affirmative procedure in both Houses of Parliament.
42. The Government is also making a number of other amendments to clauses 57, 128, 129, 130 and 131. The amendments to clause 128 include new subsections (3), (4) and (4A) which include delegated powers enabling a scheme to be set up and provide more detail of membership conditions that may be prescribed, including for example a condition requiring an eligible person to ensure that no prescribed product of prescribed persons is used in prescribed cases. New subsection (6) of clause 128 provides that regulations may make provision about the keeping and publication of lists. The amendments to clause 129 include inserting new subsections with new delegated powers, including that regulations may make provision about procedures relating to membership of a scheme under clause 128 (previously clause 129 provided for them to be set out in a document published by the Secretary of State). New provisions in clause 129 provide that the regulations may make provision as to disputes and provision as to termination of a scheme. The amendments to clauses 130 and 131 provide that the description of persons who may be prescribed, in regulations, as subject to the prohibitions in clauses 130 and 131 include persons who are eligible to join a clause 128 scheme but are not a member.
43. There is also an amendment to clause 57 which is consequential on the amendments to clause 128. We have amended clause 57 to provide that the different provision that may be made in regulations under that clause include different provision based on a person's membership of the scheme under clause 128. The amendment means persons who are eligible to join a clause 128 scheme but are not a member could face a higher levy.

#### Justification for delegation

44. As mentioned in the first supplementary delegated powers memorandum, 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. The Government does not consider it is appropriate for

the technical and procedural details relating to such a scheme in clauses 128 and 129 and the consequences in clauses 130 and 131 to be set out in primary legislation.

#### Justification for procedure selected

45. We have changed the procedure for the regulations made under clauses 128 to 131 so instead of being subject to the negative resolution procedure they are subject to the affirmative resolution procedure in both Houses of Parliament as we consider it is important for such regulations to be scrutinised in both Houses before being made.

#### **New clause after clause 133: order for information in connection with building liability order**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary procedure: Negative procedure*

#### Purpose and context

46. The new clause (order for information in connection with building liability order) gives the Secretary of State a power to allow the High Court to place an information order specified body corporate which would require them to share information about their associated companies. The power allows for prescribed persons to petition the High Court to request an information order be placed on a specified body corporate. The clause allows for the Secretary of State, by regulations, to prescribe the description of persons who can apply to the court for such an order.

47. The intent behind this power is to support those who wish to be granted a building liability order under clause 132. The building liability order clauses allow for the courts to make a 'building liability order' when it is just and equitable to do so. Once granted, a building liability order will mean that a certain liability of an original company is also a liability of specified associated companies, and the original and associated companies may be joint and severally liable.

48. The amendment is needed as we are concerned that companies may use ever more complex and opaque structures to prevent a building owner, landlord or leaseholder from being able to prove who is an associated company and therefore undermine the intended outcome of building liability orders. The duty to disclose information about associated companies would provide a route for persons to obtain information in order to support them applying for a building

liability order and support them receiving adequate recompense from the industry which caused the issues.

#### Justification for delegation

49. The delegated powers have been included as it is considered more appropriate for the detail of the provisions as to who may apply for an order to be set out in secondary legislation. It would not be appropriate to list the detail of who prescribed persons are on the face of the Bill. These persons may change over time, and secondary legislation provides the flexibility to amend if this is the case.
50. Providing powers for these detailed provisions to be set out in secondary legislation will also enable the Government to engage further with relevant stakeholders before provisions are made.

#### Justification for procedure selected

51. The Government considers it is appropriate for this provision to be subject to the negative procedure in Parliament as the provisions will be of a detailed technical nature.

### **New clauses after clause 144: New build home warranties and New build homes warranties: financial penalties**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary procedure: Negative procedure*

#### Purpose and context

52. The first of these two new clauses (New build home warranties), which applies to newly created dwellings in England, provides that a developer must provide the purchaser a new build home warranty.
53. Subsection (2) of the new clause gives the Secretary of State the power to prescribe the persons who will be entitled to a new building home warranty in relation to the common parts of a building.
54. Subsection (3) of the new clause gives the Secretary of State the power to prescribe the persons who will benefit from any insurance policy relating to defects within the new build home warranty.
55. Subsection (4) of the new clause gives the Secretary of State the power to make regulations which impose requirements as to the kinds of defects to which the warranty applies, the circumstances in which a developer must agree to remedy

a defect, the costs a developer must meet, the insurance policies, solvency of the insurer or underwriter, their standard of service and the ability to transfer the benefit of the warranty. Subsection (5) state that the regulations must provide for the insurance cover to be at least 15 years from date of purchase of the home.

