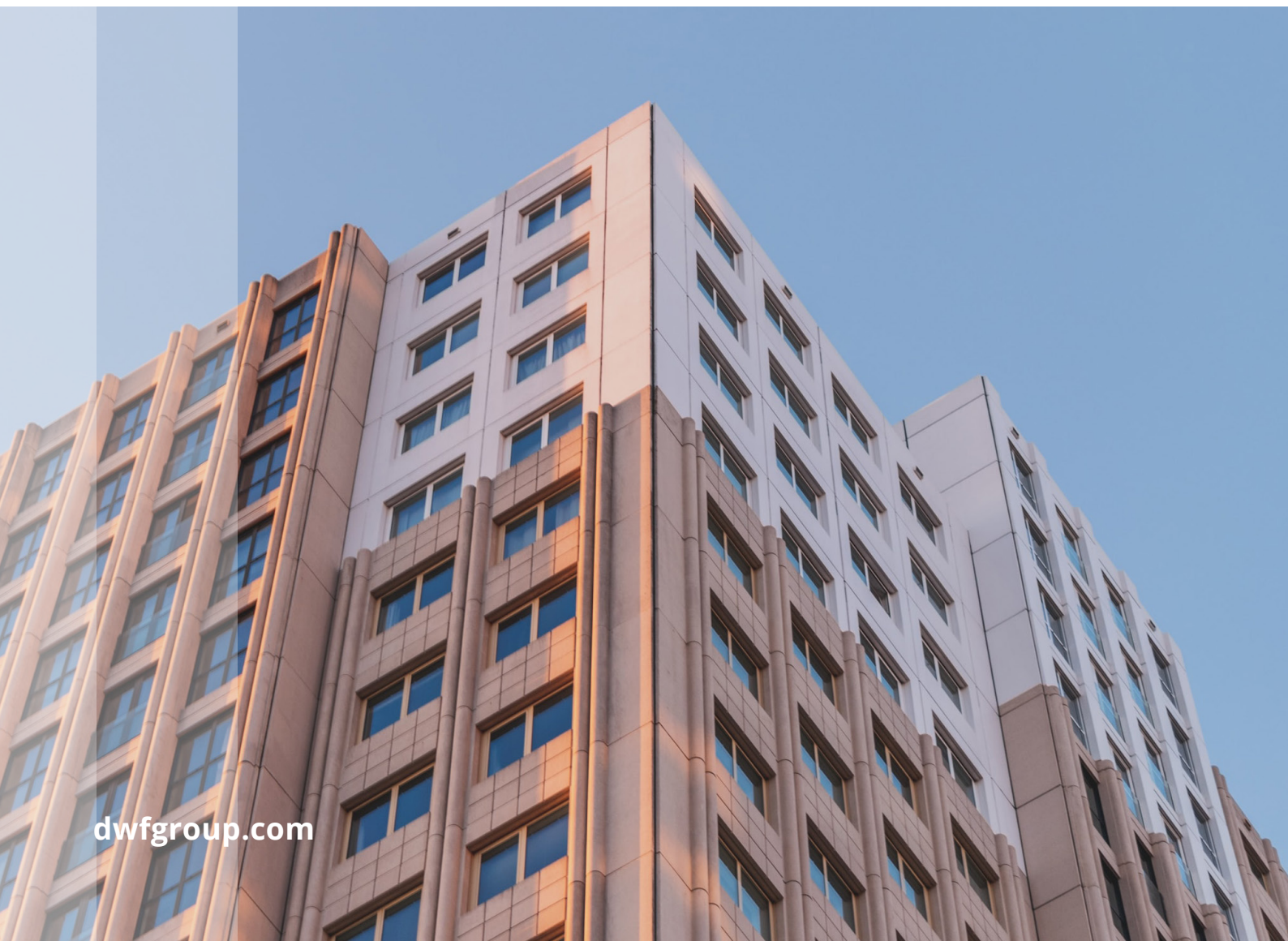




The aftermath of Grenfell

A new building safety regime



Contents

3. Introduction

4. Executive summary

6. Background

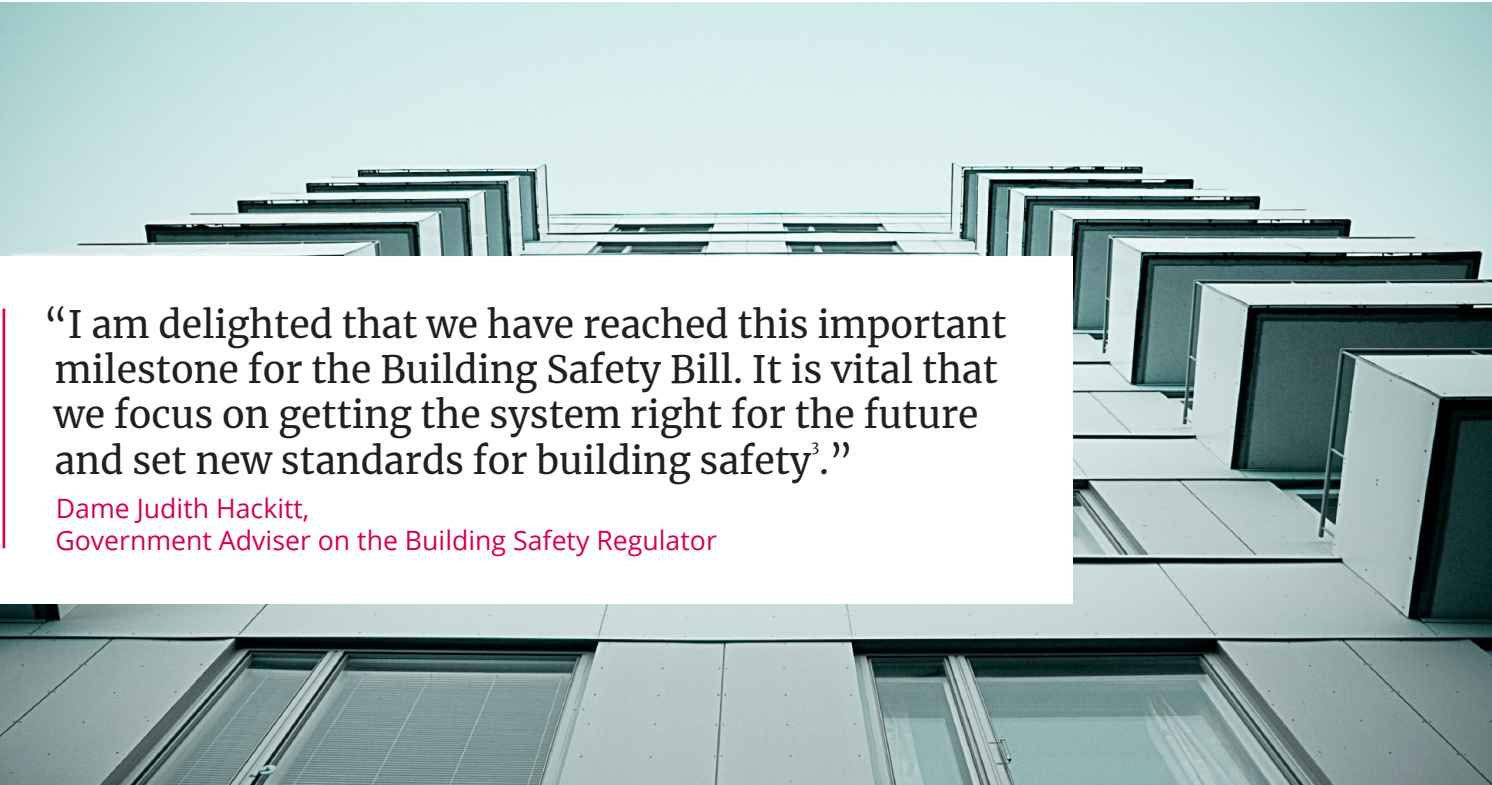
8. The state of the nation – the UK’s cladding crisis

12. The Fire Safety Act and the Building Safety Bill

14. How to solve the cladding crisis and thoughts on the Building Safety Bill

20. About DWF

20. Our team



“I am delighted that we have reached this important milestone for the Building Safety Bill. It is vital that we focus on getting the system right for the future and set new standards for building safety³.”

