

HOT TOPICS IN PFI/PPP PROJECTS

PART 1: CHANGE OF LAW IN THE CONTEXT OF CHANGES TO FIRE SAFETY LEGISLATION

12 November 2020



INTRODUCTION



Erin Shoemith
Partner
Global Investigations



Stephanie Townley
Legal Director
Infrastructure, Projects & Energy



Sarah Wilson
Managing Associate
Construction, Engineering & Environment



Sally Friswell
Associate
Arup's Fire Team lead, Midlands

AGENDA

- Change of Law provisions in standard form PFI/PPP contracts
- Changes to fire safety legislation and practical implications of the same
- Application of those changes in your PFI/PPP projects
- Other examples of a Change of Law
- Questions

WHY DOES CHANGE OF LAW MATTER IN PFI/PPP?

1. Compliance with the Contract in long term contracts
2. Health and Safety of users and residents of the facility
3. Certainty
4. Avoid Disputes

WHAT IS A CHANGE OF LAW?

“Change in Law” means the coming into effect after the date of this Contract of:

(a) Legislation, other than any Legislation which on the date of this Contract has been published:

(i) in a draft Bill as part of a Government Departmental Consultation Paper;

(ii) in a Bill;

(iii) in a draft statutory instrument; or

(iv) as a proposal in the Official Journal of the European Communities,

(b) any Guidance, or

(c) any applicable judgment of a relevant court of law which changes a binding precedent.

“Legislation” means any Act of Parliament or subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, any exercise of the Royal Prerogative, and any enforceable community right within the meaning of Section 2 of the European Communities Act 1972, in each case in the United Kingdom.

IMPACT AND COST CONSEQUENCES

- Impact of a Change in Law:
 - Alterations to the structure of a building
 - Change to how Services are provided
- Category of Change of Law:
 - Discriminatory
 - Specific
 - General
- Cost liability:
 - Sole Authority Risk – Discriminatory and Specific
 - Sole Contractor Risk – Rare – some MOD Projects
 - Shared Risk – General

COST SHARING – GENERAL POSITION

- Capital Expenditure – shared on a progressive scale
- Capital Costs – Contactor's Risk (although this does vary and Authorities were advised to consider cost benefit of Authority taking the risk)
- Operational Costs – Generally Contractor's Risk with changes to Services being applied through the Change Protocol

THE CHANGE OF LAW PROCESS – STEP 1 – NOTIFY AND AGREE

- Consider the Change in Law and impact on the Services
- Notify the other Party of the change and:
 - (i) any necessary change in Service;
 - (ii) whether any changes are required to the terms of this Contract
 - (iii) whether relief from compliance with obligations is required
 - (iv) any loss of revenue that will result
 - (v) any Estimated Change in Project Costs
 - (vi) any Capital Expenditure that is required or no longer required
- Discuss and agree these items and mitigation of costs
- If agreement cannot be reached then the issues should be determined via the Dispute Resolution Procedure

THE CHANGE OF LAW PROCESS – STEP 2 – FUND AND DOCUMENT

Once Agreed or Determined:

- Apply the relevant cost sharing provisions to each element of cost associated with the changes;
- Project Co to obtain Funding for additional capital expenditure
- Apply changes to the Unitary Charge if required
- Document all changes to Project Document accurately
- Implement the Changes

