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THE BUILDING SAFETY ACT

The new building safety landscape

After an extended period of debate, discussion, consultation and parliamentary amendment processes, the Government's Building Safety Bill received Royal Assent on 28 April 2022. The resulting Building Safety Act, which was first announced in draft form in July 2020, was published on 5 July 2021 and outlined by then-Housing Secretary as a "key step in an extensiveoverhaul to building safety legislation". The reforms outlined in the Act are intended to create "lasting generational change and a clear pathway for the future" on how high risk and residential buildings should be constructed and maintained, according to the Government.

The Building Safety Act is applicable to England and Wales, and it is set to transform how tall structures are designed, constructed and managed, with the Government describing the changes proposed as the biggest for almost four decades.

The Act gained Royal Assent there have been numerous consultations have and are being undertaken that have underlined the massive implications for the industry. The impact will be felt across all sectors and by all disciplines involved in the design and construction of building works.

At the heart of the change is the legal obligation for all individuals and organisations to be competent to ensure compliance with the Building Regulations in both design and construction. This obligation applies across all sectors even the smallest of residential alteration, whether the designer and/or contractor are legally responsible for compliance whether in formal contract or not.

The Health and Safety Executive (HSE) will act as a new Building Safety Regulator (Building Control body for high-risk buildings), bringing checks and balances in line with its already established protocols and best practices in other areas. Tougher penalties will also be put in place for anyone who breaks the rules being put forward, in particular any building owner who does not 'demonstrate that they have effective, proportionate measures in place to manage safety risks.

This Act of Parliament is the direct result of Dame Judith Hackitt's Independent Review of Building Regulations and Fire Safety, published in 2018, a year after the tragic Grenfell Tower fire. It covers every aspect of safety across the built environment and aims to implement access to reliable, up-to-date information (the 'golden thread') at all points of a building's life cycle, from design to build to ongoing inspection, maintenance and refurbishment/conversion.

As the Department for Levelling Up, Housing and Communities notes, access to such information "will require individuals and organizations responsible for a building to have good information management systems and a clear understanding of how information management supports building safety. Going forward the information management for safety will need to be embedded across the sector."

This short paper reviews the Act (particularly its information management requirements) but also presents evidence of public concern about its implementation and enforcement. The paper then summarizes the various schemes in place around building safety along with a short description of how individuals, contractors and companies can 'Identify' initiatives to allay public concerns by bringing quality data together in one place and making it easily accessible throughout a building's life cycle.

'These are the biggest changes to building safety legislation for nearly 40 years, and they will raise standards across the industry and ensure building owners have nowhere to hide if they break the rules".

(Lord Greenhalgh Building safety and fire minister)

All buildings that require Building Regulations are in scope of the new Building Safety Act.

- The Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations [2021]
- The Architects (Fees for Services) Regulations [2022]
- The Building (Restricted Activities and Functions) (England) Regulations [2022]
- The Building Safety (Fees) Regulations [2022
- The Construction Products Regulations [2022]
- The Building (Higher-Risk Buildings) (England) Regulations [2022]
- The Higher-Risk Buildings (Prescribed Principles for Management of Building Safety Risks) Regulations [2022]
- The Building (Appointment of Persons, Industry Competence and Duty holders) (England) Regulations [2021]

Does the Building Safety Act apply to all buildings?

The responsibility for competence applies to all building works that are subject to the building regulations.

The Act also puts specific controls in place for High-Risk Residential Buildings (HRRB). HRRB are buildings over 18m in height or have seven or more storeys and two or more residential units (typically high-rise apartment blocks, student accommodation, hospitals and care homes). Relevant hospitals and care homes are only controlled through their design and construction phases. Hotels are not currently including in scope of the new controls outlined below.

What are the main points of interest in the Act?

Competence

A defining element of the Building Safety Act is the responsibility on Clients, Designers and Contractors to be competent to ensure compliance with the Building Regulations. For Principal Designers and Contractors this responsibility for competence extends to compliance with the Act.

The use of the term Principal Designer has caused some confusion with the CDM role. It is intended that the Architect as the Lead Designer takes on the role of Principal Designer under the Building Safety Act; as it has to be a designer in control of all design work. The CDM15 Regs were also intended for the Lead Designer to take on the Principal Designer role this has not become industry standard and rarely occurs.

