

OVERVIEW OF THE BUILDING FIRE SAFETY REGIME AND HOW IT HAS (AND WILL) CHANGE FOLLOWING THE GRENFELL TOWER TRAGEDY AND THE HACKITT REVIEW

CATALYST FOR ACTION: THE GRENFELL TOWER TRAGEDY (14 JUNE 2017) AND THE HACKITT REVIEW

In the aftermath of the Grenfell Tower tragedy, the regulatory system covering high-rise and complex buildings came under intense scrutiny and serious flaws were exposed. As a result, the Government commissioned an independent review of Building Regulations and Fire Safety, led by Dame Judith Hackitt (Hackitt Review). The aim of the Hackitt Review was to make recommendations for changes to ensure that we have a sufficiently robust regulatory system for the future, and to provide assurance to residents that the system is "*fit for purpose*" and working to ensure the buildings they live in are safe and remain so.

The final report from the Hackitt Review set out over 50 recommendations as to how to deliver a more robust regulatory system. Whilst the wider enforcement powers summarised in the Hackitt Review are outside of the scope of this article, the initial actions taken by Government would suggest it is committed to implementing Dame Judith's recommendations. Whilst this would appear to be the case, some in the industry do not believe that Government has gone far enough, particularly as regards protecting leaseholders/homeowners from issues such as the cost of remediating defective cladding.

LEGISLATIVE REGIME IN FORCE AS AT 14 JUNE 2017:

- **Building Act 1984** – creates the statutory system under which building regulations are created and adapted through secondary legislation;
- **Building Regulations 2010** – is the current version in force and introduced the "*Fire Safety: Approved Document B*" (**ADB**). ADB is the approved guidance for all fire safety matters within and around buildings; and
- **Fire Safety Order 2005** – on 1 October 2006 there was a significant development in fire safety legislation when the Regulatory Reform (Fire Safety) Order 2005 (**FSO**) was introduced. The FSO fundamentally changed the way in which fire safety for businesses is carried out and enforced, providing for a risk-based approach in non-domestic premises and allowing more efficient and effective enforcement by the fire and rescue service. The majority of premises in England and Wales are covered by the requirements of the FSO, subject to certain exceptions which are classed as "*excluded premises*".

The law in relation to fire safety is therefore inherently tied to, and governed by, both the Building Regulations (including ADB) and the FSO.

This was essentially the state of the law as at 14 June 2017 and we have set out below the subsequent changes or improvements introduced by the Government:

(A). CHANGES TO LEGISLATION AND IMPACT – "*BUILDING A SAFER FUTURE*" CONSULTATION

As the first tangible step towards change, in December 2018 the Government launched a major new policy, entitled "*Building a Safer Future*". Among other things, the policy committed the Government to establishing two new bodies, a new Standards Committee to advise on construction product and system standards and regulations and a Joint Regulators' Group to trial elements of its new regulatory system ahead of any new proposed legislation.

Most significantly, the policy also committed the Government to amending ADB – the principal fire safety guidance – in order to specifically clarify the role of desktop assessments and to launch a new call for evidence, entitled "*Technical review of Approved Document B of the building regulations*". The launch of this new policy and the steps taken have been labelled as some of the biggest changes to be seen in a generation.

(B). CHANGES TO LEGISLATION AND IMPACT – THE BUILDING (AMENDMENT) REGULATIONS 2018

Whilst the Hackitt Review made various recommendations, somewhat surprisingly it did not include a call for a ban on the use of combustible cladding on high-rise residential buildings. However, within just days of its publication, the Government announced that it would consult on the introduction of a ban in this respect. This consultation ran for eight weeks from 18 June 2018 to 14 August 2018, and sought views on matters such as whether a ban should be introduced, how it should be implemented and the types of buildings to which it should apply.

As a result, **The Building (Amendment) Regulations**, SI 2018/1230 came into force on 21 December 2018, which implemented a ban on combustible cladding by prohibiting the use of combustible materials anywhere in the external walls of high-rise buildings over 18m above ground level and which contained one or more dwellings. The ban also applies where building work is a "*material change of use*" that brings an existing building within one of these categories.

(C). CHANGES TO LEGISLATION AND IMPACT – EWS1 FORMS

In December 2019, a new form known as the "*External Wall Fire Review Form*" (**EWS1**) was introduced with the intention of recording in a consistent and universal manner what assessments have been carried out on the external wall construction of residential apartment buildings. The EWS1 was originally designed following Government advice regarding external wall systems on buildings above 18m and was created to ensure residential buildings over 18m tall could be assessed for safety to allow lenders to offer mortgages. While the EWS1 applies to residential buildings, changes in government advice means that all residential buildings of any height with a wall system may need to be risk assessed. The EWS1 may only be completed by a designated competent person within strictly defined criteria as set out by the Government and has been endorsed by the RICS, UK Finance and the Building Societies Association.

