



Department for Levelling Up,
Housing & Communities

**Statutory guidance: the reasonable steps landlords should take before
passing remediation costs onto leaseholders, under section 20D of the
Landlord and Tenant Act 1985**

Contents

Introduction to this guidance	2
<i>1. Summary</i>	2
<i>2. Purpose of this guidance</i>	2
<i>3. Application of this guidance</i>	2
<i>4. Interpretation of terms</i>	3
Overview of who pays for remediation works and legal expenses	4
<i>5. The leaseholder protections</i>	4
<i>6. The new requirements on landlords before they can pass remediation costs onto leaseholders</i>	5
<i>7. Adopting a proportional approach to building safety</i>	6
What reasonable steps should the landlord follow to recover the costs of remediation before asking leaseholder to contribute?	6
<i>8. Insurance</i>	6
<i>9. Warranties</i>	7
<i>10. Dispute resolution (relating to warranties and insurance)</i>	8
<i>11. Pursuing third parties</i>	9
<i>12. Government grants and funding</i>	11
Other duties	12
<i>13. Information provision</i>	12
<i>14. Carrying out notifiable building work in existing buildings</i>	12
<i>15. Other relevant legislation</i>	13



Introduction to this guidance

1. Summary

- 1.1 Section 133 of the [Building Safety Act 2022](#) amends the existing section 20 consultation process in the [Landlord and Tenant Act 1985](#). It inserts new section 20D which requires that, where landlords are able to pass remediation costs onto leaseholders, they must take reasonable steps to ensure that they have explored all alternative cost recovery avenues before asking leaseholders to contribute funds.

2. Purpose of this guidance

- 2.1 The First-tier Tribunal may have regard to the statutory guidance when determining whether a landlord has complied with, or breached, new section 20D. Failure to follow the guidance may show that the landlord did not take reasonable steps.
- 2.2 The statutory guidance should also be used by landlords to clarify their responsibilities in respect of the reasonable steps they should take to access alternative sources of funding before passing on any remediation costs to leaseholders. Landlords must have regard to the guidance – failure to follow the guidance may be used as evidence of lack of compliance with new section 20D of the Landlord and Tenant Act 1985.
- 2.3 Additionally, the statutory guidance can be used by leaseholders as a point of reference - to clarify their landlord's requirements, and to provide evidence should they wish to make an application to the First-tier Tribunal, in instances where they feel their landlord has failed to comply with their obligations
- 2.4 Landlords are not required to complete this duty before carrying out remediation works. The expectation is that landlords will commence remediation works even if the monies are not guaranteed from alternative cost recovery avenues.
- 2.5 Where a landlord makes an application under section 27A of the Landlord and Tenant Act 1985, this does not prevent a leaseholder from making an application to the First-tier Tribunal under section 20D of the Landlord and Tenant Act 1985.

3. Application of this guidance

- 3.1 [For a building to be in scope of the section 20D duty, it must meet **all** the following criteria:
 - 3.1.1 it is at least 11 metres in height or has at least five storeys
 - 3.1.2 it contains at least two dwellings
 - 3.1.3 it is not a leaseholder-owned or leaseholder-managed building
 - 3.1.4 it is not on commonhold land
- 3.2 For a defect to be in scope of the section 20D duty, it must meet **all** the following criteria:



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Housing & Communities

- 3.2.1 it puts people's safety at risk from the spread of fire, or structural collapse
 - 3.2.2 it has arisen from work done to a building, including the use of inappropriate or defective products, during its construction, or any later works (such as refurbishment or remediation)
 - 3.2.3 it has been created in the 30 years prior to the leaseholder protections coming into force (meaning the defect had to be created from 28 June 1992 to 27 June 2022)
 - 3.2.4 it relates to **at least one** of the following types of works:
 - 3.2.4.1 the initial construction of the building
 - 3.2.4.2 the conversion of a non-residential building into a residential building
 - 3.2.4.3 any other works undertaken or commissioned by or on behalf of the building owner, or management company]¹
11. The 20D duty applies only to buildings in England.