Dame Judith Hackitt,
Government Adviser on the Building Safety Regulator

Introduction

The Grenfell Tower fire was one of the most appalling disasters in recent history. The tragedy claimed the lives of 72 people.

The loss of life was a tragedy that cannot and will not be forgotten; not just by the friends, families and neighbours who lost loved ones, but by the many who witnessed the traumatic events unfold. Countless errors collectively contributed to the events that resulted in a small isolated kitchen fire on the fourth floor resulting in a tragic loss of life.

The tragedy was followed by years of in-depth investigation that identified a significant number of high-rise buildings (as well as many others under 18 metres) posed similar threats to that of Grenfell Tower, caused particularly by the use of highly combustible material within their cladding or curtain walling. Most alarmingly, a large number of these at risk buildings are residential.

The fallout created by the Grenfell tragedy within the construction and insurance industries and the subsequent discovery of sub-par building and fire safety is often referred to as the UK's cladding crisis. This has led to thousands of residential buildings across the UK being identified as posing a dangerous risk to residents, with many requiring urgent remedial works. The most recent figures from the New Build Database and Office for National Statistics suggest that there could be as many as 11 million people¹ living in buildings that are inherently unsafe.

Critics have accused the Government of being slow to respond to the findings of the Grenfell investigation. More importantly, the remedies the Government initially proposed are seen as focusing too much on future developments rather than the huge backlog of existing buildings which need urgent remedial works. The Government has since introduced a number of initiatives, including the Building Safety Programme and

remediation funds, as well as two major pieces of legislation designed to address the issues raised: the Fire Safety Act, enacted in April 2021, and the Building Safety Bill² which was presented to Parliament in July 2021.

Both the Government and the construction industry in the UK now stand at a crossroads in terms of building safety. There is an opportunity to reform building safety for new buildings and to fix the problems in existing ones. However, to achieve this, it will be necessary for all parties involved; the Government, local authorities, the construction industry as a whole and, critically, residents, to work together to ensure that the reforms deliver what is needed. These include at a minimum:

- The need to set out a robust set of building safety standards for the future, with accountability and consequences for those that do not comply;
- Political will to improve regulations and regulatory powers and ensure a new regime is implemented; and
- An industry that is committed to learning from the past, putting building safety ahead of costs and ensuring continued education and a transparent culture around health and safety is embraced.

DWF is a legal business that embraces innovation and has a wealth of experience and expertise in the real estate, construction and insurance sectors. As a result, we were interested to learn more about the views of key stakeholders within the construction industry on the current cladding crisis, the Building Safety Bill, and more importantly, how to deliver a better system that can prevent future tragedies.

Over the last six months, we hosted a series of roundtable discussions, interviews, and surveys with professionals, industry leaders and businesses across the insurance and construction sectors. During these discussions, we examined a wide range of topics around the cladding crisis and the new Building Safety Bill, and offered a forum for sharing specific ideas and proposals. The important insights gathered from these discussions have informed the content of this report. It was important to create a trusted and open environment to explore sensitive and complex issues. Therefore, to maintain confidentiality, we have included anonymised comments from the discussions.

This report takes a holistic look at the past, present and future of building safety, with the aim of contributing to the conversation on what building safety actually means to all of those affected by the cladding crisis and beyond. The views reflected in this report have been informed by the insight gathered through our extensive engagement with the construction and insurance industries, for which we are extremely grateful.

We believe this report is a timely and thought-provoking contribution to the national and wider debate around how best to find a solution to the cladding crisis and to ensure the mistakes of the past are never repeated.



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Executive summary

The considerations and recommendations from our research highlights the following:

A blueprint for building better

The legacy of the Grenfell tragedy should be a safe, robust and clear framework for building safety regulation which helps to safeguard residents and prevent another appalling loss of life. This must remain the primary focus. With an increasing need for affordable housing in the UK, it is critical that the Government effectively delivers and manages a robust framework to check, ensure and regulate building safety standards for the future. The new building safety regime must balance cost, build quality and the expediency in which changes are made. The new regime cannot be limited to focus on only those buildings considered potentially “high-risk”, to the detriment of all new builds.

A new regime at what cost?

The question remains: who is going to pay for the remedial costs for existing properties affected by the cladding crisis? The consensus from those who participated in the roundtables was that the Government would inevitably end up paying for most of the remedial work precisely because of the difficulty of recovering costs from contractors with expired bonds for buildings that were often built 20-30 years ago.

Yet the current level of the Cladding Relief Fund is unlikely to cover more than a small proportion of the total costs of the remedial work needed. Until there is greater clarity on the size of the fund and the speed that remedial work can be implemented, this issue will cause more emotional distress and financial worries for tens if not hundreds of thousands of people.

The level of government support that has been made available to effect urgent remedial works for buildings identified as unsafe appears to be far less than that which is required.

This coupled with considerable ambiguity as to what is likely to be covered by the Government fund means the industry is left wondering who will be left paying the bill?

Revolution, not evolution

There needs to be a fundamental reform of building and fire safety, from legislation to culture. Those regulating safety need to be consistent. The Building Safety Bill is an excellent start, but it does not capture the complete reform that is needed for Building Regulations in terms of fire and build safety. Our discussions highlighted the need for a consistent approach across the entire industry.

There is also a need for a clear and consistent chain of culpability. People must be held accountable for future issues of non-compliance, with significant penalties for those that fail to comply with Statutes and Resolutions. To ensure that the Grenfell Tower tragedy is never repeated, it will be vital for there to be a stick, as well as a carrot, to encourage behavioural change.

Building smarter, not cheaper

The construction industry needs to continuously evolve if it is to deliver the very highest safety standards – not just for the next few years but throughout a building’s lifecycle. If investment towards education and the adoption of BIM (or Building Information Modelling), block chain and digital technology are not utilised as they should (for build quality and safety as opposed to a claims culture focusing on proofing it will be a missed opportunity.

Technology has an increasingly important role to play in ensuring the 'golden thread', the information that allows you to understand a building and the steps needed to keep both the building and people safe, now and in

the future. There will be opportunities for tech companies to develop improved systems which aid regulation, oversight, inspection, approval, and management of building and safety information across the industry.

There is a vital need for industry leaders to come together to share ideas, discuss new ways of working and develop new technology which encourages and empowers the golden thread of information.

“We’re not tracking technologies in the built environment – AI that helps work out and approve documents. Responsibility for looking at suitability is left to the designer but passed to the contractor. The changes go some way to closing gaps. But the issues in the building [Grenfell] were not deemed to have been issues at the time. I don’t think it was a wilful desire to build a building badly, but to build buildings to an adequate standard which was inadequate.”

Roundtable participant comment

Reducing risk

The Government has an important role in encouraging insurers to underwrite construction projects and professionals in a way that accurately reflects risk. The sooner the Government can clarify how the new building regime will work, that in itself will contribute to greater certainty for insurers.

While the insurance sector must do more to appreciate the risk profile of projects, so too must developers, who cannot simply transfer all risk to those with the deepest pockets (or global players who can afford the largest premiums).

Skills and education

It is estimated that an additional 700 staff will be required in regulatory roles to carry out compliance checks and ensure continued building safety. It is apparent that the industry has struggled with employing the right skillset in the past, so it is imperative that the best talent is secured for the future. There must be a culture shift away from viewing building safety and regulatory compliance as just a box-ticking exercise. Education will be paramount to achieving that goal.

Size matters

Only buildings over 18m in height are eligible for current government funding, which leaves those living in shorter buildings without any support, despite facing the same kinds of fire safety issues as those living in taller blocks. There are hundreds of thousands of buildings believed to be affected, and limited funds available.

