

DRAFT BUILDING SAFETY BILL

Essential guide



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Introduction

The draft Building Safety Bill is the Government's legislative response to the Grenfell Tower fire and Dame Judith Hackitt's 2018 review of the building industry, "Building a Safer Future". The Bill represents a wholesale reform of the regulatory system for building control and safety in England. The proposed reforms are designed to improve building and fire safety with the primary aim of ensuring that residents will be safer in their homes.

In the Foreword to the draft Bill, Robert Jenrick MP (Secretary of State for Housing, Communities and Local Government) states, "the draft Bill will introduce a new era of accountability, making it clear where the responsibility for managing safety risks lies throughout the design, construction and occupation of buildings in scope. There will be tougher sanctions for those that fail to meet their obligations."

Trowers & Hamlins is committed to helping our clients navigate the new building safety regime. We have been involved with government working groups on the competency regime and have participated in the consultation of the legislative proposals and the implementation of the draft Bill, and are already working alongside clients, helping to deliver meaningful change and results in accordance with the proposals.

As part of this work we have produced this essential guide to the draft Bill, which provides an overview of the key elements of the proposed law changes.

We hope that this will help all those committed to delivering safer buildings get to grips with the draft Bill and move the conversation forward.



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Overview of the draft Bill

The draft Bill introduces a new regulatory regime for high-risk residential buildings, now defined as “higher-risk buildings”. The Explanatory Notes to the draft Bill provide a proposed definition of higher-risk buildings as being at least 18 metres above ground level (whichever is reached first) or more than six storeys above ground level; and having two or more dwellings or two or more rooms used by one or more persons to live and sleep. Houses, flats, serviced apartments, supported accommodation and student accommodation facilities are all expected to be within the scope of higher-risk buildings whereas residential care homes, prisons, hotels, hospitals and hospices are likely to be excluded. The Secretary of State is authorised to update the list of higher-risk buildings, based on emerging risk evidence.

The Building Safety Regulator

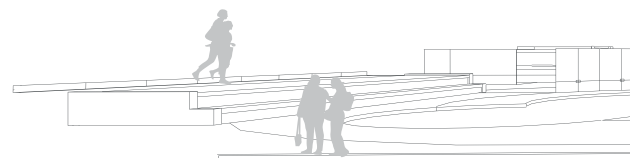
Part 2 of the draft Bill establishes a new national Building Safety Regulator, which will sit in the Health and Safety Executive and report to the Secretary of State. The Regulator will be responsible for implementing the new regulatory regime, overseeing the registration and inspection of higher-risk buildings, and has express powers to authorise remedial works, stop non-compliant projects, appoint special measures for failing projects and order the replacement of key fire safety officers. The Regulator will establish and consult with three advisory committees on building, industry competence and resident representation while developing the new building safety regime.

Amendments to the Building Act

Part 3 of the draft Bill empowers the Secretary of State to impose competency requirements on Dutyholders working on higher-risk buildings. Those appointing Dutyholders will also be required to ensure all appointees and prescribed persons meet competency requirements, and provide documents demonstrating competency. Full details of Dutyholder responsibilities and the Gateway system for approving the design, construction and occupation of in-scope buildings, will be covered in secondary legislation.

In-occupation obligations

Part 4 of the draft Bill establishes the role of the Accountable Person who will be legally responsible for the safety of higher-risk buildings. Accountable Persons may be individuals or corporate entities, and will hold either a legal estate in possession of the common parts of the building or a relevant repairing obligation in respect of the common parts (meaning that management companies may also be Accountable Persons). Further guidance is promised on how Accountable Persons will be identified. Accountable Persons have ongoing obligations to assess and prevent fire safety risks, update prescribed building safety information (formerly referred to as “the golden thread”), register higher-risk buildings and apply for a Building Assurance Certificate before the building can be occupied. Accountable Persons must also appoint the Building Safety Manager, who is responsible for the day to day management of fire and structural safety in the building. Accountable Persons and Building Safety Managers must proactively engage with residents, provide them with key building information and develop a Resident Engagement Strategy.

