

How Proposals for Building Safety Regulatory Reform Could Affect You

With the 2nd anniversary of the Grenfell tragedy approaching, the Government has finally released its proposals for the reform of the building regulatory regime, entitled “Building a Safer Future: Proposals for Reform of the Building Safety Regulatory System” (“the Proposals”).

In this note, we seek to digest the 192-page consultation document to help you understand what the key Proposals are, what input the Government is seeking, and our own views on what this all means for the industry. The Proposals call for a brand new regulatory regime that will be administered and enforced by a newly-formed building safety regulator. As readers will see, this spells dramatic change across all sections of the construction sector, from the design and procurement of tall buildings through to their construction, occupation and management.

For each proposal, the Ministry of Housing, Communities & Local Government (“MHCLG”) has asked a series of questions that will be used to guide its approach to the consultation and its final recommendations. There is a fairly tight eight week consultation period, so time is of the essence for those who wish to submit a considered response.

Initial Observations

Our overriding view is that the Proposals are ambitious in both their scope and method of application, but in certain cases, overly so. While we recognise that the new regime will be subject to tinkering during the consultation period and before Parliament, we consider that an eight week consultation period is woefully inadequate for such a significant document that will have far reaching consequences.

The Proposals will almost certainly necessitate an early conversion to BIM (in our view, it will not be possible to comply with the new information duties without it). It will also be necessary to support the design and construction of a tall building with greater resource to check and ensure compliance with Building Regulations.

On the question of Building Regulations, the Proposals do not follow all of Dame Judith Hackitt’s recommendations. There is no suggestion (that we can see) that changes will be made to the current Building Regulations system. Although the new regulator will have the ability to recommend and make changes to Building Regulations, we are seemingly not going to see a complete overhaul at this stage. Also, the Joint Competent Authority has been ditched in favour of a standalone regulator. This is to be welcomed as we considered the Joint Competent Authority to be an unworkable prospect.

Changes that we did perhaps expect have not been made. Building Control inspectors and Approved Inspectors will continue to exist, for the time being at least. Quite why remains unclear. In our view, their role becomes almost redundant given the steps that must be taken under the new regime to evidence compliance with Building Regulations.

There are a number of notable concerns with the Proposals, and we have sought to highlight the most obvious ones in our comments on the individual proposals. No doubt there are many more to be found, and different sections of the construction industry will have their own concerns as to the repercussions of this document.

As we say, this document represents our initial thoughts. Our view on some individual proposals may change as clarifications and dialogue continue during the consultation period. One thing that readers will appreciate is the sheer scale of the proposed changes. There has been nothing like it imposed on the construction industry in recent times. In that sense, it can quite legitimately be called a revolution.



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The Proposals

1. Should the new regime apply to residential buildings over 18 metres in height?

The Proposals start with the assumption that they will apply to all buildings over 18 metres in height. This means that the Proposals are consistent with the definition of Tall Buildings contained within the current edition of the Building Regulations. Readers may recall that Dame Judith Hackitt recommended the reforms should, in the first instance, apply to residential buildings over 30 metres in height only. The intention was always to increase that scope gradually, but that appears to no longer be the case.

Devonshires' View: This proposal ensures consistency with the existing Building Regulations and will avoid creating a separate class of regulated building. Given the significant problems we have found in the vast majority of Tall Buildings inspected since the Grenfell Tower fire¹, it seems artificial to limit the proposals to buildings over 30 metres in height. We believe that consistency with the Building Regulations is sensible and desirable. What this means in practice, however, is that many hundreds more buildings are within scope and will be affected by the new regime.

¹ Primarily in relation to external wall construction where readily combustible insulation has been used, often in conjunction with missing or defective cavity barriers and readily combustible facing products, such as high pressure laminates and rendered systems. Investigations into internal passive fire protection measures have also revealed a number of significant failures to comply with the functional requirements of the Building Regulations.

