

Grenfell Tower Inquiry

The Rt Hon Geoffrey Cox QC MP
Attorney General
102 Petty France
London
SW1H 9EA

7 February 2020

Dear Mr Attorney-General,

Grenfell Tower Inquiry - Request for Attorney-General's Undertaking

Introduction

I write on behalf of the Grenfell Tower Inquiry Panel consisting of myself and Ms Thouria Istephan.

As I am sure you know, I was appointed in June 2017 by the then Prime Minister, the Rt Hon Theresa May MP, under the Inquiries Act 2005 to chair a public inquiry into the Grenfell Tower fire. The Inquiry's Terms of Reference are attached as **Appendix A** to this letter. They are to examine the circumstances surrounding the fire at Grenfell Tower on 14 June 2017, including:

- (b) the design and construction of the building and the decisions relating to its modification, refurbishment and management;...
- (c) whether [applicable] regulations, legislation, guidance and industry practice were complied with in the case of Grenfell Tower and the safety measures adopted in relation to it...
- (d) whether such regulations . . . were complied with . . . "

I was also asked to make recommendations.

The Inquiry is being conducted in two Phases. Phase 1 was concerned with the events of the night of the fire. My report into those matters was published on 30 October 2019. In it I found, among other things, that following the refurbishment the external walls of the tower did not comply with functional requirement B4(1) of Schedule 1 to the Building Regulations 2010 (see Chapter 26).

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The structure of Phase 2

The range of matters to be investigated in Phase 2 is very broad and it has therefore been decided that the investigation should be conducted in a series of eight modules dealing with different subject matters. For the purposes of this letter I need only address Modules 1, 2 and 3, for reasons I will explain.

Module 1

In Module 1, which has just begun, the Panel will investigate the parts played by those who designed the refurbishment, selected the materials to be used and carried out the work. That will include the following matters:

1. the decision to refurbish the tower;
2. the appointment of professional consultants and the relationship between them;
3. the appointment of the Design and Build contractor;
4. obtaining planning consent;
5. the design of the cladding and the choice of materials;
6. the steps taken to ensure compliance with the Building Regulations, with particular emphasis on the assessment of the fire risk.
7. the fire strategy for the building, both before and after refurbishment;
8. the steps taken by Building Control to ensure compliance with the Building Regulations and other legislative requirements.

In preparation for Module 1 the Inquiry has obtained reports from a number of experts, all of whom are highly critical of the work done by those who were involved in the refurbishment of the tower, including local authority Building Control.

The Inquiry has also amassed a considerable number of documents and written statements which have provided much important information, but it is obviously necessary to supplement that evidence with the oral evidence of many of those who were involved in the work. The first witnesses were due to be called on Monday this week (3 February) starting with the architects (Studio E).

Module 2

Module 2 will examine the testing, classification, certification and marketing of key products used in the external wall, specifically

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1. the aluminium composite material (ACM) panels used in the rainscreen system (made and sold by Arconic);
2. the polyisocyanurate (PIR) and phenolic insulation used behind those ACM panels in the external wall construction, principally RS5000 made and sold by Celotex (which was PIR) and the K15 Kooltherm made and sold by Kingspan (which was phenolic);
3. the cavity barriers made and sold by Siderise;
4. the Aluglaze window infill panels.

The Panel will be particularly interested in investigating (i) the key tests that these products underwent (particularly the Arconic ACM panels with the polyethylene (PE) core and the Celotex and Kingspan insulation), (ii) their resultant fire classifications, and (iii) how those tests and classifications were represented by the manufacturers to their markets and to two certification bodies, the Local Authority Building Control (LABC) and the British Board of Agrément (BBA), and how those certificates were used by the manufacturers in marketing those products.

Module 3

Module 3 will be divided into three broad topics. The first topic will investigate the complaints made by residents of the Tower before 14 June 2017 which particularly relate to fire safety and concerns that were raised about doors and the quality of workmanship during the refurbishment. We propose then to examine the responses of the Tenant Management Organisation (TMO) and the Royal Borough of Kensington and Chelsea (RBKC) to those complaints and the degree of engagement by the TMO in the refurbishment works.

The second topic will be the compliance by the TMO, RBKC and the London Fire Brigade (LFB) with their obligations under the Regulatory Reform (Fire Safety) Order 2005 (“the Fire Safety Order”). A particular focus of the investigation at that stage will be the fire risk assessments carried out by Carl Stokes and whether they were adequate.