It is preferred that the principal designer is the same individual discharging both duties but the consultation acknowledged this may not be the case.

The Golden Thread

A defining element of the Building Safety Bill is a 'golden thread' of information, which in basic terms will act as a digital and always accessible audit trail throughout the life of a building. no explicit directive is given for the digital method of data gathering/holding recognising that digital solutions advance quickly, however, it's clear that effective, collaborative whole-lifecycle BIM solutions will be essential to the success of this core aspect of the Act.

Duty Holder clarification

Definitive responsibilities will be assigned to the full spectrum of duty holders involved in a building project such as the client, the principal designer, designer, principal contractor, or contractor. Effectively, anyone who might create a risk during their contribution to a construction or refurbishment either as an individual or via a multi-disciplinary service provider will be expected to manage that risk and its associated compliance demands.

'It is only right that those who commission building work and who participate in the design and construction process take responsibility for ensuring building safety is carefully considered throughout the project and the building is fully compliant with building regulations, thereby ensuring that residents are safe and feel safe".
(Government Guidance)

The Act and its information

The Building Safety Act introduces several key initiatives:

- It introduces a significantly more onerous safety regime accompanied by new obligations which must be met throughout a building's life cycle. In fact, the Act extends across the delivery, design, construction and operational phases and puts requirements in place for periodic building inspections, safety and fire risks reviews.
- It establishes a new Building Safety Regulator (BSR), along with revised training and competency standards for designers, contractors and installers. For instance, engineers and architects must now carry out mandatory Continuing Professional Development.
- It imposes a framework of measures designed to deal with breaches, including fines and prison sentences, as well as opening legal liability to extended periods.
- It institutes financial levies on developers to fund remediation.
- It introduces routes to remediation including the ability to bring claims under the Defective Premises Act for construction, conversion or refurbishment works from the previous 30 years.

Table 1: Building Safety Act 2022 - Schedule 11.

Construction installations and products with designated standards or technical assessments may include provision for the imposition of requirements relating to:

- declarations of performance in respect of products which are or are to be marketed;
- training and competency requirements for those appointed as designers, contractors and installers;
- the making of other statements or claims in relation to the performance of products which are or are to be marketed;
- the marking or packaging of products;
- the provision of information, including information about risk, to persons to whom products are supplied;
- the monitoring, assessment and verification of product performance, including sample testing;
- the storage and transportation of products;
- the taking of corrective action, including withdrawal of products from the market and recall of products from persons to whom they have been supplied;
- recording and investigating complaints;
- the production and retention of documentation or samples;
- the notification of risks to relevant authorities;
- information which must or may be provided to relevant authorities;
- co-operation with relevant authorities;
- the appointment of competent installers and authorized representatives by persons carrying out activities in relation to construction installations and products.

Additionally, the Act enshrines a new 'golden thread' of information for the storage and dissemination of all safety related matters in the design and construction of buildings, including the huge range of products deployed in any building project. Duties of care enshrined in the Building Safety Act specifically reference products. The Act is concerned not only that products are certified safe according to the various established standards, but also that they are deployed and installed in a compliant and safe fashion. A perfectly 'safe' product can pose serious dangers to contractors/installers and subsequent occupants if not properly installed.

Accountability definitions

Clarity is provided on the role and accountability of the 'Accountable Person', who oversees and/or manages the building post-build. This individual is accountable for registering the building with the Building Safety Regulator and regularly logging information about the building to reviewing risk assessments.

The statutory responsibility to name a Building Safety Manager has been dropped but, even so, the Accountable Person has to be absolutely clear how they are going to ensure their continuing responsibilities throughout the occupation of the building are met.

All existing buildings over 18m or 7 storeys or more with two or more residences will need to be registered with the Building Safety Regulator. The registration window is 6 months and commences in April 2023. The accountable person will then be invited to submit their Safety Management System for consideration by the Regulator. The invitations will be sent on a

priority basis and the whole exercise is expected to last five years and then continue on a 5 yearly review cycle.

Gateway concept

The Building Safety Act introduces the Gateway approach for the buildings in scope. There will be no choice of Building Control provider and all building works, new build, extension, refurbishments will be subject to the control of the Building Safety regulator and the Gateway Approach.