2. What about residential buildings under 18 metres in height?

The MHCLG cites the current regimes imposed by the Housing Health and Safety Rating System ("HHSRS") under the Housing Act 2004 and the Regulatory Reform (Fire Safety) Order 2005 ("RRFSO"), and asks whether these two overlapping regimes can be improved to better ensure resident safety.

Devonshires' View: In construction terms, a key risk to residents in any building is the quality of the as-built passive fire protection and active fire protection systems. In a traditional fire risk assessment as envisaged by the RRFSO, there is no requirement to check the embedded passive fire protection systems (either internally or externally) through intrusive investigation.

The RRFSO could be improved to provide a requirement that within a period of 12 months from occupation (or later if the building has already been occupied for longer than 12 months) a fire risk assessment must be carried out that tests the as-built construction to ensure that health and safety critical elements of the construction have been built in accordance with the Building Regulations. This might include compartmentation, fire stopping of penetrations and an assessment of whether 30 or 60 minutes fire protection has been provided (depending on the location of the area tested).

It would be for fire risk assessors, working in conjunction with the Responsible Person (as defined in the RRFSO), to identify areas to be opened up. Having done so, the Responsible Person would have a record of the adequacy of the passive and active fire protection measures in the building.

Where these were found to be defective, that would of course need to be remediated. This 'in depth' fire risk assessment would only need to take place once but could be undertaken subsequently if any material changes to the building were made.

In our view there is no need to make any changes to the HHSRS as this provides a readily flexible tool for enforcing health and safety standards in a wide variety of circumstances.

3. What about non-residential buildings where multiple people sleep?

This category of buildings includes hospitals, prisons and boarding schools. The MHCLG has asked whether these 'higher risk workplaces' ought to be subject to the new regime during the design and construction phases.

Devonshires' View: These 'higher risk workplaces' are already subject to the requirements of CDM 2015 and the RRFSO. In our view, the overall fire safety of these buildings could be enhanced by an amendment to the RRFSO as suggested above – namely through an initial intrusive assessment of the active and passive fire protection measures.

4. How should the new regime be regulated?

The heart of the new regulatory regime is the building safety regulator. It is envisaged that the regulator will undertake the functions that Dame Judith Hackitt had earmarked for the Joint Competent Authority and far more besides. The regulator will be an entirely new creation and will be responsible for overseeing and enforcing the duties imposed on dutyholders under the new regime.

The functions of the regulator are wide, encompassing not only the performance of complex and varied regulatory duties, but also a much wider oversight of the construction industry. This includes an ability to recommend and implement changes to Building Regulations and construction practices, and setting compulsory standards for competence right across the construction sector.

It is anticipated that the regulator will also form specialist committees to liaise with material manufacturers, specific trades and others to ensure that construction information is shared, analysed and challenged with consequential changes to practice and the Building Regulations where required. The regulator will oversee and control the implementation of a new performance standard regime for building products that seeks to remove the ambiguities and uncertainties present in the current system, and there will be a toughening up of independent assurance schemes so that accreditation by an independent assurer to an overall standard can be properly relied upon.

Devonshires' View: These are bold and ambitious proposals that, if properly resourced, will undoubtedly bring significant benefits to the construction sector and the wider public that relies on it for the delivery of safe buildings. Given all that is proposed for the regulator, it will need to be a significant organisation with an army of experienced employees across all disciplines in the construction sector. This is not going to be an easy system to create and it must not be rushed. In order to build a body that is capable of undertaking this role from the moment it launches, the Government will have to commit serious time and resources. It must not be done on the cheap or on a piecemeal basis.

Unless the Government is prepared to commit the necessary resource, there is a real possibility that we could end up with a number of loosely connected and under resourced groups whose only real contribution will be to put the brakes on progress in the construction sector. That must be avoided at all costs.