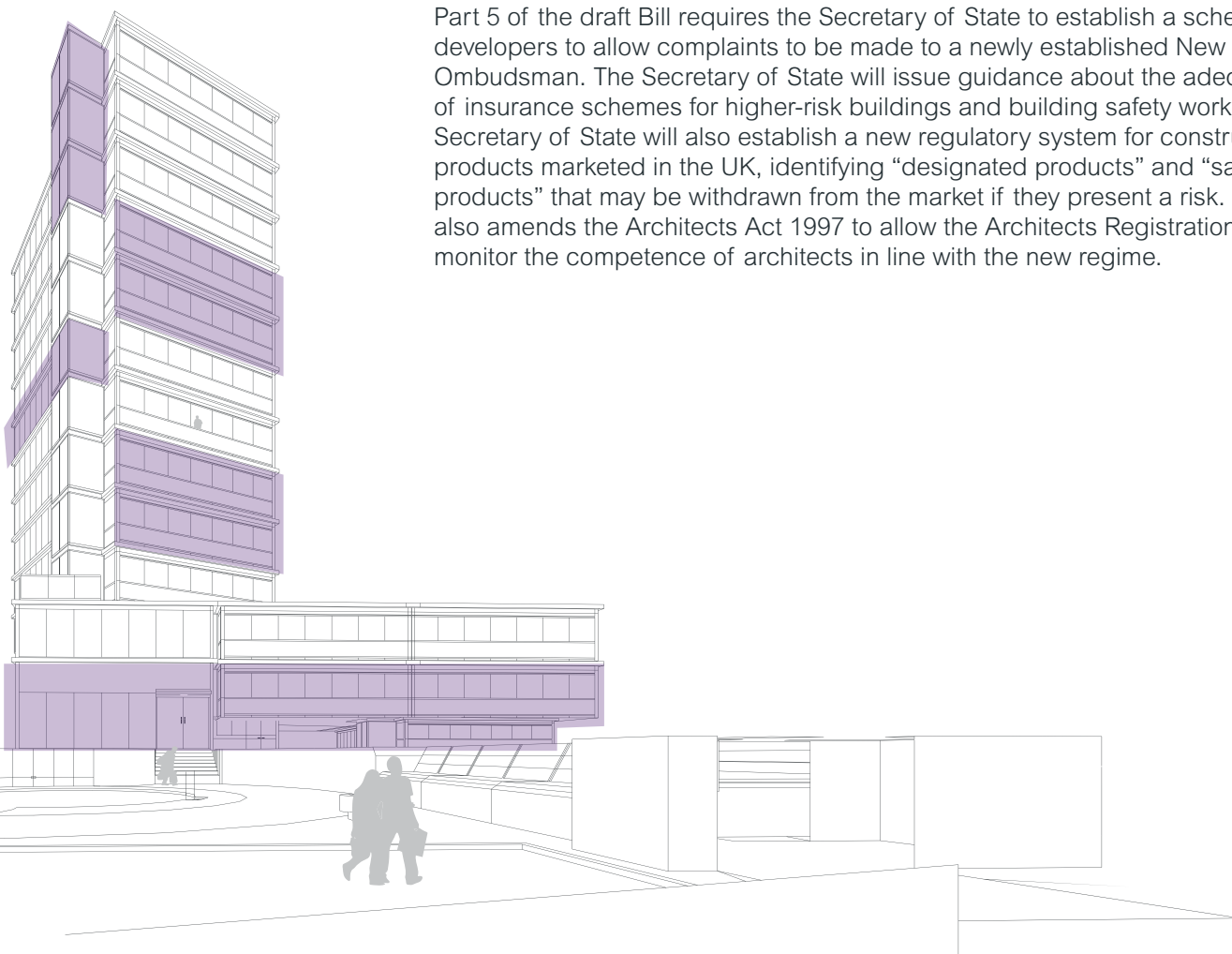


The draft Bill updates the Landlord and Tenant Act 1985, placing express duties on residents of higher-risk buildings to keep their property in good repair, cooperate with Building Safety Managers to fulfil building safety duties and not hinder or damage fire safety works or equipment. Accountable Persons will have rights to enter residents' dwellings and issue enforcement notices, which shall be enforceable via the courts. The draft Bill imports a new regime for charging tenants building safety costs incurred carrying out building safety work. However, landlords will not be able to recharge residents for work which are the subject of enforcement proceedings by the Regulator or as a result of the Accountable Person's negligence or breach of contract. The draft Bill will impose implied terms on lease agreements covered by the 1985 Act to incorporate this new regime.

The draft Bill provides details about liability and sanctions for breaches of the building safety regime. Dutyholders who fail to meet key building safety obligations will be guilty of criminal offences. Where a Dutyholder is a corporate entity, individuals within that organisation may also be prosecuted where the breach was committed with their consent or connivance or as a result of their neglect. Accountable Persons who fail to meet key obligations will also be guilty of a criminal offence, punishable by imprisonment for up to two years and/or a fine. The draft Bill also amends the Building Act to allow prosecutions for breaches of the Building Regulations for up to 10 years. However, the draft Bill does not anticipate Dutyholders being placed under statutory duties or allowing individuals to bring actions in civil court against Dutyholders, as mooted in the 2019 Consultation document.

Supplementary provisions

Part 5 of the draft Bill requires the Secretary of State to establish a scheme for all developers to allow complaints to be made to a newly established New Homes Ombudsman. The Secretary of State will issue guidance about the adequacy of insurance schemes for higher-risk buildings and building safety works. The Secretary of State will also establish a new regulatory system for construction products marketed in the UK, identifying "designated products" and "safety critical products" that may be withdrawn from the market if they present a risk. The draft Bill also amends the Architects Act 1997 to allow the Architects Registration Board to monitor the competence of architects in line with the new regime.



Structure

There are 119 sections in the draft Bill divided into 5 Parts (each sub-divided into different “Chapters”) and 8 Schedules. The Parts are as follows:

- Part 1 – Overview of the draft Bill.
- Part 2 – Establishes the Building Safety Regulator; definitions and scope of the regime.
- Part 3 – Amendments to the Building Act, design and construction phase (dutyholder regime) and building control and inspectors (registration and competency requirements).
- Part 4 – Sets out in-occupation obligations and the roles of Accountable Person and Building Safety Manager, and sets out details of offences and sanctions (see below).
- Part 5 – Supplementary provisions regarding:
 - Establishment of a New Homes Ombudsman
 - Powers to make provision about Construction Products
 - Registration and monitoring of competence of architects in line with new competency requirements.

References in this Guide to “sections” refer to the relevant section of the draft Bill.

Commencement and timings

Currently there is no indication as to when the draft Bill will be enacted, nor when each of the provisions of the draft Bill will come into force. The Explanatory Notes acknowledge that the draft Bill will be subject to scrutiny by a Parliamentary Committee, who will report with feedback and recommendations before it is finalised. MHCLG will also consult with stakeholders during this period. The draft Bill will then be introduced in the House of Commons and proceed through the parliamentary process.

The Explanatory Notes also acknowledge that many aspects of the regime will be taken forward throughout secondary legislation. For example, the competency requirements will be developed through Approved Documents, while the design and construction Gateway policy will be established via a Statutory Instrument.

There is currently no commencement date envisaged for the provisions contained within the draft Bill, nor is there a timetable for the tabling of required secondary legislation. Crucially (and of most interest to our landlord clients), there is no timeline for when in-occupation obligations will apply to existing in-scope buildings.

In terms of the individual obligations contained within the draft Bill, we would note as follows:

- On the date of commencement of the draft Bill, Accountable Persons will be required to provide fire safety information to residents (section 78). Failure to provide this information will constitute an offence, as explained further below.
- Two months after the commencement date, rules around construction products (section 110) and amendments to the Architects Act (sections 111 and 112) come into force.