The risk of rising premiums

With concern in the insurance industry about the increased liability for building professionals, there is a real prospect that there will be fewer insurers willing to cover such high-risk, which could lead to rising premiums or certain building works becoming 'uninsurable'.

Watching the watchmen

As evidenced in the Building Safety Bill, the Government intends to leave oversight of setting safety standards to the industry itself. Questions have been raised in consultation about the role of architects and others in the 'built environment', including how proper Continuing Professional Development (CPD) requirements will be monitored and sanctions for those who do not maintain this. Many would argue that the industry is best placed to do this, but there remains the question of who will ensure those safety standards are met, maintained and where necessary upheld?

Looking to the future, with an eye on the past

The Building Safety Bill is almost entirely 'forward looking'. Whilst designed to ensure that the deficiencies, such as those that led to the Grenfell tragedy, are never repeated in future buildings, there is concern within the industry that the legislation does not adequately address how to tackle defects in existing buildings. There are potentially millions of individuals who own or live in existing buildings that continue to present a safety risk.



Background

Building safety in the UK is at the forefront of political, media and public attention.

The changes proposed by the Government are currently subject to intense scrutiny and debate by industry experts. The two most recent major pieces of legislation, the Fire Safety Act and the proposed Building Safety Bill are focused both on preventing future buildings having the same problems that led to the Grenfell disaster, as well as fixing the problems with existing buildings, specifically in relation to building safety and oversight. However, there remain a number of serious outstanding issues and questions that are unresolved. This is a pivotal moment for the construction industry; an opportunity to put robust and effective building safety regulations in place, rebuild confidence in build quality (and the industry in general), but perhaps, most importantly, to ensure a tragedy like Grenfell never happens again.


Following the Building Safety Bill being submitted for consultation in July 2021, it is clear that there are concerns across the industry about whether the new regime goes far enough to tackle the problems that exist within the current cladding crisis, building safety and the many issues for owners and tenants of existing buildings. While the steps the Government has taken to date are welcome, our extensive research has found concerns that there are gaps in the legislative regime and opportunities that may have been missed by the Government.

Over the last six months, DWF hosted a series of roundtable discussions and one-on-one interviews with professionals, industry leaders, institutions and organisations across the construction industry, including contractors, consultants, insurers, developers, building owners and occupiers amongst others. The discussions explored how the cladding

crisis arose, how the industry has dealt with this in the aftermath of the Grenfell tragedy and what the next steps could be, including specific feedback on the key points in the draft Building Safety Bill.

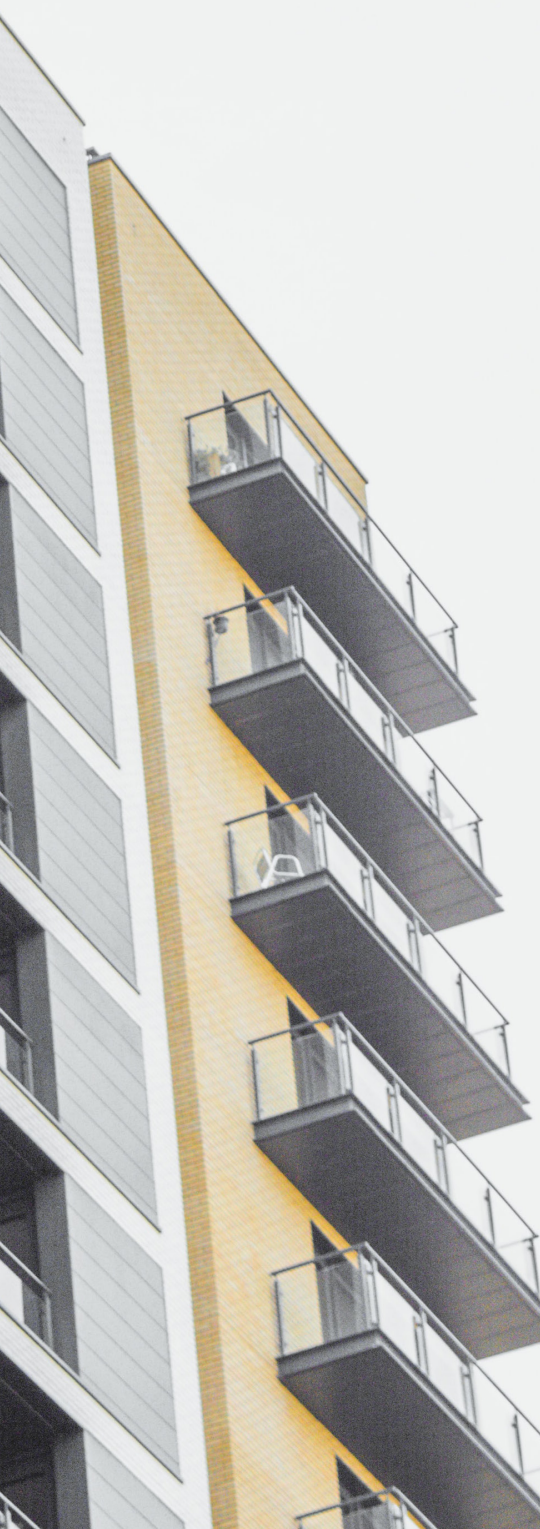
The feedback gathered from our discussions with the construction community painted a picture of an uncertain future. There was unanimous agreement, amongst those who participated, that building safety regulations need a major overhaul. Many felt that the Building Safety Bill still left significant uncertainty in some key areas including managing costs, liability, regulation and monitoring, among other issues.

The findings also highlighted that the issue of cost is a complex one, with two key concerns regarding the funding of remedial works today. First, the level of government support that has been made available appears to be far less than what will be required to remedy the problems people are currently facing. Second, there is considerable ambiguity as to what is likely to be covered by the Government funds. While a fund for remedial cladding works has been made available for privately owned buildings, it is limited in quantity and in scope. There are build quality and fire safety problems beyond cladding that will continue to put residents at risk, with no apparent plan included in the legislative regime change or existing funding. Currently, residents and building owners appear to be responsible for covering costs for much, and, in some instances, all of the costs of remedial work. It was widely reported that the House of Lords acknowledged this as an issue in the passing of the Fire Safety Act 2021.



“Over the years people have been pushed to make savings – in resources, training, the quality of people we've been using...that has a massive impact on the quality of workmanship. When you then add in the issues with materials etc., it's the perfect storm, which is what Grenfell was.”

Roundtable participant comment



During our discussions, the issue of cost led into the question of liability, or perhaps culpability, and who can (or should) be held accountable for costs where no inherent or latent 'defects' in the building exist (i.e., when no one is to blame for the inadequate fire safety), or when a statute of limitations has absolved those who would normally be liable. Those interviewed suggested that while, in some instances, there have been attempts to extend liability periods moving forward, the Bill in its current form does not appear to provide guidance on how to determine responsibility for payment or, if one is identified, how to hold a responsible party liable.

With heightened concern about increased liability of building professionals and the potential of large payouts, the evidence from our industry research is that insurance companies are very wary of providing cover for the sector, with many firms choosing to move out of underwriting in the construction industry altogether. This appears to have been accelerated by the coverage garnered in building safety and the inherent Professional Indemnity crisis across the construction industry that has followed. As a result, there is a danger that with fewer insurers likely to remain, premiums will continue to rise quickly. However, there is hope that the market will widen with the announcement of a state-funded insurance scheme.

There are powers within the Building Safety Bill that the Government intends to use to regulate competence requirements. Ensuring construction professionals meet set standards is vital in ensuring confidence in build quality and the industry as a whole. However, the Government appears to be leaving oversight in setting standards to the

industry itself. While some argue they may be best placed to do this, the question remains; how will this ensure appropriate standards are maintained and ultimately who will govern or 'watch the watchmen'?