5. The Gateway Obligations – what should be required at each gateway?

MHCLG proposes three distinct gateway points for the design and construction of a building (including major refurbishments). Each gateway is intended to ensure that dutyholders are able to demonstrate at certain stages of a project that they have met their obligations under the new regime and that the building complies with Building Regulations. If the gateway requirements are not met, the project cannot continue until they have been. Each gateway point is therefore critical.

• Gateway One:

Gateway one must be passed before outline planning permission can be granted. At present, the precise requirements for gateway one are a little vague, but helpfully quite limited. Because buildings at this stage of the planning cycle are not subject to detailed design, it is anticipated that the gateway requirements will be limited to demonstrating how the fire and rescue services will be able to access the site and water facilities in the event of an emergency. It is proposed that the planning authority liaise with the fire and rescue services in order to obtain their view, and that for buildings in excess of 30 metres, the planning applicant supply a Fire Statement that will specifically address these issues.

It is anticipated that it will be for the Client (see below) to discharge the duties required at gateway one.

Devonshires' View: We see no harm and a great deal of sense in the fire services giving their view on access at this very early stage in the development of a building. However, access and the supply of water may not be well developed (or developed at all) at this point in the planning cycle, and legal issues may give rise to complications, particularly over access. While these can all potentially be addressed, there remains a very serious question mark over the fire services' ability to resource and discharge this new function effectively and without causing significant delay.

There is also a very real concern over how access is going to be judged. Will the standard be straightforward or will the fire services require more enhanced access arrangements, possibly leading to the need to re-design the building or parts of it. We therefore see the need to develop a clear and (fittingly) accessible set of access standards to ensure that all parties to the process understand what is required of them. This must be accompanied by a commitment from the Government that it will provide the fire service with the necessary financial resources to discharge this new function effectively and in a timely way.

We also anticipate that in some cases, it will not be possible to determine the suitability of fire service access until later on in the planning process. There should therefore be the ability to move the requirements of gateway one to gateway two where this is necessary and appropriate.

• Gateway Two:

Gateway two will operate at the "full plans building application" stage required under the current Building Regulations. At gateway two, the Client (as currently anticipated) will be responsible for providing an overall strategy setting out how it, in conjunction with the other dutyholders, will comply with Building Regulations. In order to produce this overall strategy it is expected that Clients will have to work with the other dutyholders in order to produce:

- i. full plans produced (or approved by) the Principal Designer that demonstrate compliance with Building Regulations;
- ii. An 'as planned' 3D digital model of the building including a description of the intended materials to be utilised. This is to be produced by (or presumably approved by) the Principal Designer;
- iii. A Fire and Emergency File produced by the Principal Designer which sets out the "key building safety information"; and
- iv. A Construction Control Plan which is produced by the Principal Contractor and will describe how building safety and compliance with Building Regulations will be met during the construction phase.

The MHCLG anticipates that the production of these documents will involve direct liaison between the regulator and the Client (and presumably other dutyholders too). The overriding objective will be to demonstrate not only that the building complies with the requirements of Building Regulations but that the necessary management systems and competencies are in place to ensure that the finished building will be safe. Unless the regulator is prepared to sign off compliance with gateway two, no construction can take place.

The MHCLG also proposes giving the regulator wide ranging enforcement powers where construction work is undertaken in breach of the Building Regulations or any specific planning requirement. This includes demolishing non-compliant work or opening it up for inspection.

Where “major” design changes are proposed during the construction phase, it will be for the Principal Contractor to firstly liaise with the Client and Principal Designer then seek the approval of the regulator before the change can be implemented.

Devonshires' View: First and foremost, the feasibility of gateway two as a process requires a well-resourced, highly sophisticated and efficient regulator. Again this can only be achieved if Government is prepared to invest the considerable time and financial resource necessary to get it right. In order to function, the regulator will need to discharge its duties as an effective single body with a set of highly developed and well considered requirements that are standardised across the nation. If this is not done, then we anticipate very considerable delay and additional cost to those dependant on the regulator.