'BUILDING A SAFER FUTURE' THE BIGGEST CHANGE IN BUILDING AND FIRE SAFETY FOR A GENERATION

Erin Shoemith
Partner, Global Investigations

12 November 2020



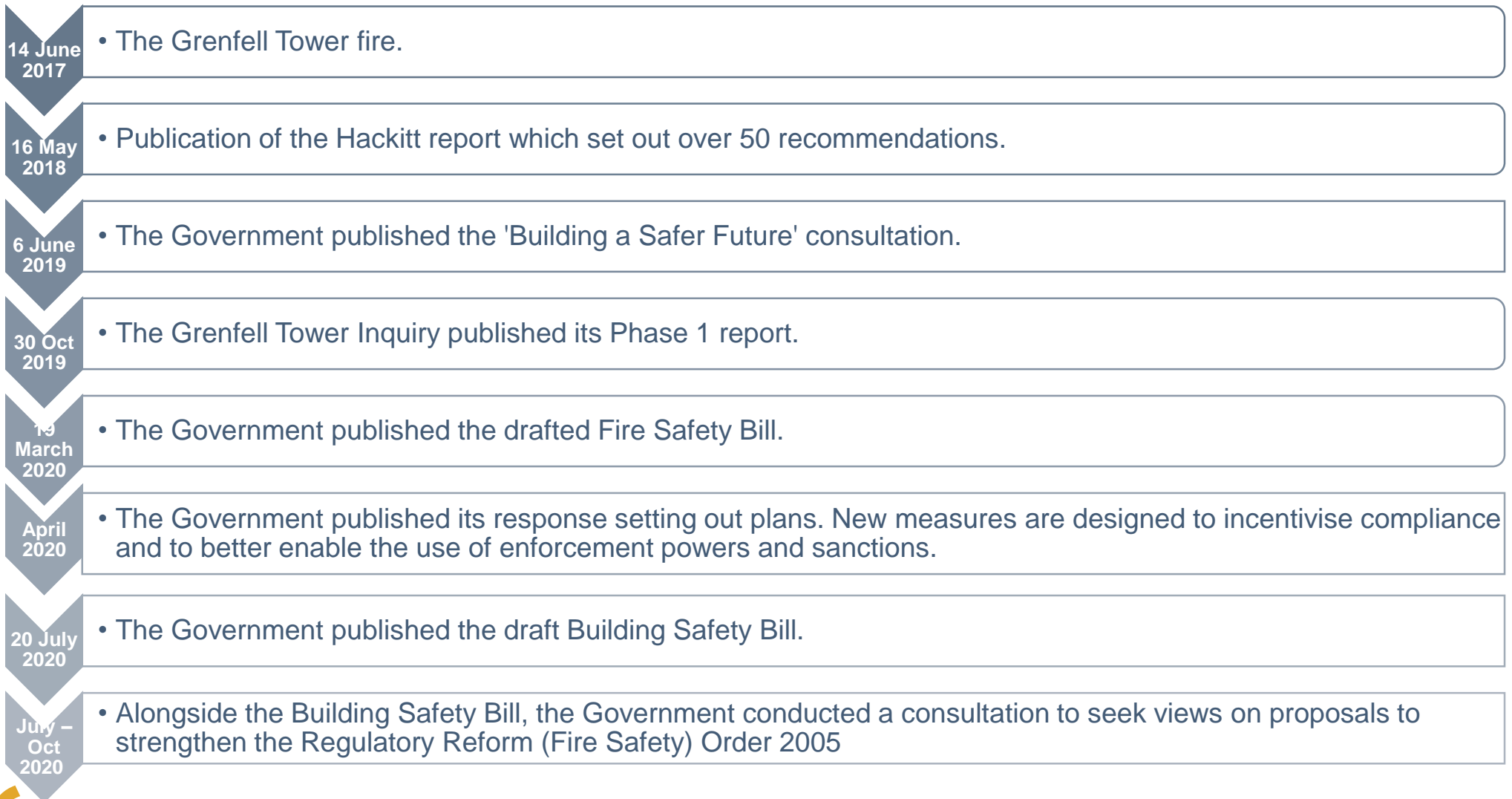
TALKING POINTS

- Background behind the changes
- The Fire Safety Bill
- The Building Safety Bill
- Alignment

Building a Safer Future

Independent Review of Building
Regulations and Fire Safety:
Final Report

BACKGROUND



The biggest change in building safety for a generation to ensure residents are safe in their homes.