Designers will be familiar with the need to provide a Fire Statement at Gateway 1 as part of their planning application, care should be taken with these reports as it is understood that the Building Safety Regulator, through the consultation process, is not accepting the approach proposed on over half the statements submitted.

The biggest cultural change will come from Gateway 2 which makes it mandatory to have Building Regulation Approval for the project before commencement. Also, the information to be provided to pass through Gateway 2 far exceeds current expectations and includes:

1. Competency statements for the Principal Designer and Contractor (this will mean contractors having to be selected much earlier in the programme than is generally the case currently)
2. A statement clearly laying out the key standards used to design the building and substantiation as to why the chosen approach is appropriate.
3. Statements on how the building will be controlled in construction to ensure compliance
4. A statement as to how changes in the design will be recognised and managed throughout construction to ensure that approval is gained from the Building Safety Regulator before the specific work is undertaken
5. If a phased completion is anticipated the plan for this approach must be submitted and approved prior to commencement

The Building Safety Act gives the Building Safety Regulator 12 weeks to give a decision following the submission of an application, the design team is advised to be certain of the compliance of the proposed design prior to applying, the 12 weeks does not allow for development of the design in response to non-compliances found and a rejection would mean work cannot commence on site.

Gateway 3 is to ensure that buildings are correctly built, and information has been provided to the Accountable person to allow the building to safely occupied. To allow occupation the contractor has to apply to the Building Safety Regulator for the issue of a Completion Certificate it is proposed the Building Safety Regulator have up to 12 weeks to respond to this application.

When the Completion Certificate has been issued, the Accountable Person can apply to register the building, the building can only be legally occupied once this is done. Within six months of registration the Accountable person will be invited to submit Safety Management System for consideration, it is expected this document will be based on the Golden Thread.

Regulatory Reform (Fire Safety) Order 2005 amendments – Fire Safety Act 2021

More prescriptive guidance is set in the new Fire Safety Act 2021, particularly aimed at the building owner 'responsible person', including fire risk assessments which must consider external walls and all fire doors entering onto common parts, and the competency for those involved in the process and its documentation. Tougher financial penalties are also a feature of the new reforms.

The consequences of non-compliance

The consequences outlined in the Act for safety failures are significant and capable of proving commercially disastrous. Failure to comply with mandatory duties is a criminal offence which carries a penalty of an unlimited fine and/or a maximum of 2 years imprisonment.

"Unlimited" fines might seem a somewhat incredible notion to developers and construction product firms. Yet regulators elsewhere are already giving the enormity of the phrase some concrete shape. Take the world of data protection. Since 25 May 2018, the Information Commissioner's Office has had the power to impose a civil monetary penalty on a data controller of up to £17million (20m Euro) or 4% of global turnover (whichever is the higher). In 2021, a fine of £20 million was indeed levied on a corporation for a data breach. Returning to the built environment sector, it is significant that the Building Safety Act has no upper limit on fines, making it an issue to be taken very seriously indeed by commercial managers in the sector, quite apart from its moral imperative.

It is therefore significant that in the debates leading up to the Act's finalisation, Baroness Hayman of Ullock remarked in the House of Lords that, "As we know, non-compliance with building regulations has been a criminal offence under the Building Act for nearly 40 years now. The Bill heavily extends the scope of available power to enforce compliance and/or impose penalties for contraventions, placing much of that power in the hands of the Health and Safety Executive as it establishes the building safety regulator." This quotation neatly summarizes the whole tone of the parliamentary debate on building safety and the intention for the new regulator to be a highly active enforcer.

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(Baroness Hayman of Ullock, House of Lords)

Building public confidence

Now that the Building Safety Act has come into force, it is essential for the construction industry and public confidence that its requirements are enforced, and are seen to be enforced. Certainly, public confidence remains low at present.

Despite wide recognition that legislation should not be rushed through and (possibly) poorly drafted, the public mood remains sceptical, with most commentators keenly watching how the new Building Safety Act and associated initiatives are implemented in practice.

MP Richard Burgon probably speaks for many in public life when he noted that "We need more than the apologies of politicians, we need more than an inquiry, we need to see justice properly done and we need to see real change." He went on to say "All that must be tackled if the words 'never again are not just platitudes from politicians', and the lessons from the inquiry must be implemented in full, however uncomfortable that is for the Government. But there are already deep concerns that lessons will be ignored and that they already are being."