The information requirements of gateway two are of themselves onerous and require the Client along with other dutyholders to invest heavily in a detailed design that includes choice of materials, layout and supply chain information. This will not always be realistic and so gateway 2 must be flexible enough to take this into account.

It remains unclear what is meant by the requirement for the Principal Designer to set out the “key building safety information” and whether this will require something different from the requirement to submit full plans. What level of information and detail will be required? Will, for example, the Principal Designer be required to ‘sign off’ as compliant the design and materials anticipated for the external wall system and the construction of internal compartments? It will be necessary to have a clear and precise definition of what constitutes “key building safety information”, how it is to be presented and the framework within which it will be considered and assessed by the regulator.

We foresee significant difficulties with the proposal that major design changes during the construction phase must receive approval from the regulator before they can be implemented. The risk of delay and cost will likely fall on the Client and these could be considerable if the regulator raises unreasonable objections or is simply unable to deal with the request in a timely way. Strict deadlines will be essential, otherwise construction programmes run the risk of being disrupted.

The more immediate issue, however, concerns how one adequately determines what is a “major” change and what is not. It seems to us that it cannot be for the regulator to determine. This will introduce an unworkable and highly uncertain mechanism into any construction project, with the inevitable consequences in time and money. What constitutes a major change cannot be subjective and must be judged by reference to a clear set of published guidelines. In our view a “major” change has to be significant such that it involves a physical change to the envelope of the building, the removal or alteration of one or more means of escape or a change to the passive fire protection measures. Anything else will bring huge uncertainty to the construction process.

In summary, it will in our view be necessary to ensure that consistency is built into the gateway two process and applied not only to the information required at the outset, but also how it will be evaluated and responded to within strict deadlines. Construction is a time based activity and parties to a construction contract must have certainty that the issues to be dealt with by the regulator during the construction phase are dealt with in a timely manner.

- **Gateway three:**

Gateway three operates from receipt of building control sign off. It will require the Client to hand over building safety information about the as-built building. The ability to occupy the building depends upon the Client successfully passing through gateway three. The primary building safety information will consist of the following:

- i. As built plans;
- ii. The Construction Control Plan;
- iii. The digital ‘as-built’ record; and
- iv. The Fire and Emergency File which includes all relevant fire safety information.

Together, these constitute part (but not all) of the golden thread of information and will be utilised by the person who owns the building and is responsible for its occupation (referred to as the accountable person) in order to develop a safety case for managing the fire and structural risks in the building. The regulator will have to approve the safety case before the building can be lawfully occupied.

Both the Principal Designer and the Principal Contractor will be required to formally sign off compliance with Building Regulations. It will be for the regulator to determine whether that declaration is reliable or not and they will be empowered to seek further information if questions arise over the accuracy of the declaration. Occupation is conditional on sign off being accepted by the regulator.

In addition, there will be a formal registration process for the building. That can either take place on a provisional basis during the construction phase or finally by the accountable person. It is envisaged that partial occupation may be permissible in certain cases. Again, the ability to occupy is conditional on registration taking place. Approval of the registration process may come with conditions that will form part of the building safety certificate provided by the regulator. It will be an absolute obligation to satisfy these requirements.

Devonshires' View: These proposals are largely sensible, although we can see real difficulties arising with the requirement that the Principal Designer be required to sign off building control compliance. Given that very many fire safety failures in Building Control compliance occur through problems with workmanship (as opposed to design), it is difficult to see on what basis the Principal Designer can be said to have any knowledge of the standard of workmanship adopted during the construction phase.

6. Who are the proposed new dutyholders and what are their roles and responsibilities?

The new duty holders will align with those already contained within CDM 2015, namely the:

- i. Client;
- ii. Principal Designer;
- iii. Principal Contractor;
- iv. Designer; and
- v. Contractor.

Under the proposed regime, the duty holders will all have to ensure that:

1. each of them co-operates and shares information with each other and the building safety regulator; and
2. they employ people who are competent to carry out the work expected of them.

