



## Insurance in Construction (2020)

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## Insurance in Construction (2020)

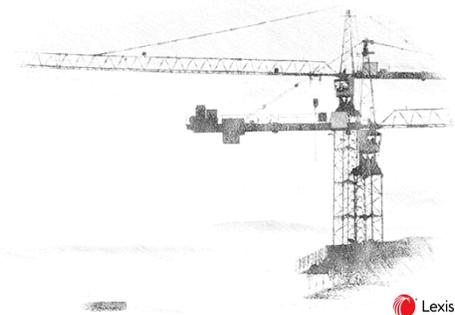
The law as stated during this webinar is up to date as of **20<sup>th</sup> January 2021**



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# Introductions



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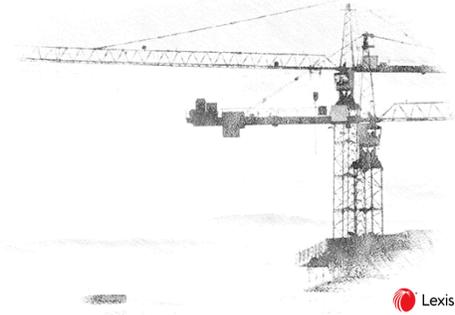
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# Insurance in Construction (2020)

## Notifications under professional indemnity policies relating to fire safety and external wall construction

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### Fire safety and external wall construction

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## Scope of notification

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### Scope of notification

- Concerns over fire safety in external wall construction have evolved over recent years, leading to defects being discovered over time. Factors contributing to this have been:
  - opening up as part of a remedial scheme;
  - inspections for the purpose of obtaining an EWS1 form;
  - investigations made in support of an application to the Building Safety Fund for funding for replacement of ACM and non-ACM cladding systems.
- Professional indemnity policies are written on a claim made basis, but include a deeming provision for 'circumstances'.
- Notification over time may lead to:
  - two or more claims in one policy period
  - two or more claims over more than one policy period

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## Scope of notification

- How does the law determine the number of claims for policy purposes? It may depend on the policy terms and circumstances.
- Subject to this, what is a claim?
  - “Claim” does not mean the same thing as cause of action and multiple causes of action may amount to an individual claim. It is necessary to look at the underlying facts to determine whether what has been claimed is one object or a number of objects.
  - The fact that allegations concern distinct physical defects does not mean they are separate claims: **Trollope & Colls Ltd v Haydon**.
  - The contents of any relevant communication(s) by the claimant are not determinative, but are relevant, and may be a good starting point.
  - It depends on the facts of each case whether later complaints are an enlargement of an existing claim or are separate claim(s).
  - Where a claim is described in general terms, i.e. in a protective Claim Form: “What is or may be covered by a generally described claim simply depends upon what are in context the matters which can properly be described as covered by the particular claim.”

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## Scope of notification

- How does the law determine the scope of a notification of a circumstance?
- Again it may depend on the policy terms, but the general legal test is objective, taking account of the insured’s actual knowledge: **HLB Kidsons (A Firm) v Lloyds Underwriters Subscribing to Lloyds Policy No 621/PKID00101 & Ors, Rev 1 [2007] EWHC 1951 (Comm)**
- “76. ...it is in my view largely a question of interpretation and analysis of the document setting out the notification, in the context of the facts known to the assured ... There may well be uncertainty at the time of notification as to what the precise problems or potential problems are; there may be, whether known, or unknown, to the assured a 'hornets' nest which may give rise to numerous types of claims of presently unknown quantum and character at the date of the notification. Whilst in principle, there is no reason why such a state of affairs should not be notified as a circumstance if the assured is aware of it, in each case the extent and ambit of the notification and the claims that are covered by such notification will depend on the particular facts and terms of the notification.

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## Scope of notification

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78. Fifthly, I also accept [Counsel's] submissions that, when [the circumstance notification clause] refers, in the context of notice having been given, to "any loss or claim to which the [notified] circumstance has given rise", it requires that the loss or claim should be sufficiently causally related to the fact, event, happening or condition which comprises the notifying circumstance, that it can be fairly said to have arisen out of it."