Housing Secretary Rt Hon Robert Jenrick MP



THE FIRE SAFETY BILL

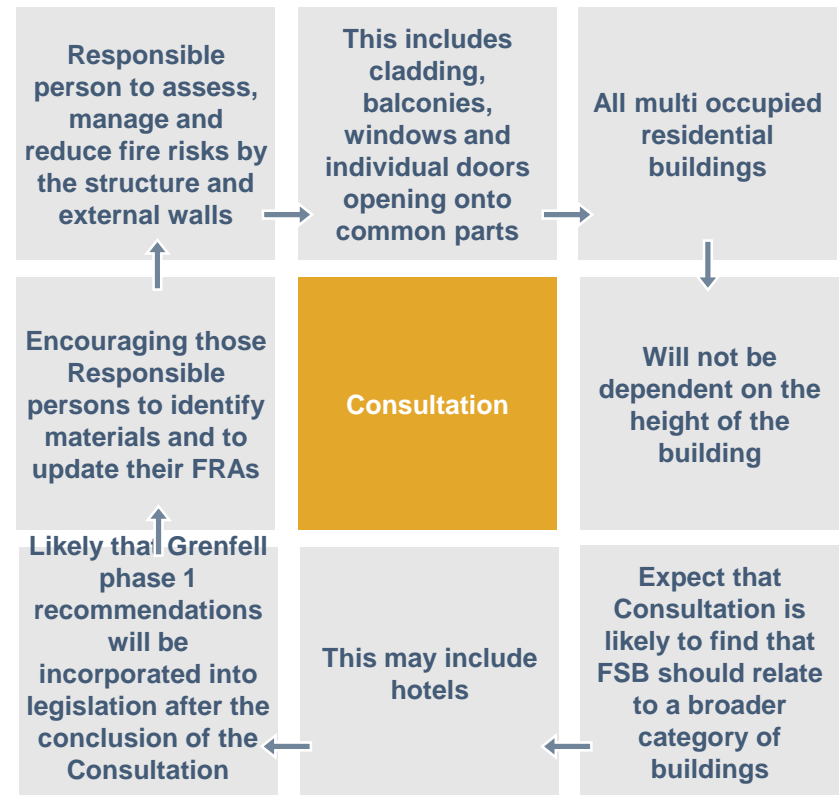


The fire safety consultation, published alongside the draft Building Safety Bill, is key part of Government's package of reform to improve building and fire safety.

The Home Office – October 2020

The Government is in the process of amending the Regulatory Reform (Fire Safety) Order 2005 (RRO) by way of draft Fire Safety Bill (FSB).

- The FSB seeks to clarify the scope of the RRO with a view to this leading to better identification and enforcement in high-rise buildings.



BUILDING SAFETY BILL

- Initially only applies to new higher risk buildings (i.e. multi occupied residential buildings of 18m or more in height, or more than 6 storeys, whichever is reached first)
- It is likely to be extended to existing and all high risk buildings in due course
- Establish a new Building Safety Regulator within the Health & Safety Executive
- Will impose new obligations on dutyholders
- Will also establish a new dutyholder regime
- New roles - Accountable Person and Building Safety Manager

INTERACTION OF THE TWO BILLS

The FSB applies to all non-domestic buildings, new and old, regardless of height

The BSB is limited in its application to new higher risk buildings

The person responsible

The person accountable

Fire & Rescue Services

The HSE

Application of new Fire Safety Legislation to existing PFI/PPP Projects

Sally Friswell
Associate

Fire Safety Bill 2020

Additional responsibilities

- Regular inspections of lifts and the reporting of results to the local fire and rescue services
- Ensuring evacuation plans are reviewed and regularly updated and personal evacuation plans are in place for residents whose ability to evacuate may be compromised
- Ensuring fire safety instructions are provided to residents in a form that they can reasonably be expected to understand
- Ensuring individual flat entrance doors, where the external walls of the building have unsafe cladding, comply with current standards

Façade fire safety – Regulation 7

STATUTORY INSTRUMENTS

2018 No. 1230

BUILDING AND BUILDINGS, ENGLAND

The Building (Amendment) Regulations 2018

<i>Made</i>	<i>28th November 2018</i>
<i>Laid before Parliament</i>	<i>29th November 2018</i>
<i>Coming into force</i>	<i>21st December 2018</i>

The Secretary of State has consulted the Building Regulations Advisory Committee for England and such other bodies as appeared to him to be representative of the interests concerned in accordance with section 14(3) of the Building Act 1984⁽¹⁾.