4. Interpretation of terms

- 4.1 Where the word 'must' is used in this guidance, it is referring to a statutory requirement under primary legislation, regulations, or case law. The landlord must comply with a requirement and cannot ignore it.
- 4.2 Where the word 'should' and 'may' are used, it means that the guidance should be considered and that proof of failure to comply may be considered as evidence that there was a failure to comply with statutory requirements. The landlord should have due regard to the requirement.
- 4.3 The term 'building owner' is used in this guidance in relation to the leaseholder protection provisions in sections 116 - 125 of the Building Safety Act 2022. In this context, 'building owner' refers to a landlord or those with a superior lease of the building.
- 4.4 The term 'landlord' is used in this guidance in relation to section 20D, 20E and 20ZA of the Landlord and Tenant Act 1985. In this context, 'landlord' includes any person who has a right to enforce payment of a service charge, as per section 30 of the Landlord and Tenant Act 1985.
- 4.5 For the purposes of this guidance, third-party litigation refers to litigation by the landlord against the developer or anyone involved in designing or carrying out works on the building.
- 4.6 For the purposes of this guidance, a cost recovery avenue is a potential full or partial funding solution for works.

¹ Text found within square brackets is based on policy proposals which are being consulted on, and so is subject to change post-consultation.



Department for Levelling Up,
Housing & Communities

Overview of who pays for remediation works and legal expenses

5. The leaseholder protections

Remediation Costs

- 5.1 Following Royal Assent of the Building Safety Act 2022, many leaseholders are now protected in law from the financial burden of remediating relevant defects in relevant buildings, as per the leaseholder protections definitions. Further guidance on the leaseholder protections can be found [here](#).
- 5.1 The protections mean that where a landlord is – or is linked to - the developer responsible for a relevant defect, they cannot legally pass on remediation costs to any of their leaseholders.
- 5.2 The protections also mean that where a leaseholder has a qualifying lease, their landlord cannot pass on any costs associated with remediation of a relevant defect in circumstances where:
 - 5.2.1 The costs are associated with the remediation of unsafe cladding systems
 - 5.2.2 Their landlord group have a net worth of more than £2 million per relevant building (with the exception of housing associations, local authorities and arms-length management organisations)
 - 5.2.3 The value of their lease on 14 February 2022 was less than £325,000 in Greater London or £175,000 elsewhere in England
- 5.3 If none of the conditions outlined in paragraphs 5.1, 5.2.1, 5.2.2 and 5.2.3 are met, then the building owner may be able to pass on remediation costs to their leaseholders. This amount is firmly capped for qualifying leaseholders.
- 5.4 In circumstances where the landlord is able to pass on remediation costs to their leaseholders (both qualifying and non-qualifying), they must comply with the requirements in new section 20D, 20E, and amended section 20ZA of the Landlord and Tenant Act 1985, as inserted by section 133 of the Building Safety Act 2022. More information on these requirements can be found in section 6 of this guidance.

Legal Expenses

- 5.5 The landlord should note that, under schedule 8 of the Building Safety Act 2022, any legal expenses relating to the liability - or potential liability - incurred as a result of a relevant defect cannot be passed onto any leaseholder with a qualifying lease through the service charge. For this purpose, “legal expenses” means any costs incurred, or to be incurred in connection with:
 - 5.5.1 Obtaining legal advice
 - 5.5.2 Any proceedings before a court or tribunal
 - 5.5.3 Arbitration



Department for Levelling Up,
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5.5.4 Mediation

- 5.6 Non-qualifying leaseholders may be liable for legal costs incurred as a result of a relevant defect, as per the terms of their individual lease. The landlord should note that, under schedule 8 of the Building Safety Act 2022, non-qualifying leaseholders are not liable to account for the legal expenses which are unrecoverable from qualifying leaseholders.