This leads to the issue of monitoring. The Building Safety Bill creates new supervisory roles, from departmental level down. This again raises the issue of adequate standard setting, ensuring they are met and overseeing their implementation. How will training be carried out and who will ensure this happens properly? Who will be ultimately responsible? And more concerning for many surveyed, will this inevitably lead to the industry self-certifying again, which was seen as a huge contributor to the Grenfell tragedy and current cladding crisis.

Finally, there is a concern that the Building Safety Bill is almost entirely forward looking. As such it is designed to ensure that deficiencies, such as those that led to the Grenfell tragedy, are not repeated in future buildings. However, the legislation does not consider existing buildings, thereby failing to address the potential millions of affected individuals who own or live in existing buildings that continue to pose a safety risk.

While any action to improve safety standards is welcome, it is important that this change is comprehensive and as robust as it can be. As it stands, the Building Safety Bill and the Government's accompanying actions are a positive start but leave some important questions unanswered. This report seeks to shine a light on these and provide insight to this ongoing debate.

The state of the nation – the UK's cladding crisis

In the wake of the Grenfell tragedy, the UK Government commissioned an independent review of building regulations and fire safety.

The Independent Review of Building Regulations and Fire Safety was undertaken by Dame Judith Hackitt with the final report and findings published on 17 May 2018. The subsequently named 'Hackitt Report',⁴ focusing on high rise residential or multi-occupancy buildings, looked at areas including the regulatory system around the design, construction and ongoing management of these buildings. The purpose of the report was to make recommendations to ensure the failings of the past would not be repeated, and to put in place a robust regulatory system for the future. A summary of the recommendations and the Government's response is dealt with later in this report.

The causes of the cladding crisis

Contributors to DWF's research identified the following factors as the 'main causes' of the cladding crisis:

- Complacency within the industry, and a general lack of understanding about continuing building safety requirements;
- A disjointed approach to responsibility across different parties in the construction process;
- Economic factors becoming pre-dominant with safety a second order concern, leading to cheaper materials being used, or corners being cut in construction with resultant build quality defects and fire safety breaches (that have largely gone unchecked);
- More recently a focus on energy efficiency over resistance to fire;
- Failing to be honest and transparent regarding materials and products being used (for more than a decade); and

- Failing to provide oversight on build quality and certification at every level, caused by 'cutting corners' or a lack of education on fire safety.

While this is not an exhaustive list, it provides insight from many different aspects of the construction industry as to why, it believes, the UK is currently in the midst of this crisis. These findings are explored further in this report.

The current situation is often referred to as the cladding crisis. However, it is apparent that cladding was not the only issue identified, and many building owners or developers complained of deficient and/or defective fire stopping materials and measures within the interior of their building, or in some instances even lacking fire cavities and barriers. This has meant there has been a need to ring fence hundreds of millions of pounds to undertake remedial works and ensure the safety and compliance of their portfolio.

For many of the buildings identified as having safety issues, fire and building safety/control certificates were in place. These buildings had been constructed to the standard required at the time. But there appears to have been a lack of understanding and a shortage of skilled people when it came to checking building regulations and requirements historically.

While in recent years there has been constant pressure to make savings, and many believe that ultimately this had an impact in terms of compromising safety, this is not the only conflicting driver that has contributed to the cladding crisis. Many of those interviewed felt that significant problems were as a result of a lack of resources, training, and quality of people used in roles to regulate and sign off building safety.

Some of those we interviewed believe the drive towards energy efficiency has had adverse effects and also contributed to the cladding crisis in cases where professionals misunderstood that materials being used with an energy efficiency focus were not as effective as traditional materials for fire safety. This has been identified as a contributing factor in some of the buildings which now required remedial work. This lack of understanding of the proper material required, made it easy for the industry to become myopic about one issue – energy efficiency – while being less focused on building and fire safety.

A running theme throughout our discussions was one of complacency. The industry has allowed itself to be distracted by economics, margins, and a general lack of technical understanding. Many felt that continuing education was needed for professionals in the industry to ensure a universal level of competence among design and build professionals.

The findings of the Hackitt Report

Throughout the extensive review process, various investigations of existing buildings took place. The findings showed that a disturbingly large number of high-rise buildings had dangerously combustible material coverings to the external facade of the building (cladding or curtain walling) and/or there was insufficient or combustible insulation, or insufficient fire stopping within the core or cavities of the buildings. More startling perhaps was that many buildings were also found to simply be non-compliant with current fire and building safety requirements, due to the total absence of cavity and fire barriers, which are

necessary in preventing the rapid spread of fire throughout buildings.

These buildings presented an obvious fire risk and potentially a significant risk to life. It was therefore crucial that in many instances urgent remedial works were required to ensure building safety. At the time of drafting this report, the Government, in conjunction with local authorities, had a number of initiatives ongoing, including a £30m 'Waking Watch' relief fund, targeted at installing alarm systems in buildings with unsafe cladding,⁵ and perhaps most significantly, a 'cladding relief fund'. In February 2021, the then-Minister for Housing, Communities and Local Government pledged £3.5bn to pay for the removal of unsafe cladding in high rise (18m and over) buildings affected by the use of combustible cladding. This was presented as part of a '5 point plan' to provide "reassurance to homeowners and confidence to the housing market".⁶ The Government later committed to increase this fund to £5.1bn.

Whilst this initiative is laudable, it has also gained significant criticism from some industry experts and Members of Parliament who suggest the true cost of the cladding remediation for affected properties is likely to cost anywhere in the region of between £15bn - £50bn.⁷

Only buildings over 18m in height are eligible for this funding, leaving those in shorter buildings with no support, despite facing the same kinds of issues as those living in taller blocks. There are hundreds of thousands of buildings believed to be affected, and limited funds available. The scaffolding alone is prohibitively expensive, and with current material and labour shortages, the likely cost of making these repairs is inevitably going to rise. If costs increase after a building has been granted

government funding for repairs, there is no guarantee that the funding will be extended. The actual cost to address all fire safety defects in high-risk buildings was estimated to be £15bn, in a report by the Housing, Communities and Local Government Commons Select Committee,⁸ which is still seen as a conservative figure. Once the current £5bn fund has been allocated, it is uncertain if new funds would be made available and over what timescale. Again, this creates huge uncertainty for residents and the construction industry alike.

The cladding crisis in context

The true scale of the cladding crisis cannot be told through statistics and numbers alone. This issue has a deeply human impact which cannot be quantified. The simple truth is many residents are unable to afford the costs of the remedial works they are being asked to cover by property owners; they themselves mostly not culpable for the original building defects or use of inappropriate or unsafe cladding materials. Residents and apartment owners have now been left in a situation where they are unable to sell their properties or flats and are facing huge costs to bring these buildings in line with current standards, or to meet the requirements set by the EWS1 process. This stress is in addition to the fear that they may be living in high-risk buildings.

It is estimated that anywhere between 600,000-11million⁹ people across the UK are living in buildings that are likely to be affected by the use of unsafe cladding or sub-par fire safety requirements. A large number of these buildings were constructed 20-30 years ago, during a period when building regulations in the UK did not require sign off by local government and private

“A guidance note on certain requirements of reporting is essential. They need to be clear what contractors need to do going forward. There needs to be a level playing pitch.”

Roundtable participant comment



companies specified building materials themselves, often self-certifying their own building works.

By 2005, buildings no longer had to hold a Fire Safety Certificate issued by the Fire Service, and instead could obtain one from an independent and appropriately qualified third party. In 2006, changes in UK Building Regulations were made which were intended to aid greater energy efficiency at reduced costs, but some critics and those interviewed in preparation of this report, believed this in fact accelerated the alleged 'race to the bottom' for building costs, and cheaper materials were used as a matter of course.