Definition of “in-scope” buildings

It is interesting to note that reference to a “High Rise Residential Building or a “Higher Risk Residential Building” has not been adopted either in the legislation or the Explanatory Notes (save for contextual references). There are now two types of buildings recognised by the legislation:

- “Higher-risk buildings” – defined by section 19 of the draft Bill as a “building of a prescribed description”. The Secretary of State will prescribe what a “higher-risk building” is (for which the more stringent regime will apply). The Explanatory Notes refer to “high-rise” buildings as “those 18 metres and above” (page 1 of the Explanatory Notes), as explained further below.
- “all buildings” – note that the more stringent regime applying to higher-risk buildings is coupled with enhancements to the Regulatory regime that applies to all buildings, including:
 - the Regulator will have oversight of the building safety and performance system that applies to all buildings,
 - the competency regime is likely to apply industry-wide; and
 - all building inspectors and building control bodies will need to be registered and be competent, regardless of what types of buildings they work on.

Higher-risk building – proposed definition by MHCLG

In para 228 of the Explanatory Notes, MHCLG has set out what it would like to see as the definition of a higher-risk building:

A building which satisfies the height condition and contains:

- Two or more dwellings (ie house, flat or serviced apartment);
- Two or more rooms for residential purposes (eg supported accommodation), or
- Student accommodation

Where

- the height condition is satisfied:
 - the floor surface of the building’s top storey is 18 metres or more above ground level (ignoring any storey which is a roof-top plant and machinery area or any storey consisting exclusively of plant and machinery); or
 - the building contains more than 6 storeys (ignoring any storey which is below ground level).

And

- “room for residential purposes” means a room (other than in a dwelling) which is used by one or more persons to live and sleep but excluding a room in:
 - a residential care home;
 - secure residential institution (eg prison, detention centre);
 - Temporary accommodation (eg a hotel, hostel, guest house, hospital, hospice).

The Building Safety Regulator

HSE

The Building Safety Regulator will sit within the Health & Safety Executive (taking the form of a new division within the HSE) and report to the Secretary of State. The Regulator is the lynchpin of the new regime – its approach to and execution of its functions and powers will determine how successful the new regime is. The Explanatory Notes make it clear that Government's expectation is that the Regulator will take a proactive role and will not limit its regulatory activity to enforcement only (see para 154 of Explanatory Notes).

The Regulator will be responsible for all regulatory decisions under the new regime during all stages of the life-cycle of a higher-risk building.

Functions

The Regulator has three broad functions. It must exercise these functions with a view to 'securing the safety of people in or about buildings in relation to risks arising from buildings; and improving the standard of buildings' (see section 3(1)).

The three functions are as follows:

Implementing the new, more stringent regulatory regime for higher-risk buildings (section 4)

This means being the building control authority in respect of building work on new higher-risk buildings (eg it will be responsible for checking building work to verify that it complies with the Building Regulations) and overseeing/enforcing the new regime in occupation phase too.

Overseeing the safety and performance of ALL buildings (section 5)

This has two key aspects:

- Overseeing the performance of other building control bodies (local authorities and registered building control approvers (previously called Approved Inspectors)). This will involve collecting performance data and having the power to impose sanctions for poor performance.
- Understanding and advising on existing and emerging building standards and safety risks including advising on changes to regulations, changes to scope of regime, commissioning advice on risks in and standards of buildings.



Assisting and encouraging competence among the built environment industry and registered building inspectors (section 6)

This has two key workstreams:

- Assisting and encouraging improvement in the competence of the built environment sector through several functions including establishing and setting the strategic direction of the proposed industry-led competence committee, carrying out research and analysis, publishing non-statutory advice and guidance etc.
- Establishing a unified building control profession with competency requirements for registration of a building control professional that will be common across both public sector (Local Authority Building Control) and private sector.

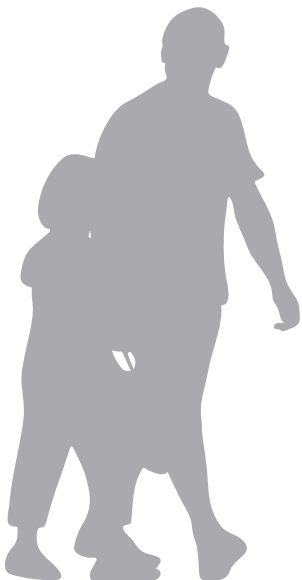
In order to assist with the carrying out of its functions, the Regulator is under a duty to establish and operate (or arrange for another person to operate) a system to facilitate the voluntary provision of information about building safety to the Regulator (see section 8). The current proposal is for this function to be fulfilled through the expansion of the Confidential Reporting on Structural Safety scheme (CROSS).

The Regulator can also ask a “relevant authority” for assistance to carry out its functions, or direct it to do something. A relevant authority is the local authority or fire and rescue authority.

Committees

There are three committees that the Regulator must establish:

- Building Advisory Committee (see section 9) – This implements one of the Hackitt Review’s recommendations that Government should create a new structure to validate and assure guidance, oversee the performance of the built environment sector and provide expert advice. This committee replaces the Building Regulations Advisory Committee for England, which will be abolished.
- Committee on Industry Competence (section 10) – This picks up Hackitt’s observations that the current landscape for ensuring competence is fragmented, inconsistent and complex. The sector needs to work together to develop proposals for a system for competence oversight. This includes the establishment of this industry-led committee to ensure a consistent approach to improving competence.
- Residents’ Panel (section 11) – This will ensure that residents are able to contribute to key policy changes related to residents made by the Regulator and also empowers the Regulator to call on the expertise of the panel for insight and support.



Plans and reports

The Regulator must produce a number of documents/plans (sections 23 – 26):

- A strategic plan setting out how it proposes to carry out its functions in the period to which the plan relates (to be approved by the Secretary of State)
- An annual report about the information provided under the mandatory reporting requirements
- This statement can be included in the annual report the HSE is already obliged to make to the Secretary of State on the performance of its functions during the year pursuant to paragraph 10(3) of Schedule 2 to the Health & Safety at Work Act 1974.

