HOWARD KENNEDY

Real Estate, Real Change, Real Expertise...

How new regulations and legislation affect the living sector



Building Safety

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Introduction



The Inquiry into the specification, use and installation of construction materials following the Grenfell Tower tragedy has resulted in major statutory reform: the Building Safety Act 2022 (the Act) and other associated legislation.

The Act introduces complex regulatory requirements to enhance building safety for higher risk multi-occupancy buildings. It creates a new Building Safety Regulator who reports to the Ministry of Housing, Communities and Local Government and is tasked with ensuring compliance with the new regulatory regime. Understanding and meeting these regulatory obligations is crucial for stakeholders and organisations to mitigate potential legal, financial, and criminal sanctions.

The Act introduces new obligations for developers and contractors, including stricter safety protocols during the planning, design, construction and occupation phases of a project, including maintaining the 'golden thread' of documents and extending the liability for defective works. Compliance is essential to avoid both project delays and financial penalties.

Management of higher risk buildings has radically changed, with the introduction of new statutory duty holders who must continue to assess and manage building safety risks during its occupation phase. Coupled with enhanced obligations on landlords, leaseholder protections have been introduced to shield leaseholders from service charge costs relating to the remediation of historic defects across buildings which are taller than 11 metres or have more than five storeys.

The Regulator oversees compliance with the Act, ensuring that buildings meet revised safety standards. They have the authority to inspect buildings, review documentation, and enforce penalties for non-compliance. In the worst case, criminal sanctions are available to the Regulator.

Developer Focus

How we can support

The Act introduces a complex set of challenges that impact every stage of a development's lifecycle—from design and planning through to construction, funding, occupation, and long-term asset management. All stakeholders involved in the creation of new buildings carry legal responsibilities, and reputational risk is high. Navigating the Act and Gateway Regime requires strategic foresight. A well-informed approach to development can significantly enhance the long-term viability of a scheme and the legacy of the asset. Managing reputational and litigation risk in respect of a historic portfolio, requires experience, insight and a dedicated team.

Key considerations include:

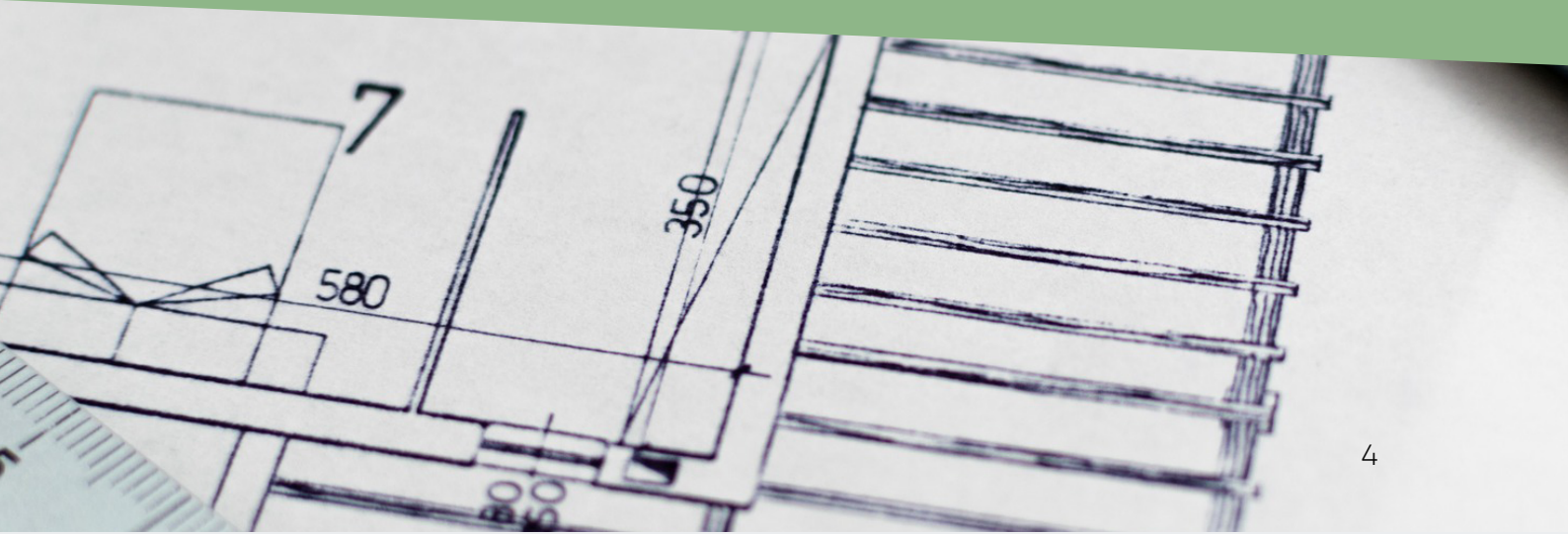
- Integrating safety compliance into early design and planning stages.
- Understanding the implications of the Gateway regime.
- Managing risk and liability across the supply chain.
- Ensuring documentation and accountability align with the Golden Thread requirements.