There has also been a major impact on the insurance market. With increased risk and concern amongst insurers about the additional liability for both

design and building professionals, the appetite of the insurance market to take on this additional risk is likely to be very limited, at least until it is clear how the new regime will work. Those we spoke to felt the uncertainty about future liabilities for new buildings had made insurers far more wary about future liabilities under the Bill. This has inevitably increased the cost of cover for new builds. Moreover, in recent years since the Grenfell Tower tragedy, many insurers have steadily moved out of the construction industry, resulting in further increases to insurance premiums and a potential monopoly among providers. In February 2021, when the Government announced the creation of a fund to finance the cost of unsafe cladding, there was a further announcement about the creation of a state-backed insurance scheme aimed at tackling the obstacles faced by construction professionals obtaining insurance.¹⁰

During our discussions, the rhetoric expressed by those we interviewed was that the industry had been “sleepwalking” into a tragedy like Grenfell, with one individual commenting:

“The removal of building control from local authorities has led to a relaxation of standards driven by the private sector.”

Roundtable participant comment

The industry as a whole, not merely one aspect of it, had allowed itself to become complacent about building safety requirements without realising the potential dangers.

The Grenfell fire and the subsequent Hackitt Report exposed fundamental and endemic flaws within the industry.

The findings of Dame Hackitt are best summarised in her own words:

"There is a need for a radical rethink of the whole system and how it works. This is most definitely not just a question of the specification of cladding systems, but of an industry that has not reflected and learned for itself, nor looked to other sectors."

There is huge concern in the industry around the uncertainty of who should or who will pay for this remedial work, as it is ultimately unclear who is 'to blame'. If we could answer this question, perhaps it would be easier to establish a clearer roadmap to resolution. Our findings from the discussions we hosted, showed that there are many different contributing factors, including but not limited to:

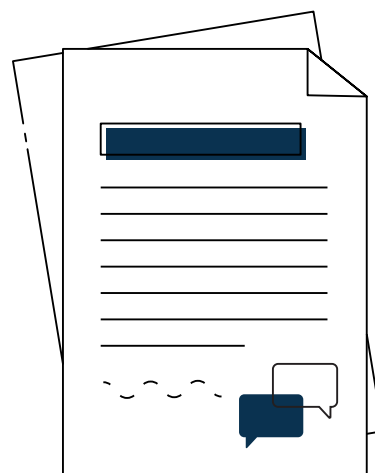
- Poor workmanship at installation;
- Lack of knowledge and understanding about materials; and
- Materials which were, at the time, adequate and approved for use by Resolution.

There are also many different factors which could potentially be responsible.

Now that Grenfell has brought these defects to public attention, what can be done to fix them?

We now have a much clearer picture as to why the Grenfell tragedy occurred and we are now aware of the extent of the cladding crisis. But this awareness does not solve the problems people are facing every day as a result.

The question now is how do we resolve the cladding crisis?



The response to the Hackitt Report

The Hackitt Report was a comprehensive examination of all the perceived failures of the UK construction industry and governmental oversight into building safety. It scrutinised what had happened over previous decades of disinterest and self-certification that directly led to the Grenfell tragedy.

In the report, Dame Hackitt made 53 recommendations on how to improve the endemic failures of previous decades. These recommendations and the findings of the report recognised that a bottom up reform was required in order to resolve the issues within building safety, but also to regain the confidence of the public in the industry and government's ability to build better and safer.

In summary of the report, the recommendations sought to focus on the following:

- Introduction of new regulatory bodies and a regime change focused on safety over cost;
- A new regulatory framework to be introduced to ensure build quality and building safety remained at the forefront of the industry's agenda;
- Responsibilities for 'duty holders' involved in the development and operation of buildings, ensuring a causal link for liability can be established;
- Greater focus on change control mechanisms when buildings are bought and sold, ensuring a golden thread of building information is maintained;
- The emphasis on gateways throughout different stages of development, from planning to construction and handover, ensuring that quality remains at the forefront;
- Increasing workforce education and competence;
- Improvements on product selection and testing; and
- The establishment of a new Joint Competent Authority (JCA), comprised of local authorities, the HSE and fire and rescue services.

In receiving the Hackitt Report, the Government decided to adopt all 53 recommendations made. This was seen as a huge step forward, showing a clear intent to resolve the crisis and lack of confidence the public had towards building safety generally.

Whilst the Government took a very positive step towards improving build quality and rebuilding confidence, the industry's approach was not viewed as forthcoming. One of the biggest changes that was introduced in the wake of the Grenfell Tower tragedy and in reaction to the Hackitt Report was the development of the EWS1 process. The EWS1 (External Wall Fire Review) certificate¹¹ was introduced by the Royal Institute of Chartered Surveyors ('RICS') along with a number of financial institutions. The EWS1 form was:

"Designed to be used for residential properties such as blocks of flats (including those owned by housing associations and social housing providers as well as privately owned), student accommodation, dormitories, assisted living, care homes and Houses in Multiple Occupation (HMOs).

The form 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. Changes in government advice in January 2020, brought all residential buildings of any height potentially within scope".¹²

The process involved in obtaining an EWS1¹¹ requires a qualified professional (as defined by the RICS) undertaking a review of the external walls, and when necessary, internal fire stopping, in order to certify whether or not the building is ultimately safe for habitation.

The purpose of an EWS1 is "to ensure that a valuation can be provided for a mortgage or re-mortgage on a property which features an external wall cladding system of uncertain make up, something that has both safety implications and which may affect value if remediation is required due to the fire risk associated". However, there has been some criticism levied at the

outcome of the EWS1 introduction; it does not focus on fire and building safety, but instead about financial risk associated with the lending of monies. It should also be noted that the EWS1 form is not mandated by the Government, however, it has been largely supportive of its implementation.

There has also been criticism regarding the EWS1 process, namely that it is purely a financial tool to "help banks make lending decisions",¹³ and is not used with genuine fire safety in mind. It is also criticised as being a slow and expensive process, contributed greatly by the UK's lack of qualified fire engineers, whom the RICS suggest are those competent to carry out the EWS1 review process. There also seems to be an inconsistent approach from the Government as to what buildings should be captured by the process.¹⁴

When speaking with building owners and occupiers who have become caught in a vicious cycle caused by the adoption of the EWS1 across the financial lending market, we found that many were critical of the regime, believing it focuses more on risk adverse lenders than on remedying the existing problems.

A summary of our findings on the EWS1 process:

- Insurers, lenders and construction professionals welcome its introduction, and for new builds it is seen as positive until the Fire Safety Act comes more fully into force. However, building owners and occupiers do not agree it provides a benefit or genuinely affects building safety;
- An inability to require building owners to carry out the EWS1 process means apartment owners or occupiers are potentially unable to move or sell their property;
- The process needs revision, in order to make it clearer what is required and who can carry out an EWS1 survey;
- The limitation of only certain individuals who can sign off an EWS1 has created a backlog that is potentially years long, and has been accused of creating an unfair monopoly; and

- That some reviews can be carried out via a desktop review relies too heavily on the digital information being accurate and available at build stage, which questions consistency in the quality of surveys.



In July 2021, the then Housing Secretary, Robert Jenrick, announced new advice from the Government commissioned report had found there was "no systemic risk of fire" in blocks of flats under 18m. He hailed this as a significant step for leaseholders unable to sell or re-mortgage properties which needed an EWS1. However, banks and lenders reported they were unlikely to make any changes until RICS updates its specialist guidance. At the time, RICS stated they would not change their guidance until the Government officially changes fire safety advice, which was not expected until November 2021, but that this did not prevent lenders from aligning with the Government's announcement that the EWS1 was not needed for buildings under 18m. Such a position leaves many residents uncertain about the future and, in many cases, unable to sell their properties.¹⁵ Our research also indicated there are significant fears that this cycle seems destined to continue for some time.

The Fire Safety Act and the Building Safety Bill

The two primary pieces of legislation introduced to deal with the impacts of Grenfell are the new Fire Safety Act 2021 and Building Safety Bill, which is currently in consultation.

The Fire Safety Bill received Royal Assent on 29 April 2021, and is subsequently now known as the Fire Safety Act 2021. The Fire Safety Act is one of the most significant steps the UK Government has taken towards improving build and fire safety.

