

# The Building Safety Bill and beyond

*Emily Holdstock considers fire safety in the construction industry post-Grenfell, focusing on the Bill and the reforms it proposes to introduce*

**F**ew will be unaware of the events at Grenfell Tower in west London on 14 June 2017, when a fire broke out and killed 72 people, and in the process injuring many more. Phase 2 of the Grenfell Inquiry is examining the cause of these events and how the building came to be in the condition that allowed the fire to spread in the ways identified in Phase 1 of the inquiry.

As the investigation continues, and given ongoing press coverage surrounding the adequacy of government remediation funds and the effects of the EWS1 form on the ability of millions of homeowners to sell or re-mortgage residential apartments, it is unsurprising that stakeholders in the construction industry are far more conscious of building and fire safety than ever.

Even before the inquiry has concluded, the effects of Grenfell have been far-reaching and will undoubtedly change the landscape of the building safety regime.

## **The Hackitt report**

Following Grenfell, the government appointed Dame Judith Hackitt to conduct an independent review of building regulations and fire safety. Her report, entitled 'Building a Safer Future – Independent Review of Building Regulations and Fire Safety: Final Report' (the Hackitt report) was published and presented to Parliament in May 2018.

The report identified a number of issues which underpin the systemic failure of the current regulatory regime, including:

- *Ignorance*: regulations and guidance (such as *Approved Document B*) have been misunderstood or misapplied.
- *Indifference*: the focus for contractors is delivering projects for the lowest possible cost and to the shortest possible programme.
- *Lack of clarity* over roles and responsibilities, leading to a lack of accountability.
- *Inadequate* regulatory oversight and sanctions.



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The Hackitt report found that the existing regulatory regime is ‘not fit for purpose’ and made 53 recommendations. These recommendations were all accepted by the government, which subsequently ran its ‘Building a Safer Future’ consultation in June 2019. In its response, published in April 2020, the government outlined how it intended to implement the recommendations made in the Hackitt report, many of which have been addressed in the Building Safety Bill.

## *The Building Safety Bill aims to establish a chain of duty holders across the life cycle of higher-risk buildings.*

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### **The Building Safety Bill**

The Bill will form part of wider regulatory and practical reform instigated by the government in the wake of Grenfell. If it comes into force, this Bill will amend the Building Act 1984 and the Health and Safety Act 1974, and will sit alongside other legislation including the Fire Safety Bill, which awaits its second reading in the House of Lords. In a similar vein, the Fire Safety Bill seeks to amend the Regulatory Reform (Fire Safety) Order 2005, and give clarity to the duty holders responsible for managing fire risk in multi-occupied residential buildings.

In May 2020, the government also took the opportunity to amend ‘Approved Document B: Fire safety, Volume 1 – Dwellings’ and ‘Volume 2 – Buildings other than dwellings’, 2019 editions.

While parts of the Bill apply to all residential buildings, its focus will be higher-risk buildings. The Bill does not define which buildings this will capture (it will be defined later in regulations), although the proposed definition includes multi-occupied residential buildings which are at least 18 metres or more than six storeys high.

The Bill covers the entire life cycle of higher-risk residential buildings, from design to construction to occupation, aiming to clarify responsibility for building safety at each stage and bring about continuity and risk assessment through a ‘golden thread’ of vital information about the building which is to be stored centrally and continually updated in a similar way to a CDM health and safety file, or operations and maintenance manuals.

### **Proposed changes to be introduced by the Bill**

The Bill introduces many changes to the existing building safety regime, of which the following are most noteworthy:

#### **The role of duty holders**

The Bill aims to establish a chain of duty holders across the life cycle of higher-risk buildings. At the top of the chain, the Health & Safety Executive will take on the role of Building Safety Regulator. Their role will include:

- maintaining a national register of buildings covered by the legislation;

- administering the new competency framework;
- taking over the building control regime for higher-risk buildings; and
- enforcing sanctions for non-compliance and overseeing the safety of occupants in higher-risk buildings.

*The accountable person will be required to appoint a building safety manager, who will have day-to-day responsibility for assessing risks and managing the safety of the building.*

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There will also be dutyholders for each stage of a higher-risk building's life cycle:

- At the design and construction stage, there will be five categories of duty holder: client, principal designer, designer, principal contractor, and contractor. These mirror the duty holders under the Construction (Design and Management) Regulations 2015.
- Once the building is occupied, an 'accountable person' will need to be appointed. This will be the person or entity that owns the freehold, or a long leaseholder who is under a repairing obligation in relation to any part of the common parts. As part of its role, the accountable person will be required to appoint a building safety manager, who will have day-to-day responsibility for assessing risks and managing the safety of the building.

### **The gateways**

Under the Bill, developers who construct or refurbish higher-risk buildings will need to obtain approval from the regulator at three phases or 'gateways':

- Gateway 1: the planning application stage.
- Gateway 2: the initial building control stage prior to the commencement of the works. Works will not be permitted to begin until the regulator is satisfied that the duty holder's design meets relevant safety requirements.
- Gateway 3: the completion/final certificate phase pre-occupation, by which all information forming part of the 'golden thread' must be complete. In practice, satisfaction of this gateway is likely to be tied in to practical completion of works, and one can expect to see obligations being placed upon contractors and designers to deliver all necessary information to satisfy the regulator that this gateway has been discharged.