The introduction of the EWS1 has resulted in further complications within the industry, as since it was introduced, the Ministry of Housing, Communities & Local Government (**MHCLG**) advice to check wall systems has extended beyond its original scope, and this has increased the number of buildings needing checks. In some cases, the introduction of the EWS1 has resulted in various buildings that were assumed to be compliant – following a review of the as-built O&M information, as opposed to an actual intrusive investigation – being deemed to be non-compliant and this issue may be exacerbated post the closing date for registrations for the Building Safety Fund (see comments below). In terms of obtaining an EWS1, there has been another issue in that there are only a relatively small pool of fire engineers who are suitably qualified and have sufficient insurance for them to undertake the necessary reviews. This has caused delay, issues and upset for many residents and owners, as the EWS1 has become a vital document in determining whether certain apartments can be sold or refinanced.

(D). CHANGES TO LEGISLATION AND IMPACT – SPRINKLERS AND OTHER SAFETY MEASURES IN NEW HIGH-RISE FLATS

The May 2020 Government consultation outlined its intention to amend ADB to reduce the trigger height at which sprinkler systems would be required in new high-rise blocks of flats and asked for views on the trigger height options. The consultation sought to obtain views on proposals to improve wayfinding signage within blocks of flats and to install evacuation alert systems for use by fire and rescue services. This resulted in the Government publishing "**Amendments to the Approved Documents**" (in Volumes 1 and 2), which took effect on 26 November 2020.

The Amendments focus on two fire safety provisions: (i) sprinklers and (ii) wayfinding signage for the fire service. In summary, the height threshold for the provision of sprinklers has been reduced from 30m down to 11m and the new guidance explicitly provides that sprinklers should be provided within individual flats. There is also an additional new recommendation for floor identification and flat indication signage within blocks of flats with storeys over 11m.

The Government provided a 6-month transition period, to allow the industry to adapt and to ensure adequate sprinkler systems can be installed to the correct standard. Whilst this transition period is necessary, it is not too long, as to have provided a greater period would have increased the number of building projects that could be submitted or started prior to the change in guidance; so reducing the impact of the change on fire safety in new buildings.

(E). CHANGES TO LEGISLATION AND IMPACT – MHCLG CONSOLIDATED ADVICE NOTE

Ahead of issuing the Fire Safety Bill (as discussed below), on 20 January 2020, the MHCLG published an advice note (**January 2020 Advice Note**), which consolidated previous advice in a single document and superseded the existing Advice Notes 1 – 22 (incorporating advice on the assessment of non-ACM external wall systems – previously Advice Note 14). The aim of the

consolidated note was to ensure that building owners of all multi-storey and multi-occupied residential buildings should undertake investigations of external walls systems and fire doors in order to:

- determine whether they represent a risk to the health and safety of residents; and
- take further steps to ensure that their buildings are safe.

On 21 November 2020, the MHCLG published a supplementary one page note (**November 2020 Supplementary Advice Note**) which clarified that the advice issued by the MHCLG is not law or statutory guidance and should not be considered a guide for valuation or insurance purposes either. However, it noted that the main aim of the notes was to ensure adequate levels of life safety for residents, people in the proximity of the building, and fire fighters, for all buildings irrespective of height. Despite the helpful clarification that these notes are not law or statutory guidance, it is recommended that building owners still consider their contents carefully and use the notes to their advantage in order to help them to successfully comply with the current fire safety legislation.

(F). CHANGES TO LEGISLATION AND IMPACT – FIRE SAFETY BILL / INTRODUCTION OF THE FIRE SAFETY ACT 2021

The **Fire Safety Bill (FSB)** built on action already taken by the Government and aimed to ensure that a tragedy like Grenfell can never happen again. Following much debate, the FSB was finally granted Royal Assent on 29 April 2021 and is now known as the **Fire Safety Act 2021 (FSA)**. Whilst the FSB has been granted Royal Assent, some parts of the FSA will not come into force immediately but instead will do so over the coming months. The FSA seeks to amend the FSO and clarifies the scope of the FSO, with a view to this leading to better identification, assessment and enforcement in high-rise residential buildings.

In this regard, the FSA clarifies that all responsible persons (i.e. the relevant duty-holder) for multi-occupied, residential buildings must manage and reduce the risk of fire for:

- the structure and external walls of the building, including cladding, balconies and windows; and
- entrance doors to individual flats that open into common parts.

This clarification will hopefully empower fire and rescue services to take enforcement action and hold building owners to account if they are not compliant and have not carried out necessary remediation. However, it should be noted that the Act does not address remediation costs in relation to cladding or its replacement. The FSA also aims to provide a foundation for secondary legislation to take forward recommendations from the Grenfell Tower Inquiry phase one report, which stated that building owners and managers of high-rise and multi-occupied residential buildings should be responsible for a number of areas including:

- regular inspections of lifts and the reporting of results to the local fire and rescue services;
- ensuring evacuation plans are reviewed and regularly updated (including personal plans for more vulnerable residents);
- ensuring fire safety instructions are provided to residents in an understandable form; and
- ensuring individual flat entrance doors comply with current standards.