In the summary, the Fire Safety Act does the following:


- It applies to all multi-occupancy residential properties;
- Introduces amendments to the Regulatory Reform (Fire Safety) Order 2005 that:
 - extends its reach to deal with the external structure and internal common areas of residential buildings, ensuring a 'responsible person' assesses and reduces fire risk;
 - introduces a risk based formula used as a marker to test whether a 'responsible person' has complied with its obligations; and
- Extends enforcement powers of the Fire Service to sanction offenders.

This is seen as a positive step forward, although criticism has been levied as the Fire Safety Act's shortcoming in not identifying who will pick up the cost for remedial works that are required to properties that fall within the scope of the Act's guidance. Whilst the 'responsible person' must assess and ensure remedial works are carried out, it is not established that they must pay for it. The House of Lords identified this as a potential failure, and they wished to insist that occupiers who were not responsible for the structural or internal fire safety deficiencies, were also not liable for remedial costs. In the end, the Act passed without this amendment.

The Government, in proposing the new regime to be introduced under the Building Safety Bill, published its policy paper entitled 'Outline Transition Plan for the Building Safety Bill' on 5 July 2021. This sets out the Government's '18-step' plan and timetable for bringing the Bill's new regime into force. Currently, the Building Safety Bill has to be debated in the House of Lords before returning to the Commons to gain Royal Assent, and there may be additional changes introduced. The most recent changes were made on 14 October 2021, when the Department for Levelling Up, Housing and Communities and the Ministry of Housing, Communities and Local Government provided updated draft regulations¹⁶ and updated their 'fact sheets' on all aspects of the new regime.¹⁷

This report is aimed at raising awareness of some of the shortcomings of the proposed Bill and Outline Transition Plan, with a view to contributing to this important conversation.





“Having a digital thread is critical to make sure it’s all tied together. It’s a big step forward in the Bill but has a lot further to go yet.”

Roundtable participant comment

The Building Safety Bill includes the following key proposals:

- The establishing of a new Building Safety Regulator who will promote safety and improve competence, ensuring a building advisory committee will be put in place, and the establishment of a number of regimes for industry competence and residents' panels;
- Amendments to existing Building Control and additional Regulations introduced to ensure the fire and building safety regime is updated;
- A register and code of conduct, including disciplinary provisions, for new building control approvers and inspectors (with a further approximately 700 envisaged to be trained);
- New IT systems for building management and a focus on the golden thread of information;
- Identified roles and responsibilities for 'duty holders', ranging from owners / developers, Principal Designers, Principal Contractors and other professionals involved in design and construction;
- The introduction of Building Safety Managers for all high-rises with reporting regime.

- Amendments to the Defective Premises Act 1972 extending the limitation period to 15 years from completion of a dwelling or from remediation to rectify work already undertaken;
- Introduction of Gateways (Planning, Construction, Completion and Handover);
- A new Homes Ombudsman scheme; and
- The strengthening of enforcement and sanctions against stakeholders that fail to comply with new regulations and extension of powers for authorised officers to obtain information and access buildings.

Due to the complexity of the Building Safety Bill, the Government anticipated it would take nine months to pass through Parliament. They have also confirmed they intend to introduce a number of the changes, including the establishment of the new Regulator within twelve months of it receiving Royal Assent.

The Bill proposes amendments to the Building Act 1984, which forms the current basis for building regulations and the building control process. A newly appointed Building Safety Regulator would be responsible for managing building control for high-risk buildings. The Bill proposed a

new three stage 'gateway' process for the construction of higher risk buildings and changes to the time limits on building control approval and enforcement procedures. The Bill will also give the Government powers to introduce regulations to set competency requirements. The regulations will require anyone employed for design or building work to meet a set level of competence. Both individuals and organisations will have standards they must meet. However, what the regulations, and thus the Bill, do not do, is specify what this competency actually looks like. The Government is leaving this determination to industry, who they believe are best placed to set the framework for sectors and roles based on a national framework.

The former Secretary of State for Housing, Communities and Local Government, Robert Jenrick stated that the Bill would ensure “high standards of safety for people’s homes” and would be a “proportionate regime” ensuring urgent remediation works for properties which need to be brought up to an acceptable standard. However, there are many areas of the Bill which are unclear, including issues around costs, insurance and competency, which are discussed further in this report.

How to solve the cladding crisis and thoughts on the Building Safety Bill

Insight, opinions and recommendations from the UK construction and insurance industries.

Earlier this year DWF wrote a short commentary piece on the draft Building Safety Bill. We were keen to understand more about the response to the Bill and wanted to gather insight into the challenges businesses were facing. Our aim was to explore the contributing factors to the crisis, to help ensure the mistakes of the past are not forgotten, as well as identifying ways of resolving these issues.

We interviewed or questioned individuals from the following industries:

- Contractors and their supply chain;
- Consultants (including architects, designers, engineers, and industry bodies);
- Developers;
- Occupiers;
- Investors and lending institutions;
- Insurers (including brokers and underwriters);
- Public sector; and
- Industry institutions.

The research gathered through this series of roundtable discussions and interviews provides a snapshot of industry sentiment about the challenges facing some construction professionals and businesses, but it also identifies ideas and suggestions on how to address them. We share our findings in this report to inform and contribute to the one of the most important debates in decades, on the reforming of building safety and standards.

The findings set out in this report are an honest reflection of the concerns and challenges identified by those who took part in the discussions. There was unanimous agreement that there have been many failings within the industry, with many accepting that it had been “asleep at the wheel” and that the current crisis was inevitable. Our key findings from the research include:

The Building Safety Bill is only “forward looking”

One of the key messages from our roundtable discussions and research is that the Building Safety Bill is primarily forward looking rather than having any meaningful retrospective effect. Whilst there are some provisions made for remedial works, the Bill itself addresses issues like planning, constructing, finishing and management – all for new builds, rather than to fix the problems with existing buildings. Setting higher standards for the future is extremely important but it leaves the larger issue of how to tackle past substandard building works unresolved. Moreover, although the Government’s fund for urgent remedial works addresses fire safety, there are no provisions for other deficiencies. Referring back to the concerns about cost, this means that other structural issues, some of which may have an impact on building safety, would need to be rectified entirely at the cost of residents or tenants.

If there were construction problems with something as important as fire safety measures, it is also possible that this may apply to other areas.

Remedial costs are, by far, the most contentious issue that the sector faces. Where there are unsafe buildings, largely now informed by the failure to obtain a valid ‘safe’ EWS1, the problem must be resolved. This is often through extremely costly remedial works, sometimes costing millions of pounds. The Building Safety Bill (or the Fire Safety Act) does not inform who is responsible.

Many we spoke to suggest the cladding relief fund is wrapped in red tape with no certainty that funds will ever be made available for those most affected, in the short term or potentially at all.

Some participants from Northern Ireland also indicated that they felt they had been “left out in the cold” with regards to accessing these funds, which are seemingly not available.

“This is a forward looking bill which doesn’t look at the massive portfolio of buildings which exist across the UK.”

Roundtable participant comment

“The Bill is bringing in a whole new regime for building inspectors and approvers and going forward that will improve things, but it's the legacy that is the issue.”

Roundtable participant comment

Recommendations:

- 1 The Government should increase the "cladding relief fund" to a more proportionate amount and make the process for applying for costs more streamlined.
- 2 Ensure the industry in Northern Ireland is able to access funds for remedial works, which to date it has seemingly not been able to do.
- 3 The Building Safety Bill should clearly define who is responsible for remedial costs for pre-existing works, in cases where there is no blame (i.e., no contractual breach from which to recover losses and costs associated with remedial works).
- 4 The Building Safety Bill should have some form of retrospective effect, setting a reasonable limit (12 years would seem a reasonable period) for its application, with penalties for non-compliance of standards existing at the time of construction.