The introduction of these gateways is designed to provide a checking mechanism for fire and safety requirements at vital points in the construction life cycle.

#### **The new homes ombudsman**

The Bill introduces the new homes ombudsman, which will give new-build owners the opportunity to apply to the ombudsman where they have a complaint against the developer.

*The Bill introduces a new regime for building control in response to the criticism surrounding the current system of local authority building control and private approved inspectors.*

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Developers of new-build homes will be required to belong to the new homes ombudsman scheme and the role of the ombudsman will be to hold developers to account for misconduct. It is anticipated that the ombudsman will be given powers to grant compensation to owners.

#### **Building control**

The Bill introduces a new regime for building control in response to the criticism surrounding the current system of local authority building control and private approved inspectors.

Under the new regime, approved inspectors will be required to register as 'building control approvers'. A new role of 'building inspector' will also be introduced, to be overseen by the regulator. This new role is envisaged to be undertaken by an individual who will support local authorities and building control approvers in their day-to-day functions.

#### **Sanctions for non-compliance**

The Bill attempts to tackle the issues the industry faces with compliance, by enhancing the HSE's current enforcement powers and sanctions against any relevant person the regulator believes has contravened, is contravening or is likely to contravene a relevant requirement. Criminal sanctions for non-compliance with building regulations will include imprisonment and unlimited fines.

#### **Is the Bill fit for purpose?**

The Hackitt report identified a:

... cultural issue across the sector, which can be described as a 'race to the bottom' caused either through ignorance, indifference, or because the system does not facilitate good practice. There is insufficient focus on delivering the best quality building possible, in order to ensure that residents are safe, and feel safe.

On its face, the Bill appears to be a well-considered legislative response by the government in an attempt to ensure that the tragic events of Grenfell are not repeated. Once in force, the Bill will

constitute the biggest reform to building safety regulation since the Building Act 1984. But does the Bill address the cultural issue and the root causes identified by the Hackitt report?

In terms of accountability, the HSE seems an apt choice for the role of the regulator. With its extensive background in health and safety, it will not be afraid to make tough decisions and enforce sanctions, as it already has a proven track record of doing. However, it will be crucial to ensure that the HSE has sufficient resources to meet this additional responsibility.

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The chain of duty-holders is also a welcome step to ensure oversight over the design and construction of buildings and their occupation. However, it may not always be easy to identify the accountable person, and there could be more than one person meeting the definition. The Bill does not elaborate on what happens when this occurs. Will they be required to work together, or will one person be nominated to discharge the duties (similar to the CDM regulations where there can be multiple ‘clients’ and an election as to who is to be sole client)? It is also likely that, in many cases, the accountable person will be a corporate entity which will need to appoint an individual to discharge the obligations of the role. Hopefully these points will be addressed in secondary legislation.

The introduction of the gateways, in which evidence of compliance must be produced before a project can move into the next phase, should improve scrutiny over safe design. In particular, gateway 2 will provide an important check of the safety of a building’s design prior to commencement of works. However, fire safety issues that are related to poor workmanship during construction will only be picked up at gateway 3. Further, gateway 2 has been described as a ‘hard stop’, meaning that construction cannot commence until gateway approval has been received. This could preclude the commencement of enabling works on site under letters of intent if flexibility is not introduced in regulations to allow certain works to commence before all information required for the gateway to be discharged is available.

The Bill also attempts to address one of the biggest criticisms of the current regime – the fact that owners of defective buildings have faced difficulties in holding approved inspectors and local authority building control to account for signing off defective works. The Bill will put in place a framework of accountability measures where the regulator can investigate complaints against local authority building control and building control approvers, and issue improvement notices or serious contravention notices. Where expected standards are continually not met and there are concerns about safety, the regulator will be able to revoke the licences of building control approvers and in the case of local authority building control, recommend a transfer of functions to the Secretary of State. One hopes that this enhanced accountability mechanism, coupled with the gateways, will reduce the instances of defective work being signed off.

Ultimately, how the legislation is implemented and embraced by the industry in practice will be crucial to its success. In order for the new regime to be effective, all parties involved in the design and construction of buildings, and those owning and occupying them, will need to pay very careful attention to the requirements of the new legislation. This will be no small feat in an industry grappling with the practical and financial implications of Covid-19 and the threat of a no-deal Brexit. Experience of the implementation of revisions to the Construction (Design and Management) Regulations 2015 suggests that it will take time for the industry to familiarise itself with, and understand, the new requirements. Whether or not the Bill does enhance the safety of buildings remains to be seen, but the industry has a real opportunity to learn vital lessons and effect important and meaningful change after Grenfell. With the right secondary legislation and a focus on how the measures are implemented in practice, one can be hopeful that the Bill is a step in the right direction. ■