



Department for
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To: Local Authority Chief Executives,

Identifying all residential tower blocks with Aluminium Composite Material (ACM) cladding: Legal Clarification

Since Tamara Finkelstein wrote to you on 5th September, I have become aware of concerns a number of you have raised regarding the legal powers under which you can act should enforcement action be required.

I am therefore writing to you to provide DCLG's interpretation of **the Housing Act 2004, and the regulations and Housing Health and Safety Rating System made under it. DCLG's view is that the powers available to local authorities under this regime are available in respect of the external cladding systems of tall residential buildings.** In addition, I have set out reminders of additional enforcement powers which may be available in some circumstances. This is not intended to be an exhaustive list however and local authorities will need to make their own considerations based on the circumstances of each particular case. I would also like to remind you of existing guidance such as guidance on the Housing health and safety rating system (HHSRA) at <https://www.gov.uk/government/collections/housing-health-and-safety-rating-system-hhsrs-guidance>

DCLG's considered position as outlined in Annex A is that the 2004 Act, the Regulations and both sets of statutory guidance made pursuant to the 2004 Act, which comprise the HHSRS regime, are clearly designed and intended to ensure the safety of residents in relation to a range of prescribed hazards, including fire, many of which will derive from the construction of the wider fabric of residential buildings which are external to the elements of individual dwelling units. The safety of any cladding system fitted to a residential building over 18m (whether in respect of fire or structural integrity) is entirely within the scope of the HHSRS regime and amenable to statutory enforcement in appropriate cases. These powers can be considered and deployed with other potential enforcement action as identified above.

However, it is of course for each local housing authority to make its own decision about what is lawful on a case by case basis, and to take their own legal advice where necessary.

Any enforcement action taken by local housing authorities under the 2004 Act can be challenged on appeal to the First-tier Tribunal in the first instance, and ultimately it is for the Tribunal and the courts to make any determination about the application of these provisions on a case by case basis.

I hope you find the above helpful. If you have any further questions, please contact housingchecks@communities.gsi.gov.uk.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'N. O'Connor', written in a cursive style.

Neil O'Connor
Director, Building Safety Programme Policy

Annex A

1. DCLG considers that the provisions of the Housing Act 2004 (the “Act”) will be available in principle for local authorities to inspect and take enforcement action in respect of ACM cladding where that poses a hazard under the HHSRS.
2. DCLG’s view is that the regime is targeted wider than the individual units of occupation in a block. The legislation is designed with a number of different purposes in mind, not all of which are dealt with expressly in guidance, and there are no grounds to consider that the external cladding on a building is not caught by the regime. Taking samples of the cladding, if necessary under warrant, would fall within the regime and the local housing authorities’ enforcement powers under that regime at part 1 and 7 of the Act.
3. There are many examples in the legislation and guidance which support that this is the only sensible interpretation.

Housing Act 2004 (“the 2004 Act”)

4. Under the 2004 Act, the section 1(4) definition of “residential premises” includes any common parts of a building containing one or more flats. The section 1(5) definition of common parts expressly includes the structure and exterior of the building **and therefore includes a cladding system on a residential block**, which is part of the exterior of a building.
5. The definition of hazard at section 2(1) includes health and safety risks arising from a deficiency in a dwelling or in any building or land in the vicinity. This is clearly beyond individual dwelling units. Hazard is cast widely – it includes not only the building (thus the cladding) but even the land in the vicinity, when a dwelling will fall within it.
6. The enforcement powers available to local authorities, in particular those at section 239 and section 240, but also all other relevant powers, must be interpreted in line with these earlier definitions in the Act which include common parts. Thus the powers are available in respect of cladding which might pose a hazard.

Housing Health and Safety Rating System (England) Regulations 2005 (the “Regulations”)

7. Regulation 3(1) and paragraph 24 of Schedule 1 define a prescribed hazard for the purposes of the 2004 Act as including exposure to uncontrolled fire and associated smoke. Exposure to such a hazard is not confined to matters arising, for example, from the construction of elements within an individual dwelling unit, but will include aspects of the wider fabric of the building or structure within which the unit is located.
8. Within Schedule 1 there are other examples of prescribed hazards which will likely derive from the wider fabric of a building, including paragraph 29 (“structural collapse and falling elements”). Such hazards clearly require consideration and inspection of a building’s wider structural elements. Indeed, if there was a potential for cladding

panels to fall from a building because of defects or deterioration in their fixings, this is a matter which would fall within the ambit of the hazard defined by paragraph 29. There can be no valid reason to exclude such panels from consideration of any exposure to uncontrolled fire and smoke which they might present.