Ensuring the golden thread is preserved

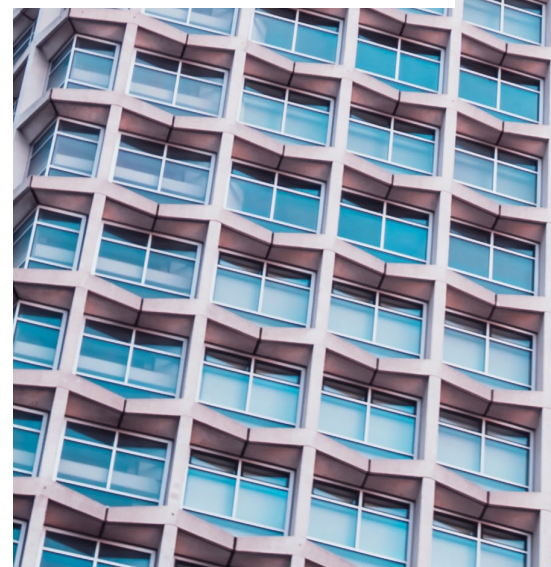
The Building Safety Bill introduces a focus on maintaining the flow of supply chain information – or what is often called the golden thread – but there does not appear to be sufficient checks and balances on how this will be achieved.

The way in which information was and continues to be obtained and passed on through the supply chain, between building owners, building control, developers, and contractors is something that must be tackled. It is essential that information that could aid the owner and management of a building is readily available, easily understood and fully compliant. This was also identified as an area where much more could be done to resolve issues. Some criticism was levied at the Government's mandate towards bringing the UK up to BIM Level 2 compliant projects across the board, and its failure to meet its proposed targets.

The drive to build better, faster and at higher margins was also believed to be another factor which has hindered maintaining supply chain information, with one contributor stating it is extremely unlikely that anybody actively set out to build an unsafe building. However, it was suggested that focus was driven away from building safety by a culmination of economic factors, bad behaviour and lack of understanding. It was these factors that ultimately jeopardised building safety.

“If you've got the building information – you can assess the building fabric; what has been drawn on the wall; type of material; test certificates. You can sign it off. When you don't have all that information in front of you (the golden thread) you can't ensure that's all in place.”

Roundtable participant comment



“There needs to be a re-education – there is a cost but the digital technology available now makes this far more affordable than it ever was. People just need to think outside the box.”

Roundtable participant comment

There is available technology within the built environment that can help manage and maintain the golden thread of information, from design to development; asset management to demolition. When technology was raised during the roundtable discussions, cost was interestingly not the primary reason why this was not used to address the issue of integration. Instead, the main factors seemed to be availability and a lack of understanding. A consistent theme across those surveyed was if access to such technology was readily available, it would be used by the industry. There seems to be scope here for the Government to use its role to encourage greater use of technology.

During the roundtables, participants discussed the use of block chain to keep accurate records of information, photographs, site reports, and more. All of this vital information could be shared across the entire supply chain and with all those involved in project delivery (including funders, sponsors and solicitors). Any changes made during construction or development, could be accurately recorded, and utilised throughout the life cycle of the asset. Some of those interviewed had also used this technology as an advisory tool in the past, but it is now also being adopted as a requirement which is an essential part of any project.

Recommendations:

- 1 Proper and workable incentives, focused on maintaining the golden thread for new buildings, requiring this as part of the Building Regulations and making this a statutory requirement on high rise or multi occupancy buildings.
- 2 Resource and financial contribution towards collating information for pre-existing buildings in a similar manner.
- 3 Amending the Building Safety Bill or subsequent Statutory Instruments to provide penalties for those that do not comply with this requirement.
- 4 The industry must embrace digital technology and the use and development of blockchain as a manner in which the golden thread of information can be maintained and stored.

A two-tiered system?

Many roundtable participants believed that the Building Safety Bill created a 'confused, two-tiered system.' The Bill focuses on higher risk residential buildings, but many believe that some of these residential buildings are not as high-risk as a great number of other buildings that are not covered by the scope of the Bill. It is argued that this would be extremely time consuming and would create a huge undertaking for Duty Holders and those involved in the built environment, which would be almost impossible to manage. However, there appears to be an opportunity to look at the construction process for building generally, rather than having different approaches for building control and regulations for different types of buildings and inadvertently creating a 'two-tiered system.'

Recommendations:

- 1 Guidance to be provided by the Government as to what categories of buildings are to be covered.

“There is an overall trend in the construction industry which is price and program drive everything; until tragedy happens and then responsibility becomes top of the chain. Responsibility and liability are always sandwiched and this discussion highlights how this needs to be fed into the culture of construction.”

Roundtable participant comment



Who accepts responsibility and conflicting drivers?

Another factor highlighted in our discussions was a lack of clear direction and guidance on the question of 'responsibility', asking who was ultimately responsible for ensuring regulatory compliance, and for problems where risk or liability is just pushed down the supply chain to the lowest common denominator. There has seemingly been no consistent approach to responsibility and liability across projects of all ranges of scale and complexity, save for a common theme of passing on responsibility to another.

The roundtables also highlighted issues around clear and concise project and contract specifications from a specific consultant's perspective. Previously, before price became the primary driver over quality, this consultant would have given input, or had creative control over certain material or product specifications, thus ensuring quality, rather than price, would remain at the forefront of the project. Over the last decade this has not been the case. Responsibility is not an issue if those being asked to insure against the products specified were able to own and control the decision-making process – by adopting the right approach for the requirements/specification of building materials needed to comply with regulations. One consultant interviewed was not suggesting this nirvana was achieved in each project. However, it is noticeable across the industry that all parties have conflicting priorities: for funders to mitigate financial risk, for developers to ensure value for money, for contractors to maintain their margin, and for consultants to manage the risk.

Considerations:

1 This will remain one of the most contentious issues moving forward, as the transfer of risk down the supply chain and a focus on budget and margin remains paramount. Participants of our roundtable discussions believed there would be no 'quick fix' for this approach to construction generally, and that building safety had to be indoctrinated into the industry at the earliest stage and with consequences for non-compliance.

“Some insurers are seeing an opportunity – it's something they need to understand a bit more about and there's a market that needs addressing.”

Roundtable participant comment

Who picks up the cost of additional training and monitoring?

The new Building Safety Regulator is an office that sits within the Health and Safety Executive and is expected to oversee any changes made by the Government to ensure they are in line with regulations. The Bill creates the position of an Accountable Person who will be the duty holder for occupied higher risk buildings. The Accountable Person is responsible for appointing a Building Safety Manager (BSM), another newly created position, to look after day-to-day matters. The appointed BSM must have “the skills, knowledge, experience and behaviours to carry out the BSM duties”¹⁸. To undertake these kinds of duties will require some level of additional training and resourcing or the individuals filling these roles will need to be drawn from the existing pool of trained people.

During the roundtables, it was apparent that these new arrangements left many things unclear.

Considerations:

The Government's plan and/or the Building Safety Bill must answer:

1 Where will these new BSMs be sourced from and how will they be trained?

2 What standards must they meet and how will these standards be monitored?

3 Who holds the responsibility for these duty holders, and will therefore have to pay their costs.

The impact on insurance premiums

In the short term, many felt the industry was unlikely to increase premiums, but could foresee potential exclusionary language to deal with some of the unknown issues until insurers became more familiar with them.

One of key benefits of the Bill is the opportunity to define standards and processes which everyone in the industry should be working towards. However, one of the main areas of uncertainty for the insurers who participated in our discussions is the lack of clarity as to where the responsibility lies. Does the Bill make it more difficult for professionals in the industry to comply with processes and ultimately less likely to get insured? There's a cautionary note about whether this creates the exact opposite of what the Bill is trying to achieve, whereby the only people who get involved in construction projects are those without the proper cover but willing to take the risk.