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## Scope of notification

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- **Kajima UK Engineering Ltd v The Underwriter Insurance Company Ltd [2008] EWHC 83 (TCC)**
- Observations in paragraph 99 including the following:
  - The insured must be aware of the circumstances it is notifying. That certainly does not require a complete understanding, but the insured cannot simply say there may be some unknown and unidentified defects;
  - "Any claim which arose consequently from the notified circumstances would arise from those circumstances. There must be some causal, as opposed to some coincidental, link between the notified circumstances and the later claim."

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## Scope of notification

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- **Euro Pools plc (in administration) v Royal and Sun Alliance Insurance plc [2019] EWCA Civ 808**
  - Movable booms in a swimming pool not rising and falling properly
  - At the time of notification Euro Pools said it was not sure of the cause but that it thought it was an issue with the tanks and had devised a solution.
  - The solution did not work and some time later the problem was traced back to the air drive system.
  - Did the scope of the notification encompass the air drive system?
  - Commercial Court: no. Court of Appeal: yes, there was a casual connection between the defects in the air drive systems and the problems experienced with the booms.
  - Accordingly, there was one claim under the original notification. In commercial terms, this meant it exceeded the limit of indemnity.

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## Scope of notification

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- **The Cultural Foundation (t/a American School of Dubai) and another v Beazley Furlonge Ltd and others [2018] EWHC 1083 (Comm)**

Where the definition of circumstance requires that it “suggests that a claim is likely”, a ‘hornets’ nest’ type notification may not be a valid one.

Do look at the particular policy wording, including of deeming provision, it may influence the precise test to be applied.

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## Scope of notification

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- Possible application to fire safety and external wall construction
  - A notification specific to the use of a particular type of cladding panel will have limited potential to have a sufficient causal connection to other matters. If the notification is about the cladding system more generally, that would give it greater potential, but very possibly not enough to extend to other cladding or façade systems on the same building if there is no causal connection.
  - Equally, even if the notification is expressed in broad terms, it will be construed in context. If, for example, there was clearly no consideration beyond a particular system at the time, it may be difficult to say that the notification was capable of being any wider than that.
  - It is also possible that multiple claims may arise from a single notification of a circumstance despite the initial communication referring to all relevant matters:
    - Where there are different parties and different contracts, this may point to separate claims for policy purposes.
    - What if there is one contract for different buildings relating to the same default?
    - What if there is one contract for different buildings relating to different defaults?
- Waiver by estoppel – insurers who wish to take the point that matters are separate claims should do so promptly or at least reserve their position.

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## Aggregation

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## Aggregation

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- A policy may have an aggregate limit of indemnity for all claims or for specified risks. It is now common to see aggregate limits for claims relating to fire safety and/or cladding systems.
- A policy may also have an aggregation clause treating individual claims as a single claim for the purpose of the excess and/or limit of indemnity.
- Such clauses tend to operate by identifying a common 'unifying factor'. Those might be:
  - event, occurrence, incident
  - act, error, omission
  - matters, transactions
  - proximate cause, underlying cause
- There might be a combination of such terms, i.e. event or series of events arising from the same proximate cause, similar acts or omissions in related matters.

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## The Building Safety Bill

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## Building Safety

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- Programme:
  1. Recap – The Bill & Background
  2. A Reformed Building Safety System – what is involved?
  3. What the changes mean for insurers?
  4. Case Studies
  5. Cladding Remediation Fund

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## Building Safety Bill Published - 20 July 2020

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- The Building Safety Bill
  - Complex legislation. 5 Parts, 119 sections and 8 Schedules.
  - Part 2- establishes a new Building Safety Regulator.
  - Part 3 - new regulatory regime during the design and construction phase for higher-risk buildings.
  - Part 4 - concerned with higher-risk buildings when they are occupied, defines and places duties on the Accountable Person.
  - Detailed Explanatory Notes set out scope of necessary secondary legislation.

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## 1. Recap – The Bill & Background

- Torre Windsor (Madrid) – February 2005 – Fire during refurbishment works; fire spread from the upper floors leading to the demolition of the tower. Cladding exacerbated fire spread.
- Lakanal House – July 2009 - The exterior cladding panels had burned through in less than five minutes.