6. The new requirements on landlords before they can pass remediation costs onto leaseholders

- 6.1 Section 133 of the Building Safety Act 2022 amends the Landlord and Tenant Act 1985, inserting new section 20D, 20E, and amending section 20ZA. The new provisions require that the landlord must take reasonable steps to ensure that they have explored all alternative cost recovery avenues and ascertain whether they can recover funds from these avenues.
- 6.2 In accordance with new section 20D(8) Landlord and Tenant Act 1985, the landlord is not required to have pursued any alternative avenues of cost recovery, or to have done anything in relation to pursuing these avenues, before carrying out remediation works. The expectation is that landlords will commence remediation works, even if the monies are not guaranteed from alternative cost recovery avenues.
- 6.3 The expectation is that landlords will commence remediation works even if the monies are not guaranteed from alternative cost recovery avenues.
- 6.4 Where landlords can pass on remediation costs to leaseholders, these provisions ensure that, where there is a prescribed defect in a prescribed building (as defined in section 3 of this guidance), landlords must now take reasonable steps to pursue other cost recovery avenues before passing on the costs for such works (this applies to both qualifying and non-qualifying leaseholders). The landlord must:
- 6.4.1 Determine whether any grant is payable in respect of the remediation works and, if so, obtain the grant
 - 6.4.2 Determine whether all or any of the cost of remediation works may be met by a third party and, if so, to obtain monies from the third party (which is defined as including monies obtained from insurance, guarantee or indemnity or from the developer or anyone involved in designing or carrying out works on the building)
 - 6.4.3 Reflect any money recouped through these avenues via a reduction in the remediation costs passed on via the service charge
 - 6.4.4 Provide adequate evidence to leaseholders that they have taken these steps
- 6.5 This guidance is therefore divided into sections covering insurance, warranties, third-party litigation (e.g. of developers), and government grants and funds.
- 6.6 Although the reasonable steps presented in this guidance are laid out in a linear structure, landlords can pursue insurance, warranties, third parties and other routes



Department for Levelling Up,
Housing & Communities

simultaneously, dependant on the specific circumstances of a case. The landlord should seek independent legal advice as a first step to inform the best approach for cost recovery according to the circumstances of their case. It should be noted that government funding or grants (such as the Building Safety Fund) may require demonstration that all reasonable steps have been taken to recover costs beforehand, and so the landlord should take this into account.

- 6.7 The diverse specifications of buildings will present their own complexities with regard to determining the routes to pursue. These should be considered in accordance with a proportionate approach to fire safety remediation (see section 7 of this guidance).
- 6.8 The Secretary of State has powers to make regulations to require that prescribed information must be given to leaseholders, to demonstrate that reasonable steps have been taken. Further detail on information provision is provided in section 13 of this guidance.
- 6.9 The new provisions provide leaseholders with the right to challenge landlords at the First-tier Tribunal if they feel that reasonable steps have not been taken to recover funds to remediate defective work from alternative cost recovery avenues.

7. Adopting a proportional approach to building safety

- 7.1 Landlords should take a proportionate approach to managing their building safety risks. Depending on the specific circumstances of the case, mitigation, prevention, control, and ongoing management - as opposed to remediation - may be a more proportionate option for the landlord to take; for example, installation of sprinklers and fire alarms may provide sufficient mitigation.

What reasonable steps should the landlord follow to recover the costs of remediation before asking leaseholder to contribute?

8. Insurance

- 8.1 If, in the conduct of their statutory duties, landlords have discovered an issue or defect in common or demised part of building, they should notify their insurance company in accordance with the terms of the insurance policy.
- 8.2 The landlord should follow any reasonable instructions from the insurance company whilst taking the instructions of the fire service, local authority and any other relevant body into account. They should provide information to the insurance company as required and ensure that they have complied with all requirements under the policy.
- 8.3 If the outcome of the claim is not in the landlord's favour, then where possible, they should follow the appeals process set by the insurance provider – this includes arbitration/mediation where available.



Department for Levelling Up,
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- 8.4 In addition, under section 136 of the Building Safety Act 2022, if the landlord has not received a satisfactory resolution, they may raise a complaint with the New Homes Ombudsman or the Financial Ombudsman Service and seek legal advice as to whether a claim should be challenged through the courts. More information on dispute resolution can be found in section 10 of this guidance.