9. Regulation 3(2) prescribes that the risk of harm arising from hazard may be at a dwelling or house in multiple occupation (HMO), or “in any building or land in the vicinity of the dwelling or HMO”. Again, it is clear that a hazard is not confined to circumstances pertaining in an individual dwelling unit, but is defined in much wider terms, consistent with the provisions in the 2004 Act referred to above.
10. In relation to the requirement to consult with fire and rescue authorities imposed by section 10 of the 2004 Act, regulation 4 prescribes that a fire hazard is where the risk of harm is associated with exposure to uncontrolled fire and associated smoke. This duty is not restricted to circumstances which concern only an individual dwelling unit.
11. Even if there was ambiguity in the interpretation of provisions of the 2004 Act and underlying regulations (and DCLG does not consider that there is such ambiguity), the regime as a whole must be interpreted purposively so as to ensure the safety of residences in respect of fire hazards.
12. In any event, DCLG’s interpretation of the primary legislation, as set out above, is also confirmed by the statutory guidance issued pursuant to section 9 of the 2004 Act.

Housing Health and Safety Rating System - Operating Guidance

13. At paragraph 1.1.2 of the Operating Guidance:

“The underlying principles of the HHSRS is that –

Any residential premises should provide a safe and healthy environment for any potential occupier or visitor”.

14. Paragraph 1.13 of the Operating Guidance is explicit that the materials with which a dwelling is constructed are within the regime; it follows that external cladding materials are within the scope of the rating system.
15. Paragraph 4.03 of the Operating Guidance makes clear that the external parts of the dwelling are expressly covered in the context of inspections.
16. At paragraph 5.03 of Operating Guidance the list of what should be included in an assessment includes at sub-paragraph (d) “the building associated with the dwelling” i.e. encompassing the wider fabric of a building which may contain several individual dwelling units.
17. Paragraphs B17 to B19 of Annex B of the Operating Guidance (Inspections for an HHSRS Assessment) explicitly mention the exterior of the building.

Annex D of the Operating Guidance (Profiles of potential health and safety hazards in dwellings) covers potential types of hazard. In particular, at paragraph 29.01 – there is the need to assess the external structure of the building. Although this is about risks of fabric being displaced or falling, it shows that the external aspects of the building are in scope of an assessment. Cladding is specifically mentioned in this context, at 29.08 and at 29.18.

Housing Health and Safety Rating System – Enforcement Guidance

18. In the Enforcement Guidance, paragraphs 6.6 - 6.11 specifically contemplate deficiencies external to any individual dwelling unit leading to enforcement action against the wider building owners.
19. In particular, paragraph 6.9 deals expressly with a deficiency relating to the structure which should be dealt with by a notice on the person that owns the building.
20. It follows from the above that DCLG considers that there should be no doubt about the ability to use the enforcement powers under the 2004 Act to address ACM cladding deficiencies which may give rise to fire hazards.
21. In addition, there are other relevant enforcement powers which we summarise below.

Building Act 1984

22. Where building work has been carried out in breach of the Building Regulations, especially where such work has been recently completed, local authority building control bodies may:
 - a. enter any premises at reasonable hours for the purpose of undertaking their functions under the Building Act and building regulations. This includes to ascertain whether there is, or has been a contravention of the Building Act or of any building regulations, and to take any action or execute works required by the Building Act or regulations where the local authority is authorised or required to do so (section 95). If admission to the premises is refused, a justice of the peace may issue a warrant under section 95(3) and 93(4);
 - b. serve an enforcement notice on a building owner to require the removal or alteration of work that does not comply with the Building Regulations under section 36(1). Such a notice must be served within 12 months of the date of completion of the building works in question as per section 36(4). If the enforcement notice is not complied with the local authority may itself take action to remove the offending work or effect such alterations in it as it deems necessary (section 36(3));
 - c. prosecute contraventions of the Building Regulations through summary proceedings in the magistrates' court (section 35), within six months of the breach being discovered, provided that action is taken within two years of completion of the building work that is in breach (section 35A).