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 1 of, and paragraphs 7, 8 and 10 of Schedule 1 to, the Building Act 1984⁽²⁾.

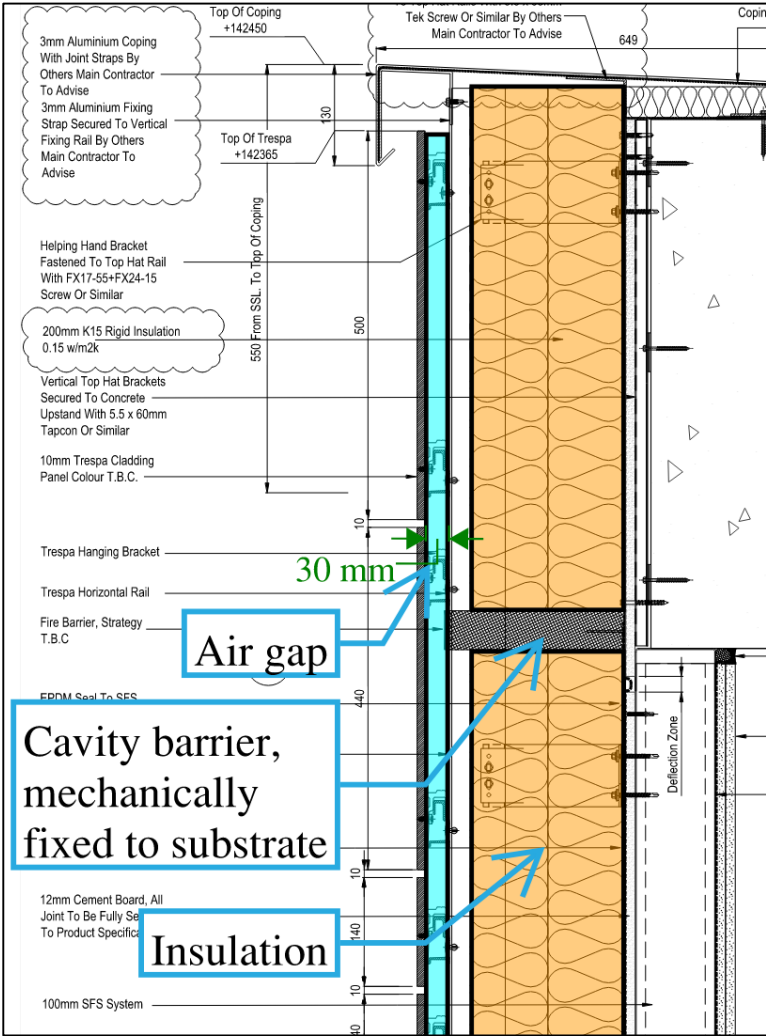
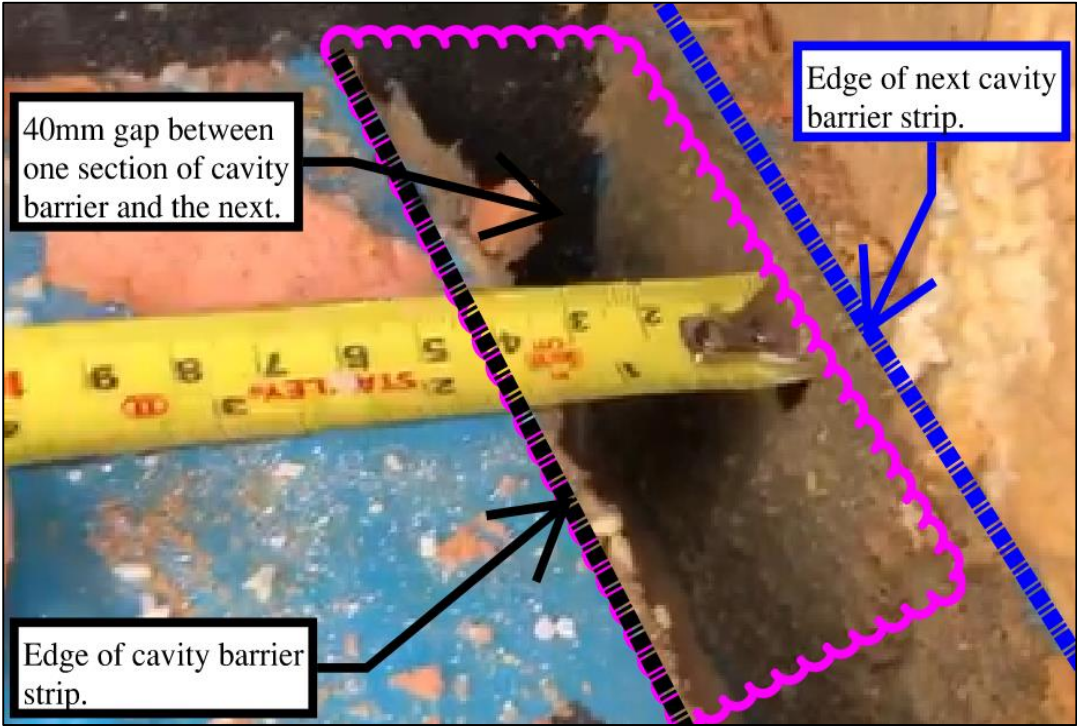
Citation, extent, application and commencement