The burden of good faith born by all the commercial players in the built environment sector has been widely emphasized, with key commentators underlining the importance of visible and practical action promoting safety in the sector. For instance, Lord Greenhalgh, then Minister for Building Safety and Fire, has noted: "Firms that lead the way in re-gaining public trust will benefit from doing so, while laggards will learn that it pays to do the right thing."

Similarly, Michael Gove MP – then Secretary of State for Levelling Up, Housing and Communities and Minister for Intergovernmental Relations - has said, "We have new statutory duties placed on those carrying out design or building work to make sure that they have the relative competence for their roles, which means that building control will be a properly regulated profession and that all construction products marketed in the UK will be properly regulated in future. To follow on from the very good point made by the right hon. Member for Leeds Central (Hilary Benn), if products are unsafe, they can be withdrawn from the market. There are also strengthened provisions in the legislation to hold industry to account."

Therefore, although the Building Safety Act represents strong regulation to protect occupants, many voices are concerned that momentum is maintained around in the issue and that strong regulation is accompanied by equally strong enforcement.

There is a general feeling, not least from Dame Judith Hackitt herself, that the practical initiatives to make sure that safe construction products are used, and that they are safely implemented, have been fragmented and insufficiently effective. In May 2022, she declared that her efforts to encourage the sector to improve building safety had met "with mixed success."

"It's been 5 years since the horrific fire at Grenfell, yet it's clear that the Government have not acted with enough speed or urgency on the building safety crisis."

(Ruth Cadbury, MP)

"It is our responsibility as an industry to regain public trust and credibility in what we do, and to demonstrate that technical competence can be trusted. I believe the Code (for construction production information) represents both a determined attempt on behalf of manufacturers to correct disingenuous marketing practices and a proactive and collaborative effort to address the issues highlighted in Dame Judith Hackitt's Report."

(Peter Caplehorn, Construction Products Association)

"We are never going to be able to right the wrongs of the past. But we can ensure that there is a lasting legacy from Grenfell. And I am very clear that that legacy must be that everyone has a right to be safe in their homes, and that all residents and all communities, their voices need to be heard.... (I am) very frustrated over the course of the last five years at the speed at which many of the changes were being implemented."

(Felicity Buchan, MP)

Top 5 considerations for building design, construction & management

1. Clients, principal designers, and contractors need to think carefully how they are to ensure they meet their responsibilities under the Act and how their teams need to be expanded/ trained and to ensure they do not fail and become liable. Everyone needs to work with the mindset that the operational safety of the building is key and accountability does not stop at the end of the design or construction.
2. The introduction of the Gateway 1 means that earlier consideration needs to be given to fire strategies to ensure passage through the planning process.
3. The introduction of Gateway 2 means that projects in scope design and build cannot be used and careful consideration will be needed in terms of programming and the competence of everyone involved.
4. The introduction of the 'golden thread' means further digital investment will be needed to record the lifecycle of the building
5. The process of applying for a completion certificate and then registering the building prior to occupation and the time frames proposed for the BSR to respond means careful consideration needs to be given around the programming of this phase of the development.

A unified gateway to information about construction products

Specifically talking about construction and construction products, Dame Judith has said "What you are now describing is a function of the fragmented nature of this industry, you've got initiatives popping up all over the place, and the industry needs to recognize that there needs to be a compatible system, not one system necessarily but the systems need to be able to talk to one another."

"Every other industry sector I know has already gone through that years ago. It continues to frustrate me in this sector. It is behind the curve with getting up to date with technology compared to other sectors, why not talk to them about how they overcame the same problems?"

Dame Judith has also outlined how safety through quality products and construction procedures should be prioritized over cost: "Building owners, occupiers, and financiers are going to demand proof of quality and competence in the future. This really is, we believe, a once in a generation opportunity to let go of that race to the bottom that we've seen over the last twenty years or so and really turn this industry around."

Initiatives have been set in place by the sector which receive support and praise from Dame Judith, highlighting positive actions undertaken by bodies in the sector to drive change, including the Considerate Constructors Scheme to establish the Building a Safer Future Charter and working with the Construction Products Association on the Code for Construction Product Information. "I am delighted to hear that more than 300 organizations have now signed up to the Building a Safer Future charter and a similar number to the Code for Construction Product Information.

