



In light of new fire safety legislation following the Grenfell Tower fire, Tom McNeill, Senior Associate at BCL Solicitors LLP, gives an introductory guide to fire safety enforcement

Fire authority investigations: An introduction to fire safety enforcement

The Grenfell Tower tragedy and Inquiry has placed a spotlight on fire safety. Onerous fire safety duties backed by criminal sanctions are commonly shared between multiple persons with complications posed by property law, contract law, and funding difficulties, in addition to the sometimes obscure drafting of the Regulatory Reform (Fire Safety) Order 2005.

The government has published two new bills relevant to fire safety aimed at strengthening the regulatory regime and aiding enforcement. It has also been compelled to set up special funds to pay for the removal of unsafe cladding from some high-rise buildings. In the meantime, increased pressure on responsible persons to comply with fire safety duties and on fire authorities to prosecute makes fire safety enforcement more relevant than ever.

In Brief

The Regulatory Reform (Fire Safety) Order 2005 ('the Order') imposes onerous fire safety duties on persons in control of non-domestic premises and the common parts of domestic premises breach of which can be a criminal offence punishable by an unlimited fine and/or imprisonment. The Order grants extensive powers to fire authorities (and in specific circumstances other authorities) to investigate and prosecute such offences.

Who Has Which Duties?

Under the Order, the 'responsible person' is the person in control of the premises whether as employer or in connection with an undertaking, or the owner.

The responsible person must:

- Undertake a suitable and sufficient fire risk assessment for the purpose of identifying general fire precautions that are needed to comply with the Order

- Take such general fire precautions as will ensure safety so far as reasonably practicable (or as may reasonably be required in the circumstances)
- Comply with other fire safety duties specified in the Order (for example, in relation to fire detection).

The fire safety duties imposed on the responsible person are also imposed on every other person who has control of the premises to the extent that requirements relate to matters in their control, including in relation to maintenance, repair or safety of the premises by virtue of any contract or tenancy.

What Does Reasonably Practicable Mean?

Reasonably practicable is narrower than physically possible: an assessment must be made in which the degree of risk is placed on one side of the scale and the sacrifice involved in taking any of the general fire precautions for minimising or averting the risk, whether in money, time or trouble, is placed on the other. If it can be shown that there was a great disproportion between any of them – the risk being insignificant in comparison to the sacrifice involved – then the taking of that precaution was not reasonably practicable.

It is unclear if taking such general fire precautions as may reasonably be required in the circumstances is a lower duty than 'reasonably practicable'.

Enforcement Options

When the fire authority considers that the responsible person (or in some cases the person with the duties of a responsible person) has failed to comply with any provision of the Order, applying a risk-based and proportionate approach the fire authority can:

- Provide oral or written advice about the nature of the non-compliance
- Serve a non-statutory notification of deficiencies explaining the deficiencies and what needs to be done to address them. The notification does not have legal force and is not binding
- Serve an enforcement notice specifying the provisions that have not been complied with and requiring failures to be remedied within a specified period. It is a criminal offence to fail to comply with an enforcement notice. An enforcement notice will be issued where there is a clear breach of the law, where the degree of risk of harm is significant, and where a remedy needs to be secured within a set period of time
- Where there is a serious risk (or there would be with a change to the premises), serve an alterations notice stating such an opinion and specifying the matters that (may) constitute such a risk. The notice may require that before any changes are made, a copy of that fire risk assessment together with details of the proposed changes must be submitted to the fire authority. It is a criminal offence to fail to comply with an alterations notice
- Where the risk is so serious that use of the premises ought to be prohibited or restricted, serve a prohibition notice stating such an opinion, specifying the relevant matters, and prohibiting or restricting use of the premises until the specified matters have been remedied. It is a criminal offence to fail to comply with a prohibition notice.

Enforcement notices, alterations notices and prohibition notices can be appealed within 21 days from the day on which the notice is served. An appeal against an alterations notice or enforcement notice has the effect of suspending the operation of the notice until the appeal is disposed of or withdrawn. An appeal against a prohibition notice does not have the effect of suspending its operation unless so directed by the court.

Even if deficiencies are remedied, for serious breaches there will remain a risk of criminal prosecution.

Investigations

Criminal investigations will be conducted to explore reasonable lines of enquiry in relation to (1) the nature and extent of suspected breaches and (2) responsibility for the same.

Inspectors have extensive 'compulsory' powers to do anything necessary for the purpose of carrying out the Order including, so far as it may be necessary, the power to:

- Enter premises
- Make such inquiry as may be necessary to ascertain, as regards any premises, whether the Order has been complied with and to identify the responsible person
- Require the production of records
- Require persons having responsibilities for premises to give such facilities and assistance within the scope of those responsibilities as may be necessary for the inspector to exercise his/her powers.

It is a criminal offence to provide false information or to obstruct an inspector; likewise, to fail to comply, without reasonable excuse, with an inspector's request for the production of records or for facilities and assistance.

Investigations will usually be conducted by inspectors making information requests using their compulsory powers. The precise limit of these powers to obtain information is unclear but will not extend to empowering inspectors to compel persons to be interviewed, whether as witnesses or suspects. Inspectors will request witnesses to provide statements, or suspects to attend an interview under caution, voluntarily.

Offences

It is a criminal offence for any responsible person (or person with the duties of a responsible person) to fail to comply with:

- Fire safety duties imposed by the Order where that failure places one or more relevant persons at risk of death or serious injury in case of fire (with limited exceptions, subject to a defence of having taken all reasonable precautions and exercised all due diligence to avoid the commission of an offence)
- An enforcement notice, alterations notice or prohibition notice.

It is a criminal offence for any person to:

- Make a false entry in a document which is required to be kept under the Order
- To provide false information in purported compliance with an obligation to give information by virtue of the Order
- Intentionally obstruct an inspector in the performance of his/her duties

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- Fail to comply, without reasonable excuse, with an inspector's request for the production of records or for facilities and assistance.

There are a number of other offences.

If an offence committed by a corporate is committed with the consent or connivance, or attributable to the neglect, of a senior manager, he/she as well as the corporate will be guilty of an offence.

Prosecutions

Decisions to prosecute will be on the basis of the two-stage test in the Code for Crown Prosecutors: (1) there must be sufficient evidence to provide a realistic prospect of conviction; and (2) prosecution must be in the public interest.

The fire authority will apply enforcement guidance which will require any enforcement decision to be proportionate. The decision will be made in the light of various factors including:

- The nature and seriousness of any alleged breaches
- The degree and likelihood of harm risked, and any harm actually caused
- Record of compliance
- Action taken to prevent recurrence
- The circumstances and attitude towards fire safety
- Any statutory defence available (eg having taken all reasonable precautions and exercised all due diligence to avoid the commission of an offence)
- The likely effectiveness of the enforcement options in securing ongoing compliance with fire safety requirements.

For less serious offending, the fire authority may consider accepting a 'simple caution', ie a non-statutory, non-conviction disposal.

Penalties

The most serious offences under the Order are punishable by an unlimited fine and, for individuals, two years' imprisonment.

There are no sentencing guidelines applicable to fire safety cases; however, courts have held that the Definitive Guideline on Health and Safety offences, Corporate Manslaughter and Food Safety and Hygiene Offences might provide a helpful structure to follow.

Sentencing will involve an assessment of the level of culpability and the level and likelihood of harm. The fine must reflect the seriousness of the offence and take into account the financial circumstances of the offender. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence. The fine must be sufficiently substantial to make a real economic impact.