These general collective duties of co-operation and standards of competence mirror those already in force under CDM 2015 and wider health and safety law.

The duties proposed for each individual dutyholder are as follows:

1. For Clients:

- a. To make suitable arrangements for planning, managing and monitoring the building work so as to ensure, in so far as is reasonably practicable, compliance with Building Regulations and other building safety requirements, and to allocate all necessary resource and time in order to do so;
- b. To appoint the other dutyholders in writing and to ensure they are competent;
- c. To take all reasonable steps to ensure, in so far as is reasonably practicable, that all other dutyholders are complying with their duties;
- d. To establish an information management system that will include a database containing all design, safety and other information necessary to use, occupy and maintain the building over its life cycle (the 'golden thread of information');
- e. To ensure the golden thread of information is handed over to the accountable person in occupation of the building;
- f. To ensure the regulatory requirements of the gateway points are met; and
- g. To meet the requirements of the mandatory occurrence reporting regime.

Devonshires' view: For those familiar with the language and function of CDM 2015, the similarities will be immediately apparent. As with CDM 2015, the Client will not only have its own specific duties to ensure compliance with Building Regulations on each project, it will also have duties to ensure the other dutyholders comply with their obligations. The use of the word 'ensure' provides consistency across other health and safety legislation, as does the qualification that the obligation only extends to doing everything reasonably practicable. These are well understood concepts and their inclusion in the new regulatory regime makes perfect sense.

The proposed duties, just like with CDM 2015, are wide ranging. The Client's primary obligation to plan, manage, and monitor the building work will require a far greater focus on checking designs and the quality of construction work as it progresses. It will no longer be permissible for a Client to rely on vague obligations placed on contract administrators to check quality. It will be necessary for each construction contract to contain a clear and cogent checking and recording regime that all parties to the project will be required to input into.

In order to ensure compliance with Building Regulations, Clients will be required to devise a detailed checklist of those health and safety critical elements of the construction that will require monitoring and recording during the construction phase. This will necessarily include passive fire protection measures both internally and externally. In order to meet this duty, Clients will have to employ additional staff or consultants whose roles will be to monitor and check the quality of work on its behalf. That will be the only realistic way of discharging the duties imposed.

Clients will have a great deal of groundwork to cover, not only in upskilling or training employees, and in some cases retaining new ones, but also preparing the information management systems necessary to ensure the golden thread of information is kept, maintained and passed on where required. BIM will become an essential tool in this process, and a far greater focus on collecting information will be required than has been the case previously.

2. For Principal Designers:

- a. To plan monitor and manage the pre-construction phase and co-ordinate matters relating to building safety to ensure that the project complies with Building Regulations;
- b. To satisfy themselves that those involved in supporting the Principal Designers are competent;
- c. To assist the Client in meeting its gateway obligations;
- d. To utilise the information management systems developed by the client to input into the golden thread of information; and
- e. To meet the requirements of the mandatory occurrence reporting regime.

Devonshires' View: The primary duty placed on the Principal Designer during the pre-construction phase is to ensure the project complies with Building Regulations. This will require the Principal Designer to check all pre-construction phase designs available to it in order to ensure the materials used and methods of construction planned are all compliant. What this means in reality is that the role of Principal Designer will have to be discharged by individuals or organisations who are able to call on the necessary skills and experience to forensically review designs for Building Control compliance.

It is questionable whether some of those who currently take on the role of Principal Designer under CDM 2015 will be qualified to undertake the role proposed by the new regime, or whether the professional indemnity insurance market will even be willing to support it.

3. For Principal Contractors

- a. To plan, monitor and manage the construction phase and co-ordinate matters relating to building safety to ensure that the project complies with Building Regulations;
- b. To satisfy themselves that those involved in supporting the Principal Contractor are competent and have suitable organisational capability;
- c. To assist the Client in meeting its gateway obligations;
- d. To utilise the information management systems developed by the client to input into the golden thread of information; and
- e. To meet the requirements of the mandatory occurrence reporting regime.