Grenfell Tower – June 2017

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## 1. Recap – The Bill & Background

### Building a Safer Future

Independent Review of Building Regulations and Fire Safety:  
Final Report

May 2018 – Report. Findings included:

- Ignorance and indifference;
- Need for a “radical rethink” of the building safety system and how it works;
- Roles and responsibilities are unclear and competence is patchy;
- Inadequate regulatory oversight and enforcement tools;
- Over 50 recommendations made.

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## 1. Recap – The Bill & Background



- December 2018 - Government Implementation Plan
- Create effective regulatory and accountability framework.
- Work with industry to drive culture change to increase responsibility for building safety (inc. competency of those undertaking building work).
- Construction and fire safety sectors to work holistically on building safety – focusing beyond own disciplines.
- Joint Regulators Group to work with Early Adopters to test the proposals.

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## 1. Recap – The Bill & Background

June 2019 Consultation:

- Key proposals for the reform of the building safety regulatory system.
- Multi occupied residential buildings of 18m high or more (i.e. "Buildings in Scope").
  - Statutory objectives: accountability over building life cycle; mandatory occurrence reporting; putting residents at the heart of building safety.
- Industry-led Competence Steering Group.
  - A single building safety regulator (the "Regulator") overseeing safety/regulation at national level for Buildings in Scope (in place of current regime of approved building inspectors).
  - More robust sanctions/enforcement measures

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## 1. Recap – The Bill & Background

- April 2020– Government Proposals.
- A Building Safety Bill that will:
  - Apply to all multi-occupied residential buildings of 18 metres or more in height and, in due course, extend to include other premises, based on emerging risk evidence. Apply to both new and existing buildings.
  - Create a more effective regulatory and accountability framework to provide greater oversight of the building industry;
  - Introduce clearer standards and guidance;
  - Put residents at the heart of a new system of building safety for buildings in scope,
  - Help to create a culture change and a more responsible building industry, from design, through to construction, management and refurbishment.
- Bill published July 2020.

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## 2. A Reformed Building Safety System – what is involved?

### New Statutory Building Safety Regulator (s.2- s.8 of the BSB)

Three broad functions.

- Implementing the new, more stringent regulatory regime for higher-risk buildings.
- Overseeing the safety and performance of all buildings. This has two key aspects
- Assisting and encouraging competence among the built environment industry, and registered building inspectors.

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## 2. A Reformed Building Safety System – what is involved?

### New Statutory Building Safety Regulator (s.2- s.8 of the BSB)

The Bill gives the Building Safety Regulator a duty to establish and maintain three specific committees.

- Building Advisory Committee. Replacing the Building Regulations Advisory Committee for England (BRAC).
- Committee on industry competence. This is concerned with the competence of those in the built environment industry.
- Residents' panel. This committee will consist of higher-risk building residents and relevant other person.

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## 2. A Reformed Building Safety System – what is involved?

### General Duties on all duty holders: (s.8, s.16 and secondary legislation)

The main dutyholder roles under CDM 2015 are:

- Client - Any person or organisation for whom a construction project is carried out;
- Principal Designer - Appointed by the Client under CDM 2015 to plan, manage, monitor and coordinate the pre-construction phase,.
- Principal Contractor - Appointed by the Client under CDM 2015, when there is more than one contractor working on the building project, to plan, manage, monitor and co-ordinate the construction phase.
- Designer - Carries on a trade, business or other undertaking in connection with which they prepare or modify a design or instruct any person under their control to prepare or modify a design.
- Contractor - Manages or controls construction work (e.g. building, altering, maintaining or demolishing a building or structure). Anyone who manages this work or directly employs or engages construction workers is a contractor.

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## 2. A Reformed Building Safety System – what is involved?

### Specific Duties

The Duty Holders will be responsible for:

- Fire and structural safety of a building during design & construction stages
- Mandatory occurrence reporting (s.78 BSB)
  - Client - to promote a 'just culture' of reporting safety concerns
  - Client/Principal Designer/Principal Contractor – to report 'appropriate occurrences' to Regulator.
- Ensuring building safety and risk management through a system of gateway points.
- Creating and maintaining a golden thread of Building Information to handover on occupation.