Transactional

- We prepare development and funding agreements, building contracts and consultant appointments to ensure our clients are sufficiently protected when progressing remediation schemes.
- We advise interested parties on the gateway, dutyholder and competency regimes during the planning, construction and occupational phase.

Development Gateways

- We help our clients understand the gateways process in the context of their development projects.
- We advise clients on risk allocation considerations relating to gateways 2 and 3 for live projects and implications for the commercial elements.
- We prepare drafting in construction, development and funding documents to reflect the complexities of the gateways process.



Developer Focus Continued

Crisis reputational management

We help our clients respond to real time 'on-site' emergencies, be that decanting dangerous buildings, liaising with statutory and local authorities, the press and institutional investor stakeholders; and managing customer communications regarding multi-occupancy building safety issues.

Dispute advisory

- We advise on dispute avoidance strategies for the country's blue-chip developers and are industry experts on the merits of building safety claims in contract, tort and statute (including the Defective Premises Act 1972).

- We also act for claimants in complex building safety disputes against contractors, consultants, product manufacturers and insurers to recover our clients' fire safety defect remediation costs. This includes litigation in the Technology and construction Court, arbitration, adjudication and all forms of alternative dispute resolution, and in the Land Tribunal under the Remediation Order and Remediation Contribution Order regimes.



Remediating Historic Defects

Duty imposed on landowners

Landlords and employers are under an ongoing duty to assess and determine building safety risks in any buildings which they control. A building safety risk is one where there is a risk of the spread of fire or structural collapse. There is a mandate to remediate such defects.

The Act introduces leaseholder protections against the cost of remediating relevant defects in buildings which contain two or more dwellings and are 11 metres or more in height or have five or more storeys. The protections apply to leaseholders who are the tenant of a lease which was granted before 14 February 2022, and where the lease is for a term of more than 21 years and provides for a service charge. The protections do require that the leaseholder on 14 February 2022 either used the subject flat as their principal home or they owned no more than 3 residential properties in the United Kingdom. Leaseholders are either wholly protected or subject to new caps introduced by the Act.

The regime is hugely complex but there are certain caveats to the presumption of protection to leaseholders and the leaseholder and landlord assert their various rights through a convoluted certificate regime. These are commonly known as the Landlord Certificate and Leaseholder Deed of Certificate.

The Act introduces strict timeframes for when these certificates should be provided and it is important that leaseholders and landlords take prompt advice to avoid inadvertently being responsible for costs of remediation.

Developer Remediation Contract

Whilst not introduced by the Act, in 2022 Michael Gove persuaded developers to contract with Government to remediate life critical fire safety risks in any higher risk buildings constructed by them in the 30 years prior to the Act coming into force. This was regardless of whether the developer had sold the asset and no longer retained any interest in it. The developer is responsible for arranging access to the buildings and remediating at their own cost.



Gateways
A new building control regime



What are the Gateways?

The Act introduced a new method of building control for higher risk buildings (buildings which are 18 metres or more in height or seven storeys or more with two or more dwellings). This provides for a more stringent regime focusing on safety during the design, construction and refurbishment of a higher risk building. This introduced three gateways from planning through to occupation.

Gateway 1: Planning

This introduces new requirements into the planning system to ensure fire safety is incorporated at the planning phase. This requires a fire statement setting out the fire safety considerations for the higher risk building. This gateway was implemented under the Town and Country Planning Act 1990 and has applied to planning applications made since August 2021.

Gateway 2: Construction and Design

This takes place at the building control phase. Construction cannot commence until Gateway 2 approval has been obtained from the Regulator. The application is made by the client or a principal designer or contractor. A Gateway 2 application should be approved within 12 weeks for works to construct a new higher risk building or eight weeks for works to an existing higher risk building. The contents of the application are prescribed by the Act and regulations, including a requirement to evidence compliance with the functional requirements of Building Regulations. There is also an emphasis on ensuring that everyone appointed to the project is fully competent and accountable for design and construction from a building safety standpoint. The Regulator provides robust scrutiny throughout the build, reinforcing safety every step of the way, and a new "golden thread" of documents is established – a living bible of records created, updated, and maintained for the building's entire lifecycle.