Devonshires' View: In order to meet its primary obligation of planning, monitoring and managing the construction phase to ensure compliance with Building Regulations, the Principal Contractor will have to develop a system of supervision and checking to ensure all designs and workmanship are compliant. It will no longer be permissible to take a 'light touch' to site supervision and the procurement of supply chain members. The supply chain will need to be closely monitored throughout the construction phase to ensure the workmanship and/or designs being completed by them comply. We can therefore expect to see a much greater focus on supply chain monitoring during the construction phase along with the introduction of information recording obligations within supply chain contracts. This will go hand in hand with greater overall scrutiny of the competence of supply chain members.

7. Duties in Occupation – what should the Safety Case include, and what must the building safety manager do?

MHCLG's approach during the occupation phase is to ensure that all fire and structural safety issues are adequately monitored and managed to ensure that the building is safe. This will be done through the production of a safety case regime that will involve a "holistic" approach to fire and structural risks. The requirement on the part of the accountable person to produce a safety case will apply to existing tall buildings as well as those that pass through the gateway process. This is a significant development and, amongst other things, is consistent with the requirements of Advice Note 14 published by MHCLG in December 2018.

For those buildings that pass through the gateway system, the regulator will be required to approve the safety case before occupation can take place. Where it does approve the safety case, it will issue the dutyholder with a building safety certificate, thereby allowing occupation. As we say above, that building safety certificate may impose conditions.

MHCLG recognises that there may be a number of accountable persons over the lifespan of the building. Where there is a change in the accountable person the golden thread of information must be passed on.

So, what will the accountable person need to do in order to discharge the obligation to produce a safety case? MHCLG first and foremost recognises that the safety case is a living document and that risks can arise and change over time. The safety case will need to be under regular review and, as with a fire risk assessment, any changes made to the building through refurbishment or planned works will need to be dealt with as part of the safety case. Where new information comes to light that highlights a risk not previously understood, this will have to be dealt with within the safety case as part of an overall safety management system for the building.

Any safety case will be an evidence-based assessment of the structural and fire risks in the building. It will set out how those risks have been dealt with and/or how they are being managed. In order to produce an effective safety case, accountable persons will need to produce (or inherit) a document that:

1. Contains a detailed description of the as-built construction;
2. Identifies within the description the health and safety critical elements of the construction along with the identity of the material used in each. This will be most effectively accomplished with a BIM model;
3. Where these elements require maintenance or regular checking, sets out the regime that has been put in place and provides evidence that it is being adhered to;
4. Where checks and maintenance do occur, sets out the results of the checks and/or records of work done;
5. Describes the overall safety management system of the building; and
6. Contains clear confirmation that all current legislative requirements for the building are being met.

For existing buildings, the safety case will necessarily have to start from a less well-advanced position. For those buildings that have been through the gateway process, where the golden thread of information should already have identified risk, this will (or at least should) enable the accountable person to produce a comprehensive safety case.

With existing buildings, MHCLG recognises that it will be a gradual process and that certain elements of the construction will need to be checked over time. Advice Note 14 was a good example of the sort of approach an accountable person will need to adopt for existing buildings. Looking at things such as readily combustible facing materials, cavity barriers and insulation is obviously a good start in determining whether the building is safe. Checking internal compartments may also be required.

It must be emphasised that existing buildings will need to be registered and the requirements of the building safety certificate will have to be met. It is likely that the regulator, in providing a building safety certificate, will prescribe the steps that will need to be taken to produce a golden thread of information and confirm whether any safety checks need to be undertaken on the fire safety and structural elements of the construction.

It is envisaged that MHCLG will publish guidance on how to produce an effective safety case.

The accountable person will have the following obligations:

1. To ensure there is a safety case for the building;
2. Ensure the building is registered; and
3. Ensure there are adequate measures in place to effectively manage building safety; and
4. Comply with any recommendations made by the regulator on the building safety certificate (issued following approval of the safety case).