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## 2. A Reformed Building Safety System – what is involved?

- The 3 Gateway stages (set out in Secondary Legislation):
- Gateway 1 – Before planning permission is granted:
  - Duties imposed on Client (Developer)
  - This Gateway occurs before dutyholders are required to be in place and its requirements will be fulfilled by those applying for planning permission for developments containing a higher-risk building.
  - Information will need to be submitted to the Local Planning Authority with the planning application information that demonstrates fire safety requirements which impact on planning considerations have been considered at an early stage and incorporated into the proposals. This information will take the form of a Fire Statement.

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## 2. A Reformed Building Safety System – what is involved?

- The 3 Gateway stages (set out in Secondary Legislation):
- Gateway 1 – Before planning permission is granted:
  - Duties imposed on Client (Developer)
  - A new statutory consultee, in the form of the Building Safety Regulator, will be introduced for all planning applications containing a higher-risk building, this will provide specialist fire safety input on the proposals to assist the Local Planning Authority in their decision-making process.
  - Where a planning application is not currently required (e.g. because it has been permitted by the General Permitted Development Order 2015), the requirements of Planning Gateway one will not apply, and development proposals will proceed straight to Gateway two.

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## 2. A Reformed Building Safety System – what is involved?

- Gateway 2 – Before construction begins:
  - The Client will build a safety case document (handover on occupation) to show the Regulator compliance with Bldg Regs and plans for management of fire and structural risks.
  - The Gateway occurs prior to construction work beginning. It bolsters the current building control 'deposit of full plans' stage where a dutyholder provides a building control body with their full design intention.
  - Gateway two provides a 'hard stop' where construction cannot begin until the Building Safety Regulator is satisfied that the dutyholder's design meets the functional requirements of the building regulations and does not contain any unrealistic safety management expectations.

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## 2. A Reformed Building Safety System – what is involved?

- Gateway 2 – Before construction begins:
  - Dutyholders will be required to submit key information to the Building Safety Regulator to demonstrate how the building, once built, will comply with the requirements of building regulations. Design decisions in relation to fire and structural safety should be well considered and justified, to ensure they will work effectively during occupation
  - Principal Designer: full plans (inc. any changes since initial plans), 3D digital building model, fire and emergency file);
  - Principal Contractor: construction control plan.
  - Dutyholder and Regulator to agree inspection regime for whole build (flexible and agile to avoid unnecessary delays)
  - Regulator may have right to condemn non compliant works and/or works commenced before approval.

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## 2. A Reformed Building Safety System – what is involved?

- Gateway 3 – Before occupation begins:
  - Gateway three is at the current completion/final certificate phase, where building work has finished, and the building control body assesses whether the work has been carried out in accordance with the building regulations.
  - At this point all prescribed documents and information (the golden thread) must be handed over to the Accountable Person. Dutyholders will be required to submit to the Building Safety Regulator prescribed documents and information on the final, as-built building.

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## 2. A Reformed Building Safety System – what is involved?

- Gateway 3 – Before occupation begins:
  - Client to confirm relevant Building Regulations are met; apply for/receive a provisional registration of the building; assure the Regulator that risks assessed and managed and the building is ready to be operated safely during occupation.
  - Principal Designer/Principal Contractor to co-sign a *final declaration of compliance* that Building Regs complied with and documents handed back to Client. Regulator to decide whether to accept it or to request further info.
  - Building owner (i) to receive 'safety case' showing how fire and structural risks have been managed inc the golden thread docs and (ii) to meet various duties/complete & maintain docs.

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## 2. A Reformed Building Safety System – what is involved?

- Occupancy Phase (s. 60 – s.77 BSB)
  - The Accountable Person is the dutyholder during occupation. They may be an individual, partnership or corporate body and there may be more than one Accountable Person for a building. The Bill makes the Accountable Person responsible for registering the building and applying for a Building Assurance Certificate.
  - Existing buildings that are already occupied will also need to be registered, and existing buildings which are unoccupied at the introduction of the new regime will have to be registered by the point the building is occupied.
  - Once the building is registered, the Accountable Person must also apply to the Building Safety Regulator for a Building Assurance Certificate.