Enforcement

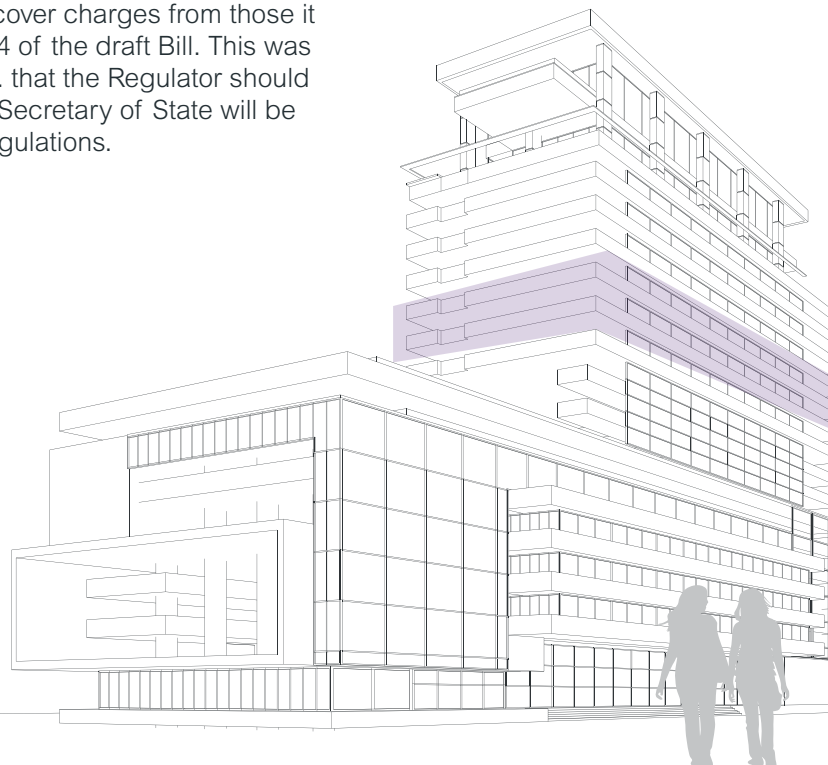
Section 27 enables the Regulator to set up a multi-disciplinary team of authorised officers to exercise powers to carry out relevant building functions (defined in sub-section 5) on its behalf.

If someone on site obstructs an authorised officer of the Regulator or if someone seeks to impersonate an authorised officer, this will be a criminal offence (see section 28) triable in the magistrates' court only. The offence of obstruction will carry a fine of level 3 on the standard scale (currently £1000 – in line with obstructing a police officer under the Police Act 1996). The offence of impersonation will carry an unlimited fine (mirroring the offence of impersonating a police officer under the Police Act).

The offence of providing false or misleading information to the Regulator is triable in the magistrates' or Crown courts. If tried by magistrates, the offence will carry a maximum penalty of an unlimited fine and/or 12 months imprisonment (six months until commencement of s154 (1) of CJA 2003). If tried at Crown court, the maximum penalty is an unlimited fine and/or two years' imprisonment.

Fees and charges

Section 33 allows the Regulator to charge fees and recover charges from those it regulates in relation to its functions under Parts 2 and 4 of the draft Bill. This was one of the recommendations of the Hackitt Review, i.e. that the Regulator should be funded through a full cost recovery approach. The Secretary of State will be required to implement this section via new statutory regulations.