9. Warranties

- 9.1 Where appropriate, the landlord should make a home warranty claim immediately after the identification of the defect, so that claim is submitted within the warranty period. If the issue has been identified during the builder liability period under the new home warranty, the landlord should notify the builder. If the builder does not then rectify the issue, the landlord may be able to seek assistance from the new home warranty provider. If this is not completed within the time frame stipulated by the warranty, the warranty may have a clause not to pay out owing to delay in identification and reporting of defect.
- 9.2 Depending on the warranty provider's requirements, the landlord may need to collate an evidenced body of information to support their claim. The additional support of technical advisors may be required.
- 9.3 Depending on the warranty provider's requirements, the issue or defect may need to be assessed by a relevant competent professional to understand the scope of the problem and suggest a proportionate path to remediation.
- 9.4 Once the nature of the issue or defect has been assessed, the landlord should ascertain whether they are able to raise a claim under the terms and conditions of the warranty or warranties that their leaseholders possess or that they jointly possess with their leaseholders, and to what extent the warranty or warranties can cover the defect.
- 9.5 The landlord should also note that, if they are not within a contractual defects' liability period under a new build warranty, they may be able to raise a claim via individual manufacturer warranties.
- 9.6 If the defect in question affects common parts of the building and the warranty is within the limitation period, the landlord should make a claim to the warranty provider. Examples of defects which affect common parts of the building include: the structure, main walls, roof, foundations, services, grounds and any other common areas serving the building or estate of which the property forms part.
- 9.7 If the warranty does not provide cover to the 'owner' (in this case, the leaseholder) for the demised part of the building, the landlord should make a claim to the warranty provider for defects within the demised part, where appropriate (for example, where the terms of the warranty cover that defect).
- 9.8 The landlord should follow any reasonable instructions from the warranty company whilst taking the instructions of the fire service, local authority and any other relevant body into account. They should provide information to the warranty company as required and ensure that they have complied with all requirements under the policy.



Department for Levelling Up,
Housing & Communities

- 9.9 If neither the builder, nor the developer, nor the warranty provider take action, or if the outcome of the claim is not in the landlord's favour, then where possible, they should follow the appeals process set by the warranty provider – this includes arbitration or mediation where available. In addition, under section 136 of the Building Safety Act 2022, if the landlord has not received a satisfactory resolution, the landlord may raise a complaint to the New Homes Ombudsman scheme or the Financial Ombudsman Service and seek legal advice as to whether a claim should be challenged through the courts. More information on dispute resolution can be found in section 10 of this guidance.
- 9.10 Information about passing on legal expenses to leaseholders can be found in paragraphs 5.5 and 5.6 of this guidance.

10. Dispute resolution (relating to warranties and insurance)

- 10.1 In deciding whether to pursue dispute resolution through a resolution service/engage a resolution service, the landlord may consider:
- 10.1.1 whether third party advice (such as legal advice and technical opinion), has suggested that a resolution service would be the best option to pursue under their circumstances, with a good prospect of cost recovery; and
 - 10.1.2 whether the length of time to settle a claim would interfere with the pace of remediation, or unnecessarily extend the ongoing costs to leaseholders
- 10.2 The factors outlined in paragraph 10.1.1 and 10.1.2 do not provide an exhaustive list, and the landlord may want to take other factors into consideration.
- 10.3 If the landlord has reasonably pursued cost recovery avenues through an insurance or warranty claim and the outcome of the resolution is in favour of the builder/developer, they may wish to appeal to a mediation/arbitration service. The landlord should consider the factors outlined in paragraph 11.14-11.17 when considering whether to engage a mediation/arbitration service.
- 10.4 If the outcome of appeal to a mediation/arbitration service is that there is no agreement, or mediation/arbitration is not a viable option (for example, because the other party is not cooperating) there are additional options that the landlord may wish to consider, including, but not limited to:
- 10.4.1 the New Homes Ombudsman scheme
 - 10.4.2 the Financial Ombudsman Services (could be an alternative avenue of cost recovery depending on the nature of the claim)
- 10.5 Pursuing third parties is discussed in further detail in section 11 of this guidance. If the landlord is not in possession of any other possibilities for cost recovery via insurance or warranties, the landlord should take reasonable steps to seek legal advice on the viability of pursuing cost recovery through litigation.



11. Pursuing third parties

- 11.1 Landlords should take reasonable steps to ascertain whether they can recover funds from a third party in connection with the undertaking of the remediation works and, if so, to obtain monies from the third party.
- 11.2 The landlord should note that at any time during the proceedings, the parties can engage in settlement discussions and litigation should be a last resort. Compliance with pre-action protocols may provide the landlord with opportunities to reduce costs, avoid legal costs, and find quicker routes to resolve disputes before the matter reaches court. More information on pre-action protocols can be found in paragraphs 12.9-12.12 of this guidance.
- 11.3 Information about passing on legal expenses to leaseholders can be found in paragraphs 5.5 and 5.6 of this guidance.
- 11.4 In accordance with new section 20D(8) Landlord and Tenant Act 1985, the landlord is not required to have pursued any alternative avenues of cost recovery, or to have done anything in relation to pursuing these avenues, before carrying out remediation works. The expectation is that landlords will commence remediation works, even if the monies are not guaranteed from alternative cost recovery avenues.