There is a general acceptance across the insurer community that we spoke to, that any government intervention to help encourage insurers to cover design and build professionals, and offer some reassurance about risk, is a long way off. If the Bill or the Government can offer more clarity on who is responsible for those risks, appetite in the insurer market will grow. It was widely accepted that there will be a period of at least two years as the new regime beds in, until some of the more practical issues are resolved, such as how the regulator works, how it is funded, is it working at the right level and volume of expertise. Until then, there will inevitably still be those in the market who simply will not want to take on the additional risk.

There is, however, a ray of light for some insurers and brokers who can spot the opportunities in the market, especially if some of the exclusions in the new regime do not go as far as they do currently. When it is time for construction professionals to renew their insurance, brokers have an opportunity to speak openly with insurers and the market. They may be more successful in securing cover if they can explain how the many aspects of the Bill impact construction professionals and by demonstrating an understanding of what is required.

Recommendations:

- 1 Government to lead on incentivising or producing guidance moving towards capping liabilities and moving away from client's requesting unlimited liability.
- 2 Government to provide clear guidance on the Bill's intention regarding insurance requirements for individuals in the construction industry.
- 3 More focus on project based insurance, with risks shared jointly between the Parties for certain risks.

“One of the uncertainties that insurers are subject to at the moment is the fact that it's not really clear where responsibility lies.”

Roundtable participant comment

Culture shock and the need for education and oversight

Culture was identified as one of the biggest challenges for the construction industry, where extensive work, education, and thought leadership were suggested to help affect a transformational culture change, from the very top (at central and/or local government or developer level) all the way through the supply chain.

The Building Safety Bill and the new regime was seen as a chance for the industry to come together and show real leadership; but it is clear this cannot happen without support from the Government. The contributors were largely in agreement in their views that there must be initiatives, incentives, and true oversight from the Government to overcome the endemic apathy which

they believed existed towards building and fire safety generally. The proposed Building Safety Bill falls short of this at present.

There was also significant criticism directed generally towards Building Control and/or Local Authorities planning teams who were accused of seeing building certification as merely a box ticking exercise. This, coupled with an apparent complacency of some professionals (both private and public), enabled poor behaviour to embed itself in the industry.

Our research also revealed the consensus that the industry needs a complete overhaul in order to genuinely protect the interests of the general public and re-establish trust in the industry.

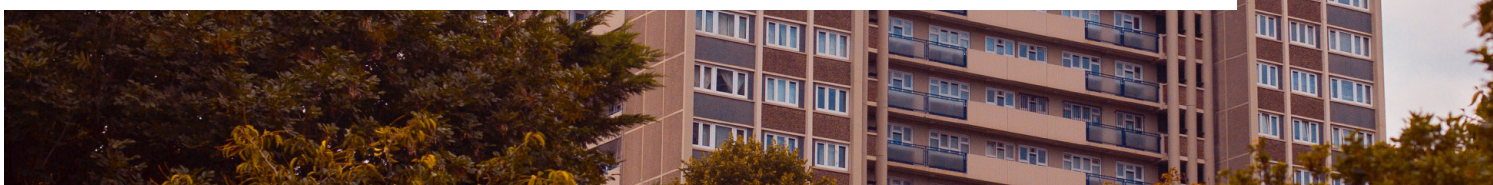
Recommendations:

- 1 A need for clear initiatives and financial support from the Government to assist with training and education on building safety at local government level.
- 2 A need for oversight from the Government and local authorities, with the correct checks and balances, and ability to penalise offending duty holders.



“There's also a big shortage of skills in the industry. To build a safer future we need leadership, a change in culture, change in the way we do things, making sure we have the appropriate guidance (not so much legislation although it is good to reiterate accountability and responsibility) we need more training – at all levels – including clients and stakeholders.”

Roundtable participant comment



“I've been involved in the industry for many years. I believe the main cause of the issue is to do with culture in the industry; behavioural culture and the approach to the situation from the early stages.”

Roundtable participant comment

Keep it simple

Another major factor raised by contributors was the lack of information and clear guidance on regulations and legislation. Specific concerns were raised that regulations could be easily misinterpreted, or in some cases deliberately misapplied, in order to cut corners and save time or money. There were several examples of loopholes which existed in regulations discussed among participants. It was widely agreed that certain Building Regulations were easy to manipulate.

Recommendations:

- 1 An overhaul on Building Regulations, with guidance clearly stipulating the correct manner of design and construction.
- 2 Increased funding to improve education on Building Regulations.
- 3 A requirement for Continuing Professional Development focusing specifically on building and fire safety.

Does the Bill focus on the right issues?

While the Building Safety Bill focuses on residential and mixed residential properties, we found that businesses were generally more cautious about fire safety across their entire portfolios. With the golden thread of the Bill and the Fire Safety Act, some businesses were

simply applying those requirements to all their properties. Some clients, such as universities, charities and public institutions, have already invested in sophisticated fire alarms and fire prevention as well as implementing 24/7 property management, such is the need to be confident of their buildings' safety. Some clients also had huge value tied up in their buildings; for example, universities with millions of pounds worth of equipment in their academic buildings, and as such were applying the same standards across their entire portfolio.

Is the question of liability ignored by the Bill?

Responsibility and liability for substandard works, remediation, and in the worst case scenario, for a tragedy, remain in question. During our roundtable discussions, some participants explained they are having to figure out how to track down contractors about works that were carried out many years ago and are or have been going through the sensitive process of identifying liability. In some cases, contractors have since gone into administration, and building owners are faced with funding these works themselves. For businesses with large portfolios of older buildings, this could realistically mean allocating hundreds of millions to carry out essential work across their estate.

This has implications for building and unit owners, as they face very large (and currently unquantifiable) costs for defects which they are not to blame for. The Bill does not define who will be at fault or identifies who is ultimately responsible. Often if there are problems with a building, one would go after the developer who would typically have indemnity insurance, at which point they turn to the contractor or subcontractor. However, as previously noted, contractors may not be traceable.

A further issue exists around the statute of limitations for claims for this kind of work. Under the Defective Premises Act (DPA) this limits claims to 6 years. Under the new Bill this would be raised to 15 years and would apply both to new buildings and existing properties. However, what is to be done when that statute of limitations expires? Grenfell

Tower was completed in 1974 – 43 years before the fire. Many of the buildings in question, as outlined earlier, were built 20 to 30 years ago, or longer. If the contractor was liable, but the statute of limitations has expired, who would be liable for any repairs or remedial work? The Bill leaves many questions around liability unanswered.

For many, the Bill seems to be inadvertently creating a two way approach towards building control. For high-risk buildings, local authorities would need to be used for building control approval, yet for low-risk buildings private companies could be used. But does this create a competitive culture? Is this even what we want?

There were certainly questions around whether private or local authority approval would be more accountable and why the Government sees the need for separate standards. Our roundtable discussions also explored the competency of different building controllers in different authorities based on their own experience, with some seemingly more agreeable than others. It is hoped that the new Building Regulators would help resolve this issue by ensuring a consistent approach across the board.

The current cladding crisis is not just a financial problem; it is a human one. The distress, anguish and mental health issues caused by the continuing uncertainty of the remedial costs and the safety of certain properties cannot be ignored. As echoed in our discussions, action was needed yesterday, and everything must now be done to resolve the problems today, before the Building Safety Bill seeks to improve building safety tomorrow. There can be no doubt that the Building Safety Bill makes great strides forward. However, the industry insight we gathered which shaped the recommendations and considerations in this report, indicate there may be some way to go, to get where we need to be. It is now time for all of those involved in the built environment and the Government to come together to bridge the gaps and perceived shortcomings of the Building Safety Bill and the current cladding crisis. This report is only the start of the conversation and much more must be done.



About us

DWF is a leading global provider of integrated legal and business services. DWF has been working with businesses in the construction industry for over 25 years. We have been involved in many significant and complex projects in the UK and internationally. The business advises on complex infrastructure projects, funding, regulatory issues, planning, regeneration, development and construction which shapes the built environment and builds better for the future.

For more information, help and/or advice on how the cladding crisis is affecting your business, or what the likely impacts of the Building Safety Bill are going to be, please contact a member of our team.

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