56. The second of these new clauses (New build home warranties: financial penalties), is supplementary to the first new clause. It provides in subsection (1) that the Secretary of State may, by regulations, impose financial penalties where the Secretary of State (or his designate) is satisfied beyond reasonable doubt that someone has failed, without a reasonable excuse, to comply with the first clause (New build home warranties). Subsection (2) provides that the regulations may include a procedure for imposing the financial penalties, the amount of the penalties and about adding interest or additional penalties for late payment to the penalties and provisions as to appeals. Subsection (3) provides that the regulations must provide that the amount of any financial penalty may not exceed 10% of the relevant interest or £10,000 whichever is the greater.

#### Justification for delegation

57. The delegated powers have been included as it is considered more appropriate for the technical detail of the provisions of the new building home warranty and the financial penalties to be imposed for breaching the warranties to be set out in secondary legislation. It would not be appropriate, for example, to list all the types of defects on the face of the Bill without first consulting with the sector. Further, setting out detail of this nature on the face of the Bill would mean the regime would not be flexible enough to respond to issues which arise as the scheme develops.

#### Justification for procedure selected

58. We consider it is appropriate for these technical provisions in relation to the new build homes warranty and the financial penalties to be subject to the negative procedure in Parliament.

### **New Clause after clause 145: Costs contribution orders made by the Secretary of State**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory Instrument*

*Parliamentary procedure: Affirmative procedure*

#### Purpose and context

59. This new clause provides that the Secretary of State may make provision, in Regulations, as to the making of a costs contribution orders by the Secretary of State. This can only be made following a successful prosecution under construction product regulations. The regulations may only make provision where certain conditions, including conditions set out in the regulations, have been met. A costs contribution order is an order made by the Secretary of State

requiring a defaulter to pay an amount to a person with a prescribed interest in a building or dwelling within the building. The Regulations may set out the interests to which the orders apply. Regulations must provide for the amount to be paid to be such amount as the Secretary of State considers just and equitable in relation to making the building or dwelling fit for habitation. The Regulations may make provision as to:

(a) matters which may or must be taken into account by the Secretary of State making a determination;

(b) the issue by the Secretary of State of warning notices before determining whether to make a costs contribution order;

(c) the form and content of a costs contribution order;

(d) how and whom an order is to be served;

(e) the enforcement of orders;

(f) payment of costs incurred by the Secretary of State in making an application under new clause (costs contribution orders: assessments);

(g) how orders relate to other remedies, for example, so that a person does not incur liability more than once in respect of the same costs;

(h) review by the Secretary of State of a costs contribution order;

(i) appeals to a court or tribunal in relation to a decision etc of the Secretary of State in relation to such orders,

(j) suspending the requirement to pay an amount due under an order while a review or appeal takes place.

#### Justification for delegation

60. The powers in the new clause will be detailed technical provisions and may need to be varied with time. It would not be practicable to include such level of details in primary legislation. We do not consider it is appropriate for the detailed provision relating to such orders to be set out in primary legislation.

#### Justification for procedure selected

61. 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.

### **New Clause after clause 145: Costs contribution orders made by courts**

*Power conferred on: Secretary of State*  
*Power exercised by: Statutory Instrument*  
*Parliamentary procedure: Affirmative procedure*

### *Purpose and context*

62. This new clause provides that the Secretary of State may make provision, in Regulations, as to the making of a costs contribution orders by a court on application by the Secretary of State. This can only be made following a successful prosecution under construction product regulations. The regulations may only make provision where certain conditions, including conditions set out in the regulations, have been met. A costs contribution order is an order made by court requiring a defaulter to pay an amount to a person with a prescribed interest in a building or dwelling within the building. The Regulations may set out the interests to which the orders apply. Regulations must provide for the amount to be paid to be such amount as the court considers just and equitable in relation to making the building or dwelling fit for habitation. The Regulations may make provision as to:

- (a) matters which may or must be taken into account by a court in determining whether, against whom and in favour of whom to make a costs contribution order;
- (b) the amount required to be paid by a person under a costs contribution order;
- (c) the enforcement of orders;
- (d) court powers to order payment of costs incurred by the Secretary of State in making an application under new clause (costs contribution orders: assessments);
- (e) how orders relate to other remedies, for example, so that a person does not incur liability more than once in respect of the same costs.