1.—(1) These Regulations may be cited as the Building (Amendment) Regulations 2018.

(2) These Regulations extend to England and Wales.

(3) These Regulations shall come into force on 21st December 2018.

Facades – knowing yours



Building Safety Bill – New Roles

- Accountable Person
- Building Safety Manager
 - Nominated individual

Change
Ahead ?

APPLYING THE CHANGE OF LAW MECHANISM TO THE FIRE SAFETY CHANGES

- Will your Project be impacted by the Fire Safety changes or is it likely to be in the future?
- If so, once implemented, these changes will be classed as a Change of Law.
- So...start early with Step 1 and be prepared!
- Remember to document the changes accurately.
- Consider how the changes will affect the rest of the Contract.

A LESS OBVIOUS “CHANGE OF LAW”

14.3 “Change in Law” means the coming into effect after the date of this Contract of:

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(c) any applicable judgment of a relevant court of law which changes a binding precedent.

“Guidance” means:

any applicable guidance or directions with which the Contractor is bound to comply

- For example, Health Technical Memorandum Guidance (HTM).

WHY BOTHER?

- Breach of Contract.
- Failure to comply can result in Deductions/ SFPs and/ or Termination.
- Avoid ambiguity and Dispute.
- Potential investigation by the regulator with the ultimate sanction of criminal prosecution.



CONTACTS



Erin Shoemith

Partner

Global Investigations

T: +44 (0)161 934 6554

E: erin.shoemith@addleshawgoddard.com



Stephanie Townley

Legal Director

Infrastructure, Projects & Energy

T: +44 (0)161 934 6489

E: stephanie.townley@addleshawgoddard.com



Sarah Wilson

Managing Associate

Construction, Engineering & Environment

T: +44 (0)161 934 6341

E: sarah.wilson@addleshawgoddard.com



Sally Friswell

Associate

Arup's Fire Team lead, Midlands

T: +44 (0)121 213 3781

E: Sally.Friswell@arup.com

Join us for Part 2 in our series in December when we will be partnering with Deloitte to explore the complex issues around termination of PFI project