One of the most contentious issues regarding the introduction of the FSA concerned who should be liable to pay for any necessary remedial costs; should this burden fall to leaseholders and tenants?

There were several attempts made by the House of Lords to amend the FSB to introduce a provision which would prohibit necessary remedial costs from being passed to tenants, however the House of Commons repeatedly rejected these amendments. Therefore it remains the case that the FSA does not include the sought after provisions that some tenants envisaged it would have, and as such tenants can be held liable to pay for necessary remedial costs.

(G). CHANGES TO LEGISLATION AND IMPACT – BUILDING SAFETY BILL

In December 2019, the Government also set out its intention to introduce a **Building Safety Bill (BSB)**, which would become known as the Building Safety Act, and would put into place a new and enhanced regulatory regime for building safety and construction products, ensuring residents have a stronger voice in the system. Whilst the FSB applies to all non-domestic buildings, new and old, regardless of height, the BSB is limited in its application to new higher risk buildings.

The outcome of the consultation confirmed that the BSB should legislate for a:

- Safety Regulator (**BSR**); and

- Construction Products Standards Committee.

The draft BSB should allow the Government to clarify the law concerning building safety, with the BSB:

- initially only applying to new "*higher-risk buildings*" (i.e. multi occupied residential buildings of 18m or more in height, or more than 6 storeys), but it is likely to be extended to existing and all high rise buildings in due course;
- establishing a new BSR within the Health & Safety Executive;
- establishing a new Duty Holder regime and imposing obligations on those Duty Holders; and
- introducing the new roles of: the '*Accountable Person*', who will be legally responsible for and manage risks once people are living in the building; and the '*Building Safety Manager*' who is anticipated to fulfil a similar role to that of the '*Competent Person*' under the Management of Health & Safety at Work Regulations 1999.

"*Higher-risk buildings*" are likely to be defined as set out above, but under the BSB the SoS will have the power to amend the definition after appropriate consultation. As such, once the BSR and the provisions of the BSB are in force, there is potential for the reach of the BSB and its provisions to expand.

The draft BSB quite clearly takes forward the Government's Building a Safer Future policy by setting out the primary legislation necessary to implement that policy. The Government has described it as bringing about "*the biggest improvements to building safety in nearly 40 years*". The BSB is unlikely to receive Royal Assent until the end of 2021 and it is currently being scrutinised by Parliamentary Committee. However, it is clear that it will introduce fundamental changes for the industry, particularly for those involved with "*higher-risk buildings*".

Following the report on the BSB, issued on 23 November 2020 by the Housing, Communities and Local Government Committee, which welcomed the intent but highlighted the lack of detail and concern that the draft does not do enough to provide adequate protection to leaseholders, the SoS' announcement on 10 February 2021 will go some way to addressing this and will also set up a "*gateway developer levy*" (for high-rise building developers) and new residential development tax in 2022 to help pay for cladding remediation works.

(H). CHANGES TO LEGISLATION AND IMPACT – BUILDING SAFETY FUND

Finally, the Government also showed a financial commitment to improving building and residents' safety by identifying buildings with unsafe Aluminium Composite Material (**ACM**) cladding and introducing a new fund of £600 million to remove and replace it in both private and social-sector homes over 18m high. There was also budget put in place of £1 billion to remove and replace non-ACM cladding materials from high-rise residential blocks, which brought the total funding for remediation work up to £1.6 billion. The recent announcement from the SoS (discussed earlier) included increased provision for the fund (albeit with little detail), which now stands at £3.5 billion and should provide further comfort for residents in affected homes/flats that remediation of defective cladding will take place reasonably swiftly and (potentially) at no cost to them.

CONCLUSION

It is clear that the Government has taken significant steps to engage with stakeholders and propose changes to the existing fire safety regime following the Grenfell tragedy and the recommendations of the Hackitt Review. Some of those changes have now been implemented and are welcome, including the introduction of The Building (Amendment) Regulations 2018 and the FSA, whilst the balance of the changes will be introduced through the forthcoming BSB (which is still under consultation and not expected to come into force until 2023).

Despite all of this, the debate continues as to whether the BSB and the introduction of the FSA go far enough or whether these pieces of legislation should be further amended. Only time will tell whether the resulting legislation brings about the fundamental and systemic changes advocated by the Hackitt Review and many in the industry.

Please follow the link for further information on AG's fire safety capabilities and key contacts

<https://www.addleshawgoddard.com/globalassets/specialisms/construction/cladding-and-fire-safety-snapshot.pdf>

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