### *Justification for delegation*

63. The powers in the new clause will be detailed technical provisions and may need to be varied with time. It would not be practicable to include such level of details in primary legislation. We do not consider it is appropriate for the detailed provision relating to such orders to be set out in primary legislation.

### *Justification for procedure selected*

64. 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.

## **New Clause after clause 145: Costs contribution orders: assessments**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory Instrument*

*Parliamentary procedure: Affirmative procedure*

### *Purpose and context*

65. This new clause provides that the Secretary of State may make provision, in Regulations, as to the appointment of persons by the Secretary of State to assess (a) whether the conditions for imposition of a costs contribution orders by the Secretary of State or by a court have been met; (b) the works required to make a building or dwelling fit for habitation; (c) what interest in a property a person has; (d) the costs the person has reasonably incurred in respect of the works; and (e) the amount a person should be required to pay under a costs contribution order. The regulations may set out criteria which an assessor must meet to be appointed, and the regulations may confer powers on the assessor to require person to provide information, and the regulations may include criminal offences for failure to provide the information or for providing false or misleading information (which must be triable summarily or either way, and that it is punishable by a fine and / or imprisonment). And the regulations may make provision in relation to securing that there is no contravention of data protection legislation.

### *Justification for delegation*

66. The powers in the new clause will be detailed technical provisions and may need to be varied with time. It would not be practicable to include such level of details in primary legislation. We do not consider it is appropriate for the detailed provision relating to such orders to be set out in primary legislation.

### *Justification for procedure selected*

67. 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.

## **Clause 159: Extent: construction products – Northern Ireland**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory Instrument*

*Parliamentary procedure: Negative procedure*

### *Purpose and context*



68. This amendment to clause 159 (extent) provides that the Secretary of State may make provision, in Regulations, to extend new clauses (Liability relating to construction products: general definitions) to (Liability for past defaults relating to cladding products) to Northern Ireland and as to the application of those new clauses to Northern Ireland. Regulations under this power are subject to the negative procedure.

Justification for delegation

69. It has been necessary to provide a delegated power in order to extend and apply the provisions to Northern Ireland because it has not been possible to progress the proposals with the Northern Ireland Executive in recent months.

Justification for procedure selected

70. Regulations under this new clause will be subject to the negative resolution procedure as they will be technical provisions which extend and apply the provisions to Northern Ireland.

**Schedule 12, paragraph 21: construction products regulations**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary procedure: Affirmative procedure*

Purpose and context

71. The amendment to paragraph 21 provides that the construction product regulations provided for by Schedule 12 may include provision which is consequential on new clause (Liability relating to construction products). In particular consequential amendments may include omitting or amending paragraph (b) and (c) from Condition A in that clause ie application of the clause to persons who market or manufacture construction products.

Justification for delegation

72. Providing for the power to make consequential amendments in secondary legislation will give the opportunity to engage with the sector in relation to these issues before making the regulations. In particular, the intention is to have flexibility to disapply these paragraphs at a certain point in time, should regulations made under Schedule 12 cover the same ground.

Justification for procedure selected

73. We have provided that where construction products regulations make consequential amendments to new clause (Liability relating to construction products) they will be subject to the affirmative resolution procedure. We

consider it is important for both Houses of Parliament to scrutinise such consequential amendments.

## **Schedule 12, paragraph 23: construction products – list of safety-critical products**

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary procedure: Affirmative procedure in some cases*

### *Purpose and context*

74. In its report on the original delegated powers memorandum for the Bill the Delegated Powers and Regulatory Reform Committee recommended that the exercise of the delegated power in paragraph 10(1) of Schedule 12 to the Bill (list of safety-critical products) should be subject to the affirmative procedure. The Bill already provides for first exercise of the power to be subject to the affirmative procedure. The Government has now brought forward amendments for Lords Report stage of the Bill to provide that any removal of product from the list of safety-critical products should be subject to the affirmative procedure.

### *Justification for delegation*

75. The Government does not consider it is sensible for lists of safety-critical products to set out on the face of the Bill and therefore we consider it is appropriate for these products to be listed in secondary legislation.

### *Justification for procedure selected*

76. We agree with the Committee that it is important for the removal of a product from the list of safety-critical products to be subject to greater scrutiny of Parliament and have, by the amendment, provided for this.

**Department for Levelling Up, Housing and Communities**  
**22 March 2022**