a) Initial steps

- 11.5 The landlord should first seek independent legal advice regarding the likelihood of successfully recovering costs or partial costs of remediation works from the third party. This should be carefully considered to determine whether it is feasible to recover costs.
- 11.6 Landlords should consider pursuing a pre-action protocol with a view to reaching a settlement.
- 11.7 Once the landlord has instructed legal advisors, then the lawyers will be able to advise on whether there may be a feasible claim. The lawyers will also be able to advise on the material which should be collected, the identification of witnesses of fact, and the identification and instruction of any expert witnesses. The landlord should aim to carry out this process and collect information in a thorough and timely manner.
- 11.8 Third parties that the landlord may wish to pursue in order to recover costs of remediation include, but are not limited to, any of the following:
 - a) Developers
 - b) Contractors
 - c) Suppliers
 - d) Product manufacturers

b) Settlement discussions

- 11.9 Where appropriate, the landlord should attempt to enter negotiations before pursuing formal litigation. For example, if there is enough time to pursue a pre-action protocol before litigation, the landlord should do so.



Department for Levelling Up,
Housing & Communities

11.10 Legal advice may be that a claim is likely to be successful, or that where there are lower prospects of success, there may still be room for negotiation.

11.11 Pre-action protocols explain the conduct and set out the steps the court would normally expect parties to take before commencing litigation. The court will expect the parties to have exchanged sufficient information to:

- a) Understand each other's position
- b) Make decisions about how to proceed
- c) Try to settle the issues without proceedings
- d) Consider a form of alternative dispute resolution to assist with settlement
- e) Support the efficient management of those proceedings
- f) Reduce the costs of resolving the dispute

11.12 The parties involved may be able to come to an agreement during the settlement discussions. For example, the developer may agree to remediate or pay for the remediation of the defect.

11.13 If the parties involved do not agree to an out of court settlement, litigation may be the next step. If litigation is being pursued, the court will expect both parties to have complied with a relevant pre-action protocol and will consider any non-compliance when giving directions for the management of proceedings.

c) Factors for landlords to consider

11.14 The landlord should obtain independent legal advice to determine the likelihood of their bringing a successful claim, the costs of pursuing such a claim, and the risks involved. With this knowledge a landlord should consider whether they wish to pursue a claim or not.

11.15 The landlord may wish to consider the following factors before deciding to pursue a cause of action:

- a) Likelihood of success: the pursuit of remediation through litigation includes an inherent degree of risk. This risk should be assessed by legal advisors and carefully considered by the landlord before proceeding.
- b) Timing: the landlord should consider the length of time to pursue the process of litigation versus the pace of remediation and ongoing costs to leaseholders.
- c) Cost: if the cost of pursuing litigation is likely to be disproportionate to the sum required to remediate the building's defects, it would be unreasonable to expect the landlord to pursue such an avenue and would place further potential burden on the landlord if the claim is unsuccessful.

11.16 A landlord may decide not to pursue litigation if they have received strong legal advice against it (for example, if their legal team has confirmed that they would be unable to litigate due to onerous anticipated costs).

11.17 If the landlord reasonably decides not to pursue litigation having considered the timescales, merits, and costs, the landlord should consider other cost recovery routes in accordance with new section 20D(3)(c) of the Landlord and Tenant Act 1985.



d) Unsuccessful outcome of litigation

- 11.18 If the outcome of litigation is unsuccessful and the landlord wishes to make an appeal, the landlord should take immediate legal advice on whether the judgment can be appealed and the chances of such an appeal succeeding, so that time limits for seeking leave to appeal are not missed.
- 11.19 If the landlord does not pursue an appeal, this does not necessarily constitute failure to take a reasonable step. However, in instances where the landlord has good reason to appeal (for example, strong legal advice that they could recoup costs), not appealing may well be unreasonable.
- 11.20 If a settlement is not reached, the landlord should consider other cost recovery routes in accordance with new section 20D(3)(c) Landlord and Tenant Act 1985. They should determine whether they would be eligible to receive funding through an appropriate government scheme. More information on exploring government grants and funding can be found in section 12 of this guidance.