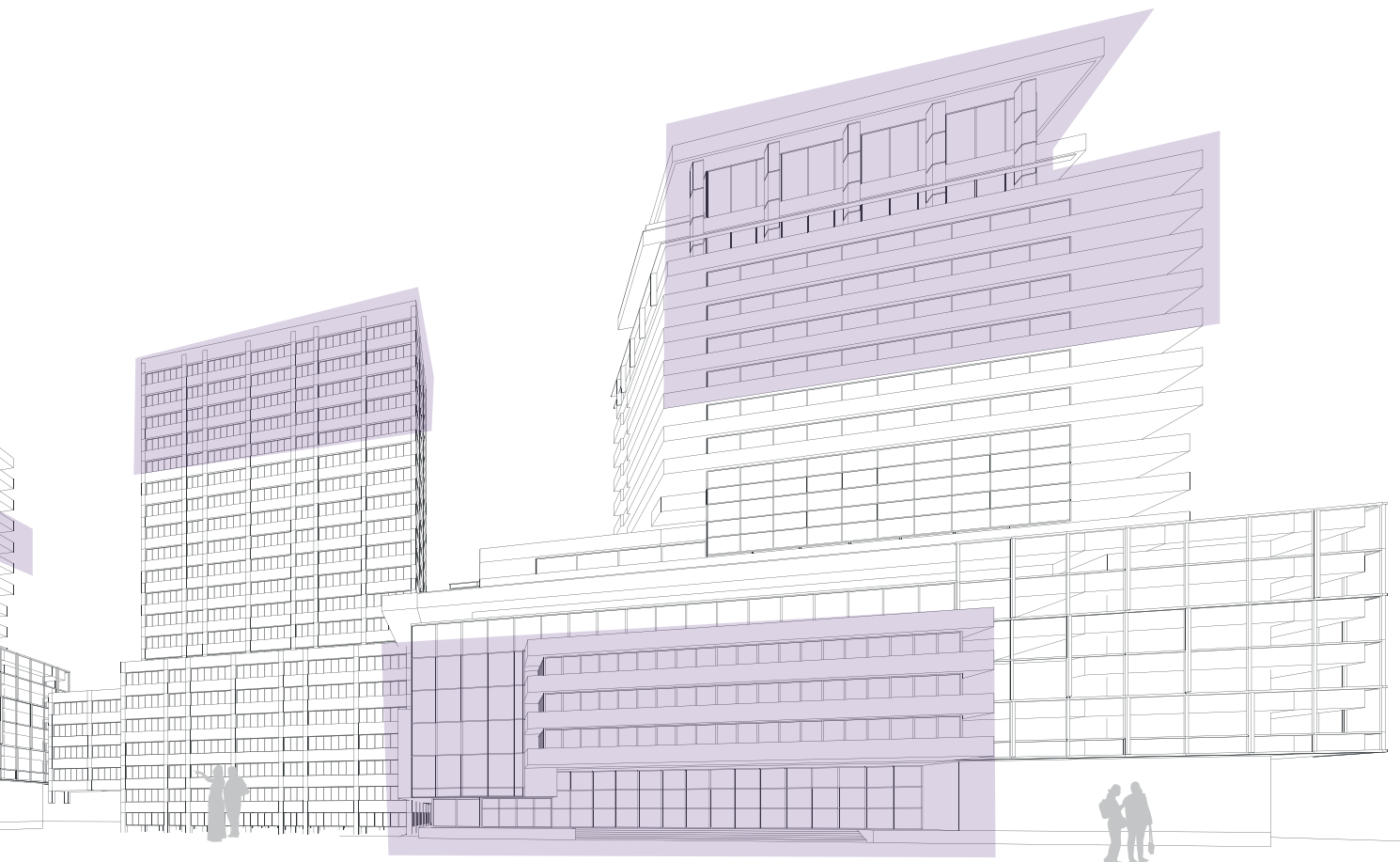
Right of appeal and review

Any decisions of the Regulator will be able to be reviewed (see section 30). Secondary legislation will need to set out what categories of decisions will be reviewable, who can apply for a review and all of the administration requirements etc.

Any reviewed decision can then be appealed to the first-Tier Tribunal (see section 31). The right of appeal may only be exercised if the decision has been reviewed pursuant to section 30. This mirrors the review regime used by the Regulator of Social Housing, Health & Safety Executive and Civil Aviation Authority and Food Standards Agency.

Section 34 provides that the Secretary of State will periodically appoint an independent reviewer to review the effectiveness of the building safety regime and make recommendations for improvement where necessary. This is to ensure the whole system is fit for purpose (see para 310 of the Explanatory Notes) – including the effectiveness of the Regulator.

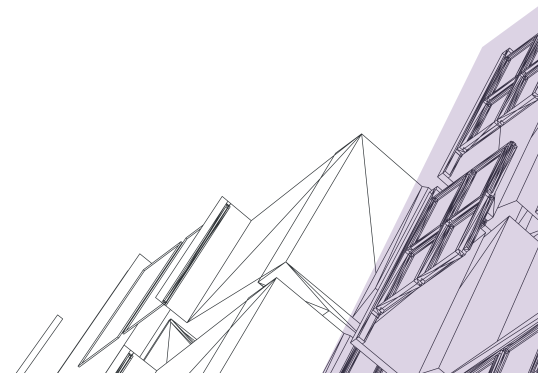
In the first instance, the Secretary of State must appoint an independent reviewer within five years of the Act being passed.



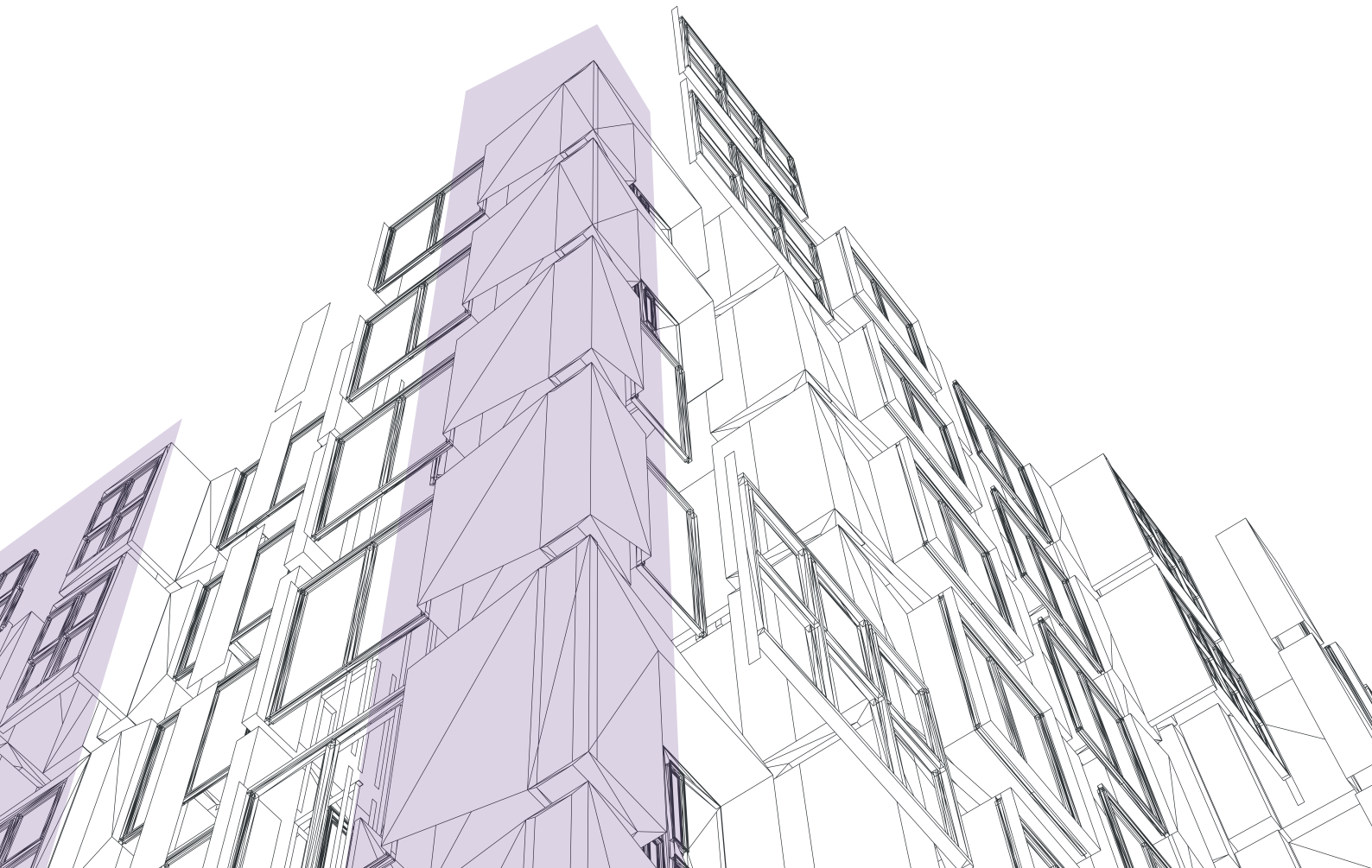
Amendments to the Building Act

These amendments are critical to the effectiveness of the enhanced regime during the design and construction phase. The amendments have the following effect:

- The Regulator is the building control authority for higher-risk buildings (ie responsible for supervising building work and enforcing compliance with the Building Regulations) and for work which leads to a building becoming a higher-risk building. The draft Bill establishes that the Regulator will be the building control authority for all higher-risk buildings, removing developers' ability to choose the building control authority for higher-risk buildings.
- Introduce the Dutyholder regime.
- Introduce the competency regime.
- Increase of time-limits for formal enforcements of non-compliance with Building Regulations (see sections 35 and 36 of the Building Act 1984). It extends prosecutions for contravention of the Regulations from 2 years to 10 years and the requirement to correct non-compliant work from 1 year to 10 years.
- Provide the Regulator (as the building control authority) powers to issue Compliance Notices (requiring issues of non-compliance to be rectified by a set date) and Stop Notices (during the design and construction phase – requiring work to be halted until serious non-compliance is addressed) and sets out offences and penalties for those persons who contravene either notice;
- Make it clear that any offences under the Building Act (which covers the Dutyholder roles and requirements for inspection and reporting of buildings) committed with the consent or connivance of a director, manager or secretary, or which are attributable to their neglect, means that both the company and the relevant officer will be liable.
- Provide that the Regulator will establish and maintain a register of building inspectors (public sector) (see sections 58B-58D) and building control approvers (private sector) (see sections 58N-58P), as well as a code of conduct for building inspectors (see section 58E) and a set of professional conduct rules for registered building control approvers (in addition to operational standard rules applying pursuant to section 58Y) (see section 58Q). It must also investigate claims of misconduct and, if proven, make a disciplinary order, including the suspension of an individual's registration. If someone impersonates a registered building inspector or a registered building control approver, it is an offence punishable on summary conviction by a fine.



- Introduce a performance management system as well as powers to investigate misconduct or contravention of the operational standard rules (see section 58Y as well as 58Z2-58Z4), powers to issue a series of improvement and serious contravention notices and the power to either recommend to the Secretary of State that the functions of the building inspector is transferred to another local authority or the registered building control approver's registration is cancelled (as appropriate).
- Oblige the Regulator to keep a register of specified relevant information provided to building control. This will be the national electronic register/portal. This will include notices, certificates, orders, consents, demands and plans. This must be maintained electronically and certain parts of it must be available for inspection by members of the public (see section 52).
- Transfer all of the Approved Inspectors' functions to registered building control approvers (ie private sector building control).



In-occupation obligations

This part of the draft Bill relates to the in-occupation phase. It includes provisions dealing with the Accountable Person and Building Safety Manager and a list of significant amendments to the Landlord and Tenant Act 1985. There is also a significant section on residents' rights and obligations.

Accountable Person

The Accountable Person is defined at section 61 in relation to a higher-risk building as:

- a person who holds a legal estate in possession in any part of the common parts (subject to subsection 2); or
- a person who is under a relevant repairing obligation in relation to any part of the common parts.

Subsection 2 of section 61 sets out the test identifying the Accountable Person where there are two or more persons with legal interests in a building in scope. The test relates to the legal estate in possession in relation to the common parts and the lease arrangements in relation to the repair and maintenance of those common parts. It therefore makes provision for management bodies to be defined as Accountable Persons in circumstances where the lease sets out repair and maintenance obligations on that management body (see para 500 of the Explanatory Notes).

Given the test set out in subsection 2, a person is not an Accountable Person where another person is under a "relevant repairing obligation" in relation to the relevant common parts. "Relevant repairing obligation" does not include any requirement on a tenant to use repair or maintain anything in a "tenant-like" manner (see subsection 5).

The Government's response to the Consultation published in April 2020 indicated that further guidance on complex ownership structures and identities of relevant Accountable Persons would be provided. Paras 498-505 of the Explanatory Notes provide some preliminary guidance, though more guidance will be needed. For example, neither the draft Bill nor the Explanatory Notes confirm whether Accountable Persons will be required to nominate a Board-level person as a nominated individual, as anticipated in the Government's 2019 Consultation document or whether this requirement has now been shelved. In contrast, Section 70 of the draft Bill places a requirement on the Building Safety Manager to nominate an individual person.

Accountable Persons must cooperate with "responsible person" under Fire Safety Order where this is a different person (see section 102).

Requirement to register a higher-risk building

Accountable Persons who fail to register a higher-risk building before its occupation commit an offence, punishable by imprisonment for a term of up to 12 months (on summary conviction) or 2 years (on conviction and indictment) or a fine or both.

Registration of higher-risk buildings is critical in that it enables the Regulator to take a systematic approach to the oversight of buildings in the new regime.

Building Assurance Certificates

Section 64 requires the Accountable Person to apply for a Building Assurance Certificate (a new term, replacing what was previously referred to as the Building Safety Certificate).

The Regulator must issue a “Building Assurance Certificate” if it is satisfied that the Accountable Person has not contravened any “relevant duties”, which are:

- section 67 (duty to appoint Building Safety Manager);
- section 71(1) (removal of Building Safety Manager);
- section 72 (duty to assess building safety risks);
- section 73 (steps to prevent major incident);
- section 74 (duties relating to Safety Case report);
- section 78(4) (duties relating to Mandatory Occurrence Reporting System);
- section 80 (duty to give information);
- section 82 (duty to produce a residents’ engagement strategy).