"The industry needs to get its act together."

(Dame Judith Hackitt)

"Over four years on from that terrible tragedy, it is clear that the building safety system remains broken. The problems that we have to fix have been identified by many across this House, from all parties."

(Michael Gove, then Secretary of State for Levelling Up)

According to the London Fire Brigade more than 1,000 buildings are still unsafe five years after Grenfell.

The Department for Levelling Up, Housing & Communities, despite the pandemic, by the end of March 2022 94% of all identified high-rise residential and publicly owned buildings in England had either completed or had started remediation work to remove and replace unsafe cladding.

The importance of BIM and good product information

According to legal firm Pinsent Masons, Building Information Modelling (BIM) is one of the great enablers for the collaboration that the UK built environment sector needs to succeed in a changing climate. One key component of BIM is accurate and up-to-date information. The firm notes, "With the UK construction industry coming to terms with the impacts from a number of exceptional events, such as the war in Ukraine, and construction companies having to meet new, stiffer obligations around sustainability and building safety, the need for collaboration is greater than ever." BIM is one of the great enablers for that collaboration. Indeed, we now appear to be at the tipping point where use of BIM will be the norm rather than the exception. The drive towards net zero and the ever louder calls for a golden thread of accurate as-built information following the Grenfell tragedy has given increased impetus to the adoption of BIM, and, with its collaboration more generally."

Construction products – the information initiatives

In the spirit of co-ordinating positive sector moves, tools are required that complement the various initiatives, bringing them together into a unitary platform that forms one single point of access for high quality product information.

A study commissioned by the Department for Levelling Up, Housing and Communities and prepared by Professor David Mosey of King's College London Centre of Construction Law and Russell Poynter-Brown of On-Pole Limited, talks about "capabilities and commitments to use suitable digital information management tools for the creation, sharing, storage and use of information comprising a golden thread of information?"

First, the nature of product information needs to conform to a set of robust quality standards. The Construction Products Association (CPA) has stated "It has become abundantly clear from (the Hackitt) review and the Inquiry into what went wrong at Grenfell, that the marketing practices of construction product manufacturers need to change." To address this, the CPA has developed a new Code for Construction Product Information (CCPI), which is being established by Considerate Constructors Scheme Ltd.

In combination, all these ground-breaking steps from the construction and products industry aim to create a virtuous information eco-system where participating brands become products of choice. There is also an economic benefit for developers, contractors, installers and buildings managers. Aside from safety issues, undue downward cost pressures may also mean that poorer construction methods and less quality products are chosen, resulting in earlier deterioration, costly need for replacement and therefore poorer longer-term net return on investment. Choosing better quality products delivers better return-on-investment over time.

Conclusions

The construction sector has already acted, and initiatives are now being put into place to ensure construction and product information is verified, clear, unambiguous, consistently formatted and easily available to all players in the construction industry.

Nevertheless, information however good is only as useful as it is accessible. High quality information about the building and about its safe installation and maintenance needs to be reliably available across periods of many years, in tune with the life cycle of buildings and its infrastructure.

The construction industry is in the early stages of inputting all this quality product information. Yet once done, firms that do not make this effort are likely to find that the easy availability of such product information has become a criterion of choice for designers, developers and maintenance companies alike. Soon, choosing products that do not come accompanied by verified, centrally accessed information will simply become too much of a risk.

The requirement for accountable persons/owners of High-Risk Residential Buildings (HRRB) to register their building with the Building Safety Regulator (BSR) commenced on 1st April 2023. The HSE have set up a new website in preparation for this.

The accountable person/owner needs to be preparing evidence of the safe management of their building, this will be contained in the Building Safety Case report

The Building Safety Case will include:

- Relevant building safety information – the golden thread
- Evidence of engaging with residents
- Evidence of a complaint's procedure
- Evidence of reporting certain incidents and risks

Following registration, the BSR will invite the accountable person/owners to submit their Building Safety Case to assess whether these duties are being complied with. It will give a building assessment certificate if satisfied. It is estimated there are around 12,500 existing HRRB to be registered and that it will take the BSR about 5 years to complete the first round of assessing each individual Building Safety Case