The third topic of Module 3 will be the active and passive fire safety measures inside the tower (in particular the lifts, fire doors and smoke extraction system), together with the gas supply system.

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The request for an undertaking

Early last week, after the start of opening statements, we were informed by counsel acting on behalf of a number of those who are to be called as witnesses in Module 1 that they are likely to invoke privilege against self-incrimination in response to many of the questions put to them. In those circumstances it was suggested that we should seek a formal undertaking from you that any answers that they and other witnesses may give in the course of their evidence will not be used in furtherance of criminal proceedings against them. That request came as something of a surprise, given the high degree of voluntary co-operation that the applicants had hitherto afforded the Inquiry, both in producing documents and answering the Inquiry's questions in the form of witness statements. A copy of the written application provided by counsel is attached as **Appendix B** to this letter. Transcripts of the oral submissions in support are attached as **Appendix C**.

Having received written and oral submissions from all those core participants who wished to address us, including counsel for the bereaved, the former residents of the tower and other local residents (all attached at **Appendix D**), we have come to the clear conclusion that it is necessary, in order for the Inquiry properly to carry out its Terms of Reference, for us to ask you to provide an undertaking in the following terms to all those who are called to give evidence during Modules 1, 2 and 3 of Phase 2 ("the undertaking"):

1. No oral evidence given by a natural or legal person before the Grenfell Tower Inquiry ("the Inquiry") in Modules 1, 2 and 3 of Phase 2 will be used in evidence against that person in any criminal proceedings or for the purpose of deciding whether to bring such proceedings save as provided in paragraph 2 herein.
2. Paragraph 1 does not apply to:
 - (a) a prosecution in which that person is charged with having given false evidence in the course of the Inquiry or with having conspired with or procured others to do so; or
 - (b) a prosecution in which that person is charged with any offence under section 35 of the Inquiries Act 2005 or with having conspired with or procured others to commit such an offence.

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As appears from our ruling, which is attached as **Appendix E**, we have reached the conclusion that in the absence of such an undertaking the Inquiry will not be able to investigate fully and thoroughly all the matters within its scope and will be unable to make the kind of recommendations that are necessary to secure meaningful change and ensure as far as possible that no similar disaster occurs in the future. We set out below in rather greater detail the reasons for that.

Witnesses and potential offences

As I have said, the scope of the Terms of Reference is very broad. In order to carry them out effectively the Inquiry needs to hear evidence in Modules 1, 2 and 3 from the witnesses who were involved in all the material aspects of the refurbishment of Grenfell Tower between 2012 and 2016. For example, in Module 1 the Panel is expecting to hear evidence from:

- (i) employees and former employees of Harley Facades Ltd, the specialist cladding sub-contractors, whose designers, sales or business people were involved in the design, specification and procurement of certain of the materials used in the cladding system;
- (ii) employees and former employees of Studio E, the architects who were involved in the design of the refurbishment and the specification of the materials, including the materials used in the cladding system;
- (iii) employees and former employees of Rydon, the Design and Build contractor, including the contracts manager, the project manager, certain site managers, and the refurbishment director, all of whom were involved in aspects of the design and execution of the refurbishment, including the cladding, as well as the bid for the tender;
- (iv) those who were employed at the time in the local authority's Building Control department, who were responsible for considering the building control application and who inspected the work and accepted the refurbishment as compliant with the Building Regulations (although it is now accepted that they should not have done so).

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In Module 2, the Inquiry proposes to hear oral evidence from employees, former employees and directors of Arconic, which made and sold the ACM rainscreen panels used in the cladding, from Celotex, which made and sold the insulation materials used in the cladding, and other witnesses from the manufacturers of the other materials I have listed above. We also intend to take evidence from testing bodies who performed certain key tests and the certification bodies who issued the relevant certificates pertaining to these products which set out the relevant fire safety characteristics and classifications.

In topic 1 of Module 3 we propose to hear the evidence of residents, employees of the TMO and senior councillors and employees from RBKC regarding complaints and their handling. In relation to topic 2, we shall hear evidence from those employees of the TMO and RBKC who were responsible for discharging their respective employer's duties under the Fire Safety Order; from the fire risk assessor himself and from officers of the LFB who were responsible for enforcing the requirements of the Fire Safety Order. Finally, in topic 3 we shall take evidence from companies and individuals involved in the supply and manufacture of fire doors, from those involved in the supply, installation and maintenance of the lifts, from those concerned with the smoke extraction system and from undertakings supplying gas to the tower.