The accountable person will also need to appoint a competent building safety manager. The idea is that the building safety manager carries out the "day to day functions of ensuring that the building is safely managed and maintained." The building safety manager will also be responsible for liaising with residents.

The building safety manager's role is another wide-ranging one. As the individual at the coal-face, they are required to maintain the information management systems that apply to the building, update the safety case, make sure that any work undertaken on the building is undertaken competently and ensure that fire risk assessments are carried out.

The MHCLG is clear that the regulator will be required to approve the building safety manager and that the accountable person will not be able to delegate their obligations under the regime to the building safety manager.

Devonshires' View: Within this proposal there seems to be scant regard given to the permanent nature of construction. Once a building has been built, the passive fire safety and structural elements of that building are more or less set in stone. Compartments, fire stopping and the external wall construction are all completed and should not deteriorate over short periods of time. While it is important to ensure that these elements comply with the requirements of Building Regulations, it is not always the case that they need to be regularly checked unless they are subject to major refurbishment or planned works. It is not therefore clear what is required beyond a programme of regular maintenance and therefore what the building safety manager will be doing on a "day to day" basis.

There is no doubt that the building safety manager's role will come into its own where materials have reached the end of their natural life and need replacement, or where refurbishment or other planned works are being undertaken that may affect the structural or fire safety critical elements of the construction. Beyond that, and ensuring the safety case and information systems are updated, it is difficult to see this role being anything other than a part-time one.

What is clear is that the information required to enable the effective safety management of the building is critical, and this is where BIM has a very significant role to play.

8. Duties over the Lifecycle of the Building - should the Government mandate BIM to ensure the Golden Thread of Information?

Having all relevant information available to dutyholders, accountable persons and building safety managers is envisaged as critical to the success of building safety. The MHCLG recognises that all the information that is required to form the golden thread should be stored and accessed digitally.

The MHCLG intends that certain information in respect of each building be made available to the regulator so that trends in design and management, for example, can be monitored throughout England. The MHCLG also proposes that certain datasets that do not compromise resident safety, security or any copyright are made available to residents.

Devonshires' View: We agree that the digital storage of building information is desirable. This can be achieved through BIM and should be mandated as the basis for keeping and maintaining the golden thread. We also agree that the use of BIM will enable key datasets to be made available to the regulator and residents. Making information available to residents as part of an openness and transparency agenda is to be welcomed, although precisely what information should be made available and when will need to be carefully considered in each case.

9. Mandatory Occurrence Reporting – should dutyholders be obligated to report occurrences to the regulator?

The MHCLG has taken the lead from the aviation industry and intends to introduce a system of mandatory occurrence reporting that will apply throughout the lifespan of the building. The idea is that where anyone connected with the design, construction or management of the building becomes aware of a specific occurrence, they will have an obligation to report that occurrence to the relevant dutyholder within 72 hours. The dutyholder, in turn, will need to record the occurrence and the response to it as part of its obligations to report to the regulator. It is intended that the regulator will set out a series of specific occurrences that must be included in the report. In order to ensure consistency in approach, these will also have to be included in the reporting systems set up by the dutyholders.

It will be incumbent on the Client, Principal Designer and Principal Contractor to set up systems to enable the mandatory reporting of specified occurrences during the design and construction phase. The same obligation will sit with the accountable person during the occupation phase.

Devonshires' View: Mandatory occurrence reporting is designed to ensure that occurrences which would otherwise pass under the radar and remain undetected are dealt with immediately. That is obviously a good thing and the proposal is to be welcomed on that basis alone.

It remains to be seen, however, whether it will work in reality, particularly during the construction phase where the supply chain will be nervous (despite there being no penalty) about reporting occurrences that might subject them to criticism or that might cause a delay to the construction work. Human nature being what it is, it may well work as a second or third line of defence, but it will probably be unwise to rely upon it as a principal means of detecting non-compliant design or workmanship.