Applications for Building Assurance Certificates must be accompanied by:

- a copy of the most recent Safety Case report for the building unless a copy of that report has been provided in accordance with section 75(2);
- prescribed information about the Mandatory Occurrence Reporting System operated by the Accountable Person;
- prescribed information demonstrating compliance by the Accountable Person with their duties under section 80 (duty to give information);
- a copy of the Residents’ Engagement Strategy.

The Accountable Person must display the Building Assurance Certificate in a “conspicuous position” in the building

Building Safety Manager

Section 67 obliges the Accountable Person to appoint a person to be the Building Safety Manager for the building before the building becomes occupied. Accountable Persons who fail to appoint a Building Safety Manager commit an offence, punishable by imprisonment for a term of up to 12 months (on summary conviction) or 2 years (on conviction and indictment) or a fine or both.

Section 68 provides that the Regulator may veto the appointment of a Building Safety Manager if it appears that the person is not suitable, after consulting with fire and rescue authority and other persons it considers appropriate.

Section 70 provides that where a corporate body has been appointed as the Building Safety Manager, it must appoint a “nominated individual” to carry out the functions of the Building Safety Manager as soon as possible. This is in line with the Hackitt Review that recommended that a sufficiently competent individual is named as the person responsible for the management of safety at a particular building.

Where it appears to the Regulator that the Building Safety Manager is not a suitable person, it must give a direction to the Accountable Person to remove the Building Safety Manager.

Building safety risks in occupation

Section 72 provides that Accountable Persons must assess building safety risks as soon as reasonably practicable. Further assessments must also be carried out:

- at regular intervals;
- where the Building Safety Manager notifies the Accountable Person that the assessment is no longer valid (s 76(2)(a));
- at any time that the Accountable Person has reason to suspect that the current assessment is no longer valid; and
- at the direction of the Regulator within a specified period.

Assessments must be suitable and sufficient for the purposes of enabling the Accountable Person to comply with their duties under section 73 (duty to prevent a major incident).

Section 73 requires Accountable Persons to take reasonable steps to prevent a “major incident” occurring as a result of a building safety risk materialising (ie significant loss of life or injury to people), and reduce the severity of the incident. Any steps may include carrying out works to any part of the building, or as directed by the Regulator, and must be taken promptly.

In Sections 74 and 75, Accountable Persons must produce “Safety case reports”, containing their assessment of building safety risks and any steps taken under section 73 to prevent those risks, and provide this to the Regulator.

Section 76 sets out that the Building Safety Managers must manage higher-risk buildings in accordance with the Safety Case report, and notify the Accountable Person if any assessment is no longer valid and/or if any further action should be taken.

Section 77 provides that the Secretary of State may require an Accountable Person to ensure there is adequate insurance against loss arising from building safety risks. Adequate insurance will be deemed to be in place if an insurance contract complying with any requirements in the Regulations is in force.

Section 78 provides that the Building Safety Manager must give all prescribed information to the Regulator. Any contravention without reasonable excuse is an offence and liable on summary conviction to a fine.

Additionally, section 78(4) also requires the Accountable Person to establish and operate a Mandatory Occurrence Reporting System. This system will be assessed as part of the Building Assurance Certificate application.

Section 79 requires Accountable Persons to keep “prescribed information” (this seems to be “the golden thread” from the Hackitt Review) in accordance with prescribed standards. The Explanatory Notes anticipate that the information will need to be kept in digital format, but neither the draft Bill nor the Notes anticipate the mandating of Building Information Modelling for prescribed information. Further guidance is expected from the Government on this point.

Section 80 allows the Secretary of State to make provision requiring the Accountable Person to give prescribed information to the Regulator, residents/owners or other prescribed persons.

Section 81 requires an outgoing Accountable Person to give prescribed information to any new or replacement Accountable Person. Failure to do so is an offence and punishable by imprisonment for a term of up to 12 months (on summary conviction) or 2 years (on conviction and indictment) or a fine or both.

Sanctions

In addition to the sanctions/offences noted above (e.g. for impersonating an authorised officers of the Regulator or obstructing a building control approver etc), the following offences all attract sanctions for the Accountable Person of imprisonment for up to 12 months on summary conviction or up to 2 years on indictment, or a fine, or both.

- Failure to respond to/comply with/implement Compliance Notices or Stop Notices issued by the Regulator (sections 91(6) of the draft Bill and new section 35C(3) of the Building Act 1984).
- Failure to register a building before the occupation phase (section 62(3)).
- Failure to appoint a Building Safety Manager (section 67(5)).
- Contravening without reasonable excuse any relevant requirement where that failure places one or more people in or about the building at critical risk (section 94(2)).

Building Safety Managers will be fined, not imprisoned, for non-compliance, as will approved building safety inspectors (or building control approvers).

Residents

Residents are held to be at the centre of the new regime proposed by the draft Bill. There are comprehensive arrangements set out in the draft Bill to promote the participation of residents and “flat-owners” in the decision-making about building safety risks in their building. The Accountable Person will need to produce a Resident Engagement Strategy (either as part of Gateway 3 requirements or as required by the registration process/Safety Case for existing in-occupation higher-risk buildings).

Resident Engagement Strategy

Section 82 provides some high-level requirements as to what the Strategy must include (subsection 3):

- details of the information that the Accountable Person will provide to residents relating to the management of the building;
- the scope of what they will consult residents about;
- the methods the Accountable Person will use to seek residents’ views; and
- details of how they will measure the effectiveness of the Strategy.

It is expected that Government (in conjunction with the Residents’ Panel established by the Regulator) will issue a Good Practice Guide to provide practical help to Accountable Persons in developing the Strategy, including examples and templates.