The criminal offences which may be engaged by answers to the questions to be asked of these witnesses (other than the residents of the tower) are potentially very broad in their scope. The Health and Safety at Work etc Act 1974 ("the 1974 Act") provides, by section 7:

"It shall be the duty of every employee while at work—
(a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work.
..."

Failure to discharge the duty imposed by that section is an offence under section 33(1)(a).

These provisions have been interpreted very broadly by the courts: see, for example, *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171, in which the Court of Appeal held that no proof of actual harm was required; it was sufficient that a risk of harm had been created. As a result it is at least arguable that any failure by an employee of any of the companies involved in the design and construction of the refurbishment to exercise all reasonable skill and care in carrying out his or her duties in a way that exposed future

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occupants of the building to a risk of death or injury by fire (or indeed from any other cause) would constitute an offence under the Act. Such offences are punishable by up to 2 years' imprisonment and a fine.

The breadth of section 7 of the 1974 Act means that most if not all witnesses whom the Inquiry has identified as having valuable oral evidence to give in Modules 1, 2 and 3 will be able successfully to invoke privilege against self-incrimination in response to any questions which relate to the way in which they carried out their work, particularly those which carry an obvious element of criticism. In some cases, answering questions may provide material that could assist in the prosecution of more serious offences as well as regulatory offences created by the Fire Safety Order, some of which impose strict liability as set out in Article 32.

The purpose of calling in Module 1 those who were directly involved in the design of the refurbishment, the choice of materials and the execution of the work is to find out in greater detail exactly what happened, to examine the basis on which they reached their decisions, and to provide them with an opportunity to explain in public why they acted as they did. That will also enable the Inquiry to examine and understand important features of the culture in the construction industry within which they were operating.

So far as Modules 2 and 3 are concerned, although the identities of our proposed witnesses have not yet been finally established, the Inquiry team has taken many statements and obtained many documents relevant to the matters to be investigated in the course of them. As a result, the identities of those whom it will be necessary to call and the lines of questioning that will need to be followed are becoming clearer. At this stage we can therefore say with confidence that the issues which will arise for investigation in Modules 2 and 3 are also very likely to involve potential offences under the 1974 Act and subordinate legislation (pre-eminently, under the Construction (Design and Management) Regulations 2007 and 2015) and the Fire Safety Order, as well (in the case of Module 2) as the possibility of offences under the Fraud Act 2006 and the common law relating to conspiracy to defraud. For example, any questions put to employees of the manufacturers or sellers of the cladding materials about how they came to market potentially dangerous products are likely to lead to their invoking the privilege against self-incrimination, in many cases successfully.

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The reasons why we are seeking an undertaking

The Inquiry was set up to respond to public concern over the occurrence of the fire and its causes. It is of the greatest importance to those who have been directly affected by the disaster that they should hear at first hand the accounts and explanations of those who were directly concerned in the refurbishment of the tower. Although it may be possible for us to piece together much of what happened from the documents and statements held by the Inquiry, from the point of view of those directly affected that is an inadequate substitute for hearing directly from those involved. If witnesses are able to avoid answering questions put to them an important element of public accountability will be lacking, which is likely to give rise to a strong sense of disappointment and frustration. There is likely to be a widespread feeling that the full story has not emerged and that the purpose of the Inquiry has not been fulfilled.

Moreover, many of those witnesses have been directly or indirectly criticised in reports made by experts appointed by the Inquiry which have been made available to all core participants and some are implicitly exposed to criticism as a result of my finding in Chapter 26 of the Phase 1 report that following the refurbishment the external walls of the tower did not comply with functional requirement B4(1) of Schedule 1 to the Building Regulations. Part of the purpose of Phase 2 of the Inquiry is to provide the witnesses with an opportunity to answer those and other criticisms which emerge from the evidence. It would be unfortunate if they were placed in the invidious position of having to choose between responding to the criticisms made of them and exposing themselves to the risk of prosecution.

There is also a wider public importance in obtaining the full and frank evidence of those directly involved in the refurbishment, which ought to give those in government and the construction industry an insight into the underlying causes of the disaster of a kind that may well not become available through criminal proceedings. Such evidence will also provide a basis for recommendations that may prevent another disaster of a similar kind.