12. Government grants and funding

- 12.1 In accordance with new section 20D(8) Landlord and Tenant Act 1985, the landlord is not required to pursue alternative cost recovery avenues before carrying out remediation works. The expectation is that landlords will commence remediation works even if the monies are not guaranteed from alternative cost recovery avenues.
- 12.2 If the landlord has not achieved full cost recovery through insurance, warranty or litigation, they should determine whether they would be eligible to receive funding through an appropriate government scheme.
- 12.3 The landlord should determine whether there is any funding available to them through an appropriate government scheme, such as the Building Safety Fund, the Social and Private Sector ACM Cladding Remediation Funds, other future government funds including the new scheme for buildings between 11-18m in height (details on will be published in 2023)
- 12.4 Where an appropriate government scheme exists, the landlord should pursue it as a cost recovery avenue.
- 12.5 When deciding whether to apply for a government scheme, the landlord should familiarise themselves with any application guidance related to the fund to ensure eligibility and avoid causing unnecessary delays to the process. It should be noted that government grant schemes may require the landlord to demonstrate that all reasonable steps have been taken to recover costs from other parties during the application process, and so the landlord should take this into account.
- 12.6 The landlord should apply for funding where a building may be eligible and comply with any requirements set out by the department in a timely manner.
- 12.7 As any government funding or grant is subject to legal due diligence and departmental assessment, the landlord should ensure that any information provided is accurate so that it does not impede the process and cause any unnecessary delays.



Other duties

13. Information provision

- 13.1 Landlords must provide evidence to the leaseholder to demonstrate the reasonable steps they have undertaken or will undertake, in line with section 20ZA(5A) of the Landlord and Tenant Act 1985.
- 13.2 [Landlords must provide leaseholders with a final summary containing the most up-to-date details of their pursuits for each defect in question, as per the information provision regulations [hyperlink to be inserted once the regulations have been commenced. This will be an absolute requirement, so landlords will have to comply before they can pass costs on to leaseholders. Without this summary, leaseholders do not have a legal obligation to pay towards the remediation of that defect.
- 13.3 Leaseholders should be kept informed promptly and as thoroughly as reasonably possible. We consider a minimum of a yearly update to be best practice but accept derogations where reasonable to fit in with the terms of individual leases. Landlords would need to be able to demonstrate a compelling reason for failing to meet the timelines set out in the guidance (for example, in some cases, an annual update might not align with the terms of the lease).
- 13.4 Guidance relating to the information provisions can be found here [hyperlink to guidance to be inserted once the regulations have been commenced].
- 13.5 Landlords should note that this duty does not override their rights to legal professional privilege. Leaseholders can appeal to the First-tier Tribunal if they feel that landlords have claimed legal privilege unreasonably]².

14. Carrying out notifiable building work in existing buildings

- 14.1 Notifiable building work carried out in existing buildings must comply with the relevant Building Regulation requirements and is subject to regulatory oversight either through a building control application to a building control body or through a work undertaken through a competent person scheme.
- 14.2 The Building Safety Act also establishes a more stringent regulatory framework for new high-rise residential buildings, care homes and hospitals which are 18 metres or more in height, or at least seven storeys. When the provisions are enacted, notifiable building work in these buildings, which is not being carried out under a competent persons scheme, must be submitted to the Building Safety Regulator through a building control application for approval. The landlord/person carrying out the work must outline to the Regulator how the work will comply with the relevant building regulations' requirements, which will include demonstrating that the measures being taken are appropriate for the use of the building and obtain building control approval prior to proceeding with the remediation work. Landlords overseeing building work

² Text found within square brackets is based on policy proposals which are being consulted on, and so is subject to change post-consultation.



Department for Levelling Up,
Housing & Communities

carried out in buildings out of scope of the new more stringent regime must equally ensure the work complies with the relevant Building Regulations requirements.

15. Other relevant legislation

15.1 It should also be noted that landlords may be subject to other pieces of enforcement legislation – these include, but are not necessarily limited to:

15.1.1 [Housing Act 2004](#)

15.1.2 [Regulatory Reform \(Fire Safety\) Order 2005](#)

15.1.3 [Building Safety Act \(2022\)](#)

15.2 Each of these pieces of legislation has the potential to enforce different deadlines regarding building safety works. Landlords should note that pursuing alternative cost recovery avenues may not necessarily correlate with the enforced deadlines.

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