Requests for information

In addition to the information to be provided pursuant to the Resident Engagement Strategy, the draft Bill provides that residents will be able to request more detailed safety information and documentation. This further information is extensive and is currently envisaged to comprise the following:

Full, current and historical fire risk assessments; planned maintenance and repairs schedules; outcome of Building Safety inspection checks; how assets in the building are managed; details of preventive measures; fire protection measures in place; information on the maintenance of fire safety systems; fire strategy for the building; structural assessments; and planned and historical changes to the building.

Complaints procedures

The Accountable Person will need to establish a complaints procedure and system to handle residents' safety concerns. The Building Safety Manager then needs to handle all complaints in line with that procedure. Details will be set out in secondary legislation, but the need for a timely response and points in the process when a complaint can be referred to the Regulation will be included.

The Regulator is also required to establish a complaints procedure and system to handle residents' safety concerns escalated to them either directly by a resident or via the Accountable Person or the Building Safety Manager. As with the Accountable Person's complaints procedure, the detail of the Regulator's complaints procedure will be set out in secondary legislation. The Resident's Panel will also be consulted in respect of the same.

Duties on residents

There are express duties on residents to keep their properties in good repair, take reasonable care to avoid damaging safety items and comply with any request made by the Accountable Person to fulfil safety duties. Accountable Persons are able to give residents notice that they have contravened their duties and require them to provide information or cease certain behaviour. If the resident breaches this notice, the Accountable Person may apply for an order from the county court to enforce it (section 86).

Rights of access to residents' dwellings

Accountable Persons will have rights to enter residents' dwellings via application to the county court (similar to the process for gaining access to properties to do gas appliance checks). Access may be needed by the Accountable Person to satisfy itself that the resident is complying with a specified duty, in order to perform their own duties to assess building safety risks and take reasonable steps to minimise them. It is likely that a presumption towards access is needed from the county court to ensure that the effective implementation of the enhanced regime in a higher-risk building is not hampered (section 87).

Building safety charges

The legislation amends the Landlord and Tenant Act 1985 and implies a new regime into every "long-lease" of a higher-risk building to recharge building safety charges for building safety costs incurred for carrying out prescribed safety measures, including overheads.



“Long-leases” are defined as a lease granted for a term of over 21 years, including Right to Buy and Right to Acquire leases and also shared ownership leases.

Landlords must provide tenants with budgets and detailed cost information about the building safety works, plus a reconciliation statement showing all costs charged to other tenants and any differential between charges levied and costs incurred. All costs must be “reasonable”, and can cover:

- the commission and production of the Safety Case, Resident Engagement Strategy and mandatory reporting scheme;
- the appointment of the Building Safety Manager;
- building safety works;
- monitoring and management of day-to-day safety in the building, resident engagement and using the mandatory reporting system;
- the costs of compliance with statutory notices, obligations and requirements (but not the cost of enforcement action); and
- fees and other charges payable to the Regulator.

Landlords are not allowed to charge work required as a result of enforcement action by the Regulator, negligence breach of contract or unlawful acts by the Accountable Person, or prescribed costs levied by the Regulator (section 89).

Implied building safety terms

By section 88, the legislation will create a number of implied terms in leases covered by the Landlord and Tenant Act 1985, including obligations:

- on landlords to comply with rules about building safety charges;
- on landlords to carry out the Accountable Person role, or to cooperate with the Accountable Person;
- on tenants to pay any building safety charges required; and
- on tenants to allow the landlord or authorised person to enter their dwelling to carry out building safety measures or inspect/assess the property, at reasonable times and on reasonable notice.

Landlords are prevented from contracting out of their obligations, and may not exercise any forfeiture or penalty in respect of either landlord or tenant enforcing their rights.



Supplementary provisions

New Homes Ombudsman

The Secretary of State must establish a scheme for all owners and occupiers of new build homes to allow complaints to be made to a new Ombudsman role. Membership of the scheme will be open to all developers. The Secretary of State may issue or approve a code of practice about the standards of conduct and quality of work (sections 106 to 109).

Housing Ombudsman

Section 113 removes the so-called “democratic filter” and enables social housing complainants to escalate a complaint directly to the Housing Ombudsman without having to make their complaint via a “designated person” (e.g. an MP, Councillor or recognised tenant panel). This removal seeks to improve and expedite access to the Housing Ombudsman service for social housing complainants, but they are still obliged to have completed their landlord’s own complaints process first. This will put social housing tenants on parity with those of other tenures. .

Construction products

Schedule 8 of the draft Bill allows the Secretary of State to regulate all construction products made available in the UK. The Regulatory regime will identify “designated products” (products that perform to a designated standard) and a statutory list of “safety critical” products (where the failure of such products would result in death or serious injury). All other construction products available on the market that are not designated or on the statutory list or subject to a UK Technical Assessment will be subject to a general safety requirement.

The Secretary of State will have ongoing powers to amend the legislation relating to designated products and technical assessments and to update the statutory list as required.

Changes to registration of architects

Section 111 of the draft Bill amends the Architects Act 1997 to allow the Architects Registration Board to monitor the competence of architects throughout their registration. The draft Bill provides broad powers for the Board to determine the criteria and process for registering as an architect in the UK.

Where an architect does not meet the requirements set out by the Board, the individual may be removed from the Register of architects. Any disciplinary orders made by architects by the Professional Conduct Committee of the Board will be listed alongside an architect’s entry in the Register, to allow greater transparency.

Concluding remarks

The draft Bill is the next step in the Government's response to the Grenfell Tower fire. There are few surprises in the draft legislation, some useful clarifications (eg that sheltered housing and student accommodation fall within the remit of the reforms) and some areas that need focussed consultation and feedback in order to ensure they deliver up a workable solution to the challenges posed by the Hackitt Review.

Trowers & Hamlins will be continuing their conversation with MHCLG, clients, industry and sector experts and interested parties to ensure that the ensuing legislation assists the built environment sector in ensuring that residents feel safe in their homes.

Please visit www.trowers.com to access our Building a Safer Future insights and recordings of our most recent Building a Safer Future webinars.

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