The urgency and importance of this work is to be emphasised. In May 2018 the Hackitt report 'Building a Safer Future' concluded that the current system of building regulations and fire safety is not fit for purpose and that a culture change is required to support the delivery of buildings that are safe. At Phase 1 of the Inquiry I made interim recommendations which were of central importance in securing public safety, including in buildings which continue to have unsafe cladding. The work of the Inquiry at Phase 2

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should lead to final recommendations which will help identify how the system can be rectified so as to support the delivery of buildings that are safe. However, the robustness and credibility of those recommendations can only be assured if the Inquiry has access to the fullest possible evidence to enable it to understand the culture which led to this unsatisfactory state of affairs. For that reason there is a real and important public interest in the work the Inquiry intends to do at Phase 2, and concomitant urgency.

We have been advised by Counsel to the Inquiry, who have prepared detailed examinations of many of the witnesses to be called in Module 1, that the bulk of the questions they intend to ask (many of which have been suggested by the core participants, including the bereaved, survivors and residents) would lead to the privilege being invoked, in most, if not all, cases successfully. Counsel have told us, and we agree, that it is not possible to limit the questions in such a way as to remove the danger of self-incrimination, particularly since the courts have recognised that even what appears to be an innocuous question may turn out to have damaging consequences.

There are also some important practical considerations. We are advised by Counsel to the Inquiry, and again we agree, that given the breadth of the duties under the 1974 Act in particular, it would not be practicable for them to pick their way through the questions in an attempt to avoid asking those which might provoke a claim to privilege and that in any event, to do so would almost certainly render the whole process of examining the witness nugatory. Unless that were done, however, it would be necessary for me as chairman to advise the witnesses on each occasion of their right not to answer the question if to do so would incriminate them and then, if the privilege were invoked, to consider the matter and make a ruling. In view of the matters to which I have already referred, the process would be likely to break down very quickly and significantly disrupt the progress of the Inquiry.

The position of the core participants

Most core participants who expressed a view said that they were neutral on the question of whether the undertaking should be sought. That included the Metropolitan Police Service, who did not suggest that the grant of the undertaking might in any way hamper their investigations or any prosecutions which may result. We return to that topic below.

The majority of bereaved, survivors and residents (BSRs) were unable to reach a common view in the time available and so they, like other core participants, expressed themselves

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to be neutral, although they fairly recognised in terms in their written submissions that the refusal by substantial numbers of important witnesses to answer a broad range of questions would seriously hinder or undermine the Inquiry's ability to fulfil its Terms of Reference adequately or at all. They said that their legitimate objectives were (i) transparency and discovering the truth in relation to the matters which the Inquiry has been asked to investigate, (ii) meaningful change and (iii) accountability in terms of clear attribution of responsibility for failures but also criminal liability where that is warranted (see BSR Team 1's submissions in **Appendix D**).

It is right to point out, however, that a significant proportion of the BSRs strongly oppose any grant of an undertaking of the kind which we are now seeking. They consider that the witnesses should have the courage and decency to give a full and frank account of their actions without receiving the formal protection of an undertaking and they appear to think that the witnesses may indeed do so (see written and oral submissions of BSR Team 2 in **Appendix D**). We do not share their optimism, but we are also concerned that if witnesses called in Modules 1, 2 and 3 were to give evidence without the benefit of an undertaking and were not to claim privilege against self-incrimination there would be an obvious incentive for them to be less open and honest than would otherwise be the case. In our view, therefore, it is in the interests of the Inquiry and of the public generally for you to grant an undertaking notwithstanding the opposition of many BSRs. It is the only way that the Inquiry can be confident of getting to the truth of what happened at Grenfell Tower.

The criminal investigations

The police investigations have been conducted in parallel with the Inquiry from the outset. The police and the Inquiry have agreed a protocol under which an evidence and information sharing regime has been established and which is available on the Inquiry's website. The police seized many millions of documents at the start of their investigation¹ and, through the protocol which has been established with the Inquiry, they can also request disclosure of the Inquiry's documents and witness statements. The police have made it clear that no decisions on charging will be made until after the Inquiry has concluded its investigations, but at no stage has it been suggested that they are relying on answers to questions obtained by the Inquiry during the oral hearings to further any investigations or prosecutions. Indeed, the police and prosecuting authorities are likely to be in the same position whether or not the undertaking is granted. Without the

¹ <https://www.bbc.co.uk/news/uk-48587288>

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undertaking, many crucial witnesses are likely to claim privilege against self-incrimination and to do so successfully on many material matters, in which case the answers will not be available to the police or the prosecutor. With an undertaking in place witnesses can be compelled to answer questions but their answers will not be capable of being used in furtherance of a prosecution. The ultimate result is the same.

We should also say (although we recognise that it is ultimately a matter for you after hearing from the prosecuting authorities) that no core participant (including any of