Delays with Gateway 2 Applications

Presently Gateway 2 applications are thought to be approved within a period of 24 – 36 weeks. The delay is as a result of a lack of guidance from the Regulator, inefficient handling of applications and a large and unexpected volume of Gateway 2 applications. There is no formal recourse for any delay for approval of any gateway application, although an applicant can agree an extension of time or appeal a decision if the application is rejected. Instead, applicants are advised to use the little guidance available, ensure they employ competent and qualified persons to assist with compiling the application and engage proactively with the Regulator prior to applications being made.



Gateway 3

This acts as a hold point and building control approval must be obtained before the higher risk building can be occupied. The Act defines this as a completion certificate. A Gateway 3 application is made when all notifiable work is complete. The outcome of the application is the issue of the completion certificate by the Regulator. The application must include a description of the as built works along with a compliance statement confirming that the works have been undertaken to comply with all applicable building regulations and the golden thread of documents. As with Gateway 2, guidance exists to assist applicants. A valid application must be dealt with by the Regulator within eight weeks.

As with Gateway 2, continual engagement with the Regulator during the build phase is key to obtaining prompt Gateway 3 approval.





Dutyholder Regime

Management of Higher risk buildings (HRBs)

The Act introduces a new in-occupation regime for management of HRBs. This is commonly known as the dutyholder regime. The Act introduces an Accountable Person and Principal Accountable Person (PAP), being those responsible for repair and maintenance of the HRB. There are potential criminal sanctions for non-compliance by the dutyholder.

The dutyholder regime requires a full health check of the HRB which should be kept up to date and evolving as the use of the HRB progresses. It is not a once-only assessment. The dutyholder regime requires:

- Management and assessment of building safety risks: this includes fire risk assessments, structural reports and assessments of the external wall system. However, each HRB will have its own unique needs which the PAP must establish.

- A method of reporting safety risks: this is known as a mandatory reporting system. The PAP must actively engage with its occupiers to ensure there is a system in place for reporting risks and a system for investigating those risks with a reporting function to the Regulator.

- Residents engagement strategies and complaints procedures: this requires consultation with the occupiers of the building, ensuring their views are heard to enable the HRB to be used in a safe manner.

Compliance with the dutyholder regime culminates in the safety case report for the HRB; a concise and accessible summary of the safety case for the HRB. The safety case report is submitted to the Regulator to demonstrate compliance by the dutyholder. This will be verified by the issue of a building assessment certificate (BAC) by the Regulator. The application for a BAC can be made at any time and the Regulator will continue to keep the validity of a BAC under review. A PAP is required to keep evidence of compliance with the duty holder regime in a single, accessible electronic system known as the golden thread so it can be accessed by occupiers of the HRB, the Regulator and the Fire Service.

Asset Management

How we can support

As the Act continues to evolve, our expert teams can advise on the obligations which have arisen under the dutyholder regime and provide strategic advice to navigate the complexities of HRB ownership and management.

Dutyholder regime

- We advise our clients in their capacity as dutyholder as to their ongoing obligations in HRBs (including the preparation of the Safety Case Report).
- We help our clients navigate their duty to maintain the golden thread of documents throughout the lifecycle of a HRB.

Service charge recoverability

- We advise our clients as to their ability to recover service charges in respect of building defects, having regard to the service charge caps imposed by the Act.
- We also advise on the interplay of the Act and the Section 20 consultation procedure.

Commercial premises

- We advise on regimes which relate to building safety but which fall outside of the Act such as the Regulatory Reform (Fire Safety) Order 2005 and Fire Safety Regulations 2022 which apply to all buildings regardless of height and use.

Landlord/leaseholder certificates

- We advise our clients on how and when to respond to requests for certificates including strategic advice where required.
- We liaise with our clients' professional advisors to ensure that information requirements are met and certificates do not fall foul of the draconian consequences provided by the Act.



Leaseholder Focus

Our teams can advise on the protections introduced by the Act.

Service charge recoverability

- We provide strategic advice to protect leaseholders from costs associated with remediating historic defects which may be recovered as service charges.
- We assist leaseholders where costs falling within the protection of the Act were demanded and paid prior to the Act coming into force, including how they might be reimbursed.

Dispute advisory

- We advance claims in the Tribunal for remediation orders and remediation contribution orders against landlords and developers to require them to remediate historic defects and contribute to the associated costs.
- We act in Tribunal and Upper Tribunal proceedings in claims where the extent of the leaseholder protections are disputed in the context of works proposed by landlords, the costs of which may be recovered as service charges.
- We identify culpable parties which may include the original developer, its parent company or an associated company.

Leaseholder owned or managed buildings

- We advise clients on the potential impact to them of the Act when considering excising the right to manage or seeking to acquire the freehold of their building through collective enfranchisement.



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