10. Residents at the heart of the new regulatory system – should more information be provided to residents?

It is fundamental to the new regulatory regime that the accountable person and the building safety manager ensure residents receive the information they need about the health and safety critical elements of the building in which they reside in a clear and accessible format. The MHCLG is determined that the views and concerns of residents must be taken into account when managing the building and that they should be kept informed of the steps being taken to deal with any hazards they have identified or which might arise.

In order to achieve this, the accountable person (through the building safety manager) must engage with residents meaningfully in order to develop a Resident Engagement Strategy (“RES”). The RES will require two separate sections. The first is a management summary to demonstrate how information will be effectively communicated and how residents will be able to engage with the building safety manager. The second is an engagement plan which will set out how residents can access information, from whom and when. The RES must also include a clear process and escalation mechanism so that residents know when they will receive the information requested and how to escalate their concerns if required.

The RES will require the accountable person to provide certain core information to residents to enable them to understand the protection measures that are in place to keep their building safe. The core information includes not only information about the building itself but also tips on how to prevent fire and instructions on what to do in the event of fire. The majority of this information should already have been made available to residents under the RRFSO.

In addition to this core information, there is information that must be made available on request. This includes:

1. Full copies of all historic and current fire risk assessments;
2. Planned maintenance and repair schedules;
3. The outcome of building safety inspection checks;
4. Maintenance regimes for M&E plant;
5. Details of the active fire protection measures in place (alarms, sprinklers etc.) including maintenance records;
6. The fire strategy;
7. Any structural assessments; and
8. Details of any planned and historic changes to the building.

It is envisaged that there will be timescales for the production of this information. Exemptions will apply if disclosure would compromise the safety of buildings and their residents, privacy or any intellectual property rights.

Devonshires' View: Resident engagement is to be welcomed and we support this proposal.

11. Enforcement and Penalties – are the proposals an effective method for addressing non-compliance?

The MHCLG envisages that the regulator will have wide powers of enforcement. The methodology proposed is as follows:

1. The regulator will first seek to achieve compliance by working with the dutyholders or accountable person;
2. If that intervention fails then the regulator may attempt enforcement action through a stop notice or an improvement notice; and
3. If that does not work or that step is not appropriate given the seriousness of the breach, the regulator may prosecute.

MHCLG envisages the issue of enforcement notices where work is commenced prior to the necessary gateway approval being granted. It anticipates a new criminal offence for failing to register a building or failing to comply with any conditions imposed pursuant to a building safety certificate.

MHCLG also intends to give the regulator the power to issue fixed and variable monetary penalties along with criminal sanctions “for the worst offenders and repeated non-compliance.” This is described as a civil penalty regime.

We will almost certainly see changes to the Building Act 1984 that will enable the regulator to bring enforcement action for breaches of Building Regulations, possibly for a period of up to up to 10 years following discovery of the defect.

Devonshires' View: This is perhaps the weakest section in the Proposals. It is entirely unclear how breaches of the duties explained above are going to be prosecuted. The assumption is that this will be consistent with CDM 2015, but that is not confirmed. It is also unclear whether there will be any right of appeal to on-the-spot fines. What is clear is that there will be penalties. Precisely what they are and how they will be enforced remains to be seen.

The MHCLG is also seeking to extend powers under the Building Act so that the regulator can enforce potentially up to 10 years after discovery. That is a significant new power, and if enacted, will have Tall Building owners everywhere feeling justifiably nervous.

Conclusion

While this paper gives a mere taste of what the Proposals contain and our view of them, it should now be clear that the consultation document is a very lengthy and detailed one. The changes it proposes and new obligations it seeks to introduce are wide-ranging and must be properly thought through and implemented in a way that ensures (as best as possible) a seamless transition. This will require significant time and resource, and our biggest concern at this stage is that if the Government rushes this process, we could be facing years of confusion and uncertainty across the industry.

As matters develop over the consultation period and beyond, we will update our position to reflect any changes made.

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