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## 2. A Reformed Building Safety System – what is involved?

- Occupancy Phase (s. 60 – s.77 BSB)
  - The Building Safety Regulator will issue a Building Assurance Certificate if it is satisfied that the Accountable Person is complying with meeting the statutory obligations placed on them.
  - The Accountable Person will be required to comply with all the statutory obligations on an ongoing basis. The Bill includes provisions allowing the Building Safety Regulator to take enforcement action for non-compliance.
  - One of the statutory obligations detailed in the Bill is for the most recent issue of the certificate to be displayed in a prominent position in the building.

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## 2. A Reformed Building Safety System – what is involved?

- Occupancy Phase (s. 60 – s.77 BSB)
  - Accountable Person will be required to appoint a competent Building Safety Manager to carry out day to day functions of ensuring that the building is safely managed.
  - The Accountable Person must notify the Building Safety Regulator who has the power to veto the appointment of the Building Safety Manager.
  - The Building Safety Manager can be an individual or organisation whose principal role is to support the Accountable Person in the day-to-day management of fire and structural safety in the building.

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## 2. A Reformed Building Safety System – what is involved?

- Occupancy Phase (s. 60 – s.77 BSB)
  - Building Safety Manager Responsibilities include:
    - Complying with their own statutory duties as set out in the Bill;
    - Managing the building in accordance with the Safety Case Report for the building and ensuring that the requirements of the Building Assurance Certificate are complied with;
    - Keeping informed and co-operating with the managing agents (if any) of the building (if different) about safety measures and works; •
    - Complying with all directions given and statutory notices issued by the Building Safety Regulator;
    - Co-operating with other occupiers or owners of the building, including any other person acting as the Responsible Person under the Fire Safety Order, to secure an integrated approach to managing building safety risks.

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## 2. A Reformed Building Safety System – what is involved?

- Occupancy Phase (s. 60 – s.77 BSB)
  - Residents
  - The Bill also places statutory obligations on the Accountable Person that will help to promote a strong partnership between residents and the Building Safety Manager. These obligations cover engagement and participation, complaints handling, information provision and the role of residents in helping keep the building safe.
  - One such obligation is to produce and keep up to date a Residents' Engagement Strategy setting out how the obligations will be delivered in practice,
  - Residents will also have clear legal responsibilities to keep in repair and proper working order any relevant resident's items, take reasonable steps to avoid damaging any relevant safety item, and comply with a request made by the Accountable Person in connection with their duty to assess safety risks in the building and take steps to prevent serious harm.

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## 2. A Reformed Building Safety System – what is involved?

- 2) The implications for Duty Holders – Culture change
  - Improve internal safety reporting - Without fear of blame or retribution, there is a need to capture more safety risks to prevent future failures and improve public safety (pilot schemes underway).
  - Improve competency ('Raising the bar') - Top down as well as bottom up = increased management responsibilities/costs (Competence Steering Group).
  - Improve quality. 'Code of quality management' by Chartered Institute of Building (construction quality/industry codes and standards).
  - Commit/collaborate – Put safety before profit & engage early.
  - Greater criminal sanctions – In the event of non compliance.

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## 3. What the changes mean for insurers

- Ambition of a safer industry producing less claims and fewer losses to insurers.

But.....

- Extensive new duties on professionals
- What does mandatory reporting mean for policy notifications?
- Availability of insurance for regulatory fines?

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### 3. What the changes mean for insurers

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- Numerous new duties
  - Likely to give rise to an extension of the professional duties owed by construction professionals;
  - For instance, failure to obtain the regulator's approval, thereby delaying a project, is likely to be considered a breach of professional duty.
  - Similar points arise in connection with the duty to collaborate and share information. Lack of compliance is likely to cause financial losses and amount to a breach of professional duty.
  - Creation of a new profession of Building Safety Manager (probably a building surveyor)
  - The possibility of tortious claims of breach of statutory duty subject to the wording of the Bill.

