Falcon Chambers

The Grenfell Inquiry Phase 2 Report: What does it mean for the Building Safety Act 2022?

1. On 4 September 2024, the Grenfell Inquiry published its Phase 2 Report ("**the Report**"). Amongst sweeping criticisms and recommendations for those involved in the Grenfell tragedy, a few recommendations concerned the Building Safety Act 2022 (the "**BSA**") itself; in particular, the Inquiry recommended that the definition of 'higher-risk building' ("**HRB**") be reviewed urgently.

The current definition of an HRB

2. In his previous article for Falcon Chambers' BSA series, Adam Rosenthal KC discussed the current definition of an HRB – a link to that article can be found **here**.

3. Generally speaking, an HRB is a building that (1) is over 18m tall or consists of at least 7 storeys and (2) has at least two residential units. That definition is somewhat complicated by the way in which the height of the building is calculated/ the number of storeys are counted. By way of summary, one measures from the ground level to the top of the floor surface of the top storey of the building, ignoring roof-top machinery and storeys below ground.

4. But it is fair to say that the definition of an HRB is one of the clearer terms of the BSA, a piece of legislation that is replete with cross-references, definitions and Regulations that can confuse as much as they can clarify.

The proposals of the Inquiry

5. At paragraph 7 of Chapter 113 in volume 7 of the Report, the Inquiry said the following:

> *"For the purpose of this and our other recommendations we have used the expression "higher-risk building" in the sense in which it is used in the Building Safety Act, that is, a building that is at least 18 metres in height (or has at least seven storeys) and contains at least two residential units. However, we do not think that to define a building as "higher-risk" by reference only to its height is satisfactory, being essentially arbitrary in nature. More relevant is the nature of its use and, in particular, the likely presence of vulnerable people, for whom evacuation in the event of a fire or other emergency would be likely to present difficulty. We therefore recommend that the definition of a higher-risk building for the purposes of the Building Safety Act be reviewed urgently."*

6. A footnote in that paragraph makes reference to both s.31 and s.65 of the BSA, and the Inquiry's proposal therefore seemingly encompasses the definition of an HRB for both

buildings under construction (s.31 of the BSA having inserted a new s.120D into the Building Act 1984) and buildings that have been construed (s.65 of the BSA incorporating the definition into Part 4 of the BSA).

7. One can easily understand the point made by the Inquiry – why is an 18m building inherently less safe than one that is 17.9m tall? That threshold does seem somewhat arbitrary, and there is a strong argument in favour of ensuring that those who need the protections afforded by the BSA are brought within its scope.

8. The conclusions of the Inquiry suggest that it is not a question of setting the height threshold for HRBs at a lower level; a threshold at 15m would be just as arbitrary as one set at 18m. Instead, a multi-factorial approach is preferred, that being one that can take into account a wider range of factors (such as use and occupation) to assess which buildings truly are 'higher-risk'.

9. It is also worth noting what is <u>not</u> covered by the Inquiry's proposals. Whilst there is a suggestion to review the current definition of an HRB, there is no suggestion to review the definition of 'Relevant Building' found in s.117 of Part 5 of the BSA. That definition sets a lower threshold than that for an HRB – a building must be at least 11m high or have at least 5 storeys – but it is still a definition that is set primarily by reference to height.

10. If the current definition of an HRB is 'arbitrary', why is the definition of 'Relevant Building' not equally arbitrary? And if the Inquiry would like the definition of an HRB to move towards a multi-factorial approach, could that cause disparities or conflicts with a height-based approach for Relevant Buildings? Could, for example, you have an HRB that does not quality as a Relevant Building? The Report does not address these points, and any review of the definition of HRB would need to do so.

<u>Previous debates on the definition of an HRB</u>

11. Before looking forward, it is worth looking back; the Inquiry's proposals are not the first time a multi-factorial approach to the definition of an HRB has been considered.

12. Defining an HRB by reference to height has its origins in the Hackitt Report, 'Building a Safer Future: Independent Review of Building Regulations and Fire Safety', published in May 2018. That report recommended a new regulatory framework for 'higher risk residential buildings' (HRRBs), which were defined as new and existing high-rise residential properties that were 10 storeys high or more.

13. Whilst the Hackitt Report recognised that it was a reasonable ambition to widen the definition in due course, it set the threshold at that level as the risks of fire and fatalities in those buildings were that much greater.

14. When the Building Safety Bill came before Parliament, that threshold was reduced to the one we now see in the BSA i.e. buildings of at least 18m or 7 storeys. However, there were debates in both Houses of Parliament as to whether this was adequate – what about the protection for those buildings below 18m?

15. Hansard reveals a great deal about the government's thinking at the time. During the debates in the House of Commons, Christopher Pincher (the then Minister of State for Housing) explained that the government proposed a lower height threshold than that suggested in the Hackitt report having considered the advice and views of stakeholders.

16. Mr Pincher expanded on the government's thinking during a debate on 21 September 2021:

> *"I understand why some regard a matrix or a set of matrices to be a better mechanism to employ. The problem with a set of matrices is that they are subjective. It is possible that one assessor could rule that a building is in scope of the regime and another rule it or a similar building out of scope. That would create unnecessary confusion in the regime. It is much more sensible that we have an objective threshold that everyone understands, be they the experts on the gamekeeper's side of the fence or those on the poacher's side. Everyone understands what the rules are."*

17. And on 19 October 2021, Eddie Hughes, the then Parliamentary Under-Secretary of State for Housing and Rough Sleeping added:

> *"We recognise that the height and the use of a building are not the only factors that affect the level of risk found in each building. However, they are commonly used factors in determining the level of risk. We consider that other factors, including the materials used for construction, the presence of fire protection measures and the distance to emergency exits, could be used to define a high-risk building, but we concluded that it would be inappropriate to base the regime on factors like that because we were concerned that there would be unintended consequences. For example, when considering the materials used in construction, a large number of materials can be found in various quantities in various combinations. A material or product may be safe on one building owing to its placement, use and combination with other materials yet unsafe on another. Apart from particular circumstances such as the ban on combustible materials in and on external walls of certain buildings, a blanket approach to specific materials would therefore be inappropriate.*
>
> *As for the accessibility of emergency routes, our assessment is that this would be a subjective factor. Different people may have different opinions about whether a building has sufficiently accessible emergency routes and therefore whether the building is or is not a high-risk building. This would not provide the clarity residents, industry and the regulator need.*

We recognise that it is important that the risk of a fire occurring is low in any building. We must be proportionate in the application of the new regulatory regime."

18. Evidently, the government had considered the level at which the height threshold should be set and whether a multi-factorial approach was more suitable for the definition of an HRB. It decided against that approach, at least for the time being, because it introduced too great uncertainty into a definition that was otherwise easily understood by the industry. The government also had proportionality firmly in mind.

What does the Report mean for the BSA?

19. The Report itself does not specify how it considers an HRB should be defined (albeit it is presumably not solely by reference to height). It simply recommends an urgent review of the definition.

20. Bearing in mind that the matters raised in the Report have already been considered and debated when the BSA was first making its way through Parliament, it is uncertain whether any changes would in fact be enacted or, if they were, what any changes would look like. The points previously made by Mr Pincher and Mr Hughes are no less applicable today as they were then. But given the significance of the Report and of the Grenfell tragedy itself, it would not be surprising if there were changes of some kind in the future.

21. The BSA already provides a process for amending the definition of an HRB – see ss.120D-120H of the Building Act 1984 and ss.65-70 of the BSA. This will generally require a consultation of the regulator and such other persons as the Secretary of State considers appropriate, as well as a cost-benefit analysis. Any changes to the definition of an HRB are unlikely to happen overnight, therefore.

22. As to the practical consequences of any changes to the definition of an HRB, those will depend on how the definition is changed. If, however, the changes result in more buildings coming within the definition of an HRB, then we can expect to see a flurry of activity by the industry, landlords and leaseholders, as well as in the Tribunal, as parties scramble to arrange and manage the rights and obligations they did not previously think applied to them.

23. Whilst moving away from an arbitrary definition of HRBs is not necessarily a bad thing, the key is how any new definition is formulated. The current definition, for its flaws, does have the benefit of simplicity and clarity, something that is sorely needed (and should be retained wherever possible) in legislation as complicated as the BSA.

EDWARD BLAKENEY, SEPTEMBER 2024