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### 3. What the changes mean for insurers

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- Mandatory Reporting & Policy Notification (s.78 BSB)
  - The Bill that will allow for a Mandatory Occurrence Reporting System to be established. This involves the obligatory reporting of structural and fire safety occurrences which could cause a significant risk to life safety to the Building Safety Regulator.
  - Dutyholders in design and construction are required to establish a framework for mandatory occurrence reporting that will enable workers on-site to report potential occurrences.

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### 3. What the changes mean for insurers

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- Mandatory Reporting & Policy Notification (s.78 BSB)
  - Mandatory occurrence reporting also continues in occupation.
  - The Accountable Person must set up a similar framework, and the Building Safety Manager will be required to report occurrences to the Building Safety Regulator.
  - The Bill also includes measures requiring the Building Safety Regulator to publish aggregated information it has received from dutyholders as part of the mandatory occurrence reporting regime on an annual basis.

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### 3. What the changes mean for insurers

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- Regulator's Enforcement Powers, D&O and insurable fines
  - The Building Safety Regulator will have powers to prosecute all offences in the Bill and the Building Act 1984, including section 35. In addition, for all offences in the Building Act 1984 and the new legislation, where an offence is committed by a corporate body with the consent or connivance of a director, manager etc, or is attributable to their neglect, that person will be liable to be prosecuted as well as the corporate body.
  - The Building Safety Regulator will also be able to issue compliance notices (requiring issues of non-compliance to be rectified by a set date) and, in design and construction, stop notices (requiring work to be halted until serious non-compliance is addressed).

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### 3. What the changes mean for insurers

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- **Regulator's Enforcement Powers, D&O and insurable fines**
  - Failure to comply with compliance and stop notices will be a criminal offence, with a maximum penalty of up to two years in prison and an unlimited fine.
  - The Bill includes powers of entry to gather evidence for compliance action. A warrant from a magistrates' court will be required for domestic premises, or where force needs to be used to enter business premises.
  - The Building Safety Regulator will also hold to account building control bodies, e.g. where they haven't registered or are performing below the set standard, and will be able to suspend or remove inspectors from the register and to prosecute where necessary.

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### 3. What the changes mean for insurers

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- Regulator's Enforcement Powers, D&O and insurable fines
  - The Bill also includes powers for the Building Safety Regulator to appoint a Special Measures Manager to replace the Accountable Person or Building Safety Manager where there are serious failures endangering the life safety of residents in the building.
  - D&O insurers will face exposure in the event that regulatory and enforcement action is taken against dutyholder's leadership.
  - Regulatory fines may be insurable – will insurers have appetite to extend cover where fines fall short of criminal sanctions?

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## Cladding Remediation Fund

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- Potential Compensation fund for 'trapped leaseholders' backed by finance houses.
- Establishment of a Cladding Safety Board. Mechanism for Recovery from Third Parties.
- EWS1 and availability of profin insurance.
- Could it work in practice?

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Q&A

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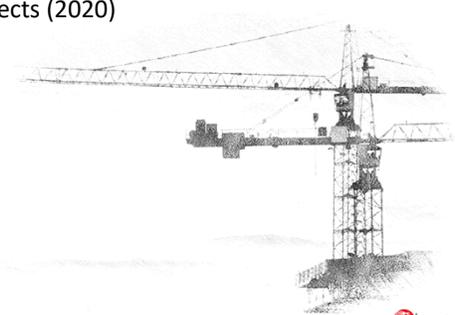


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## Thank you and reminders

- This webinar is designed to help solicitors meet requirements A2 (Maintain competence and legal knowledge) and A4 (Draw on detailed knowledge/understanding) of the SRA's Statement of solicitor competence. You may also use the quiz, which can be accessed via the "Take a quiz" link on the webinar details page, to reinforce your understanding of the webinar content. You should answer 7 out of 10 questions correctly and will have two attempts at the quiz.
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- A transcript of the webinar can be made available on request within 48 hours.
- You can use the training and evaluation record form which is included in the supporting materials for this webinar to log this training activity and how it relates to the continuing competences that the SRA requires from all solicitors.

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**Thank you for attending.**  
**We hope you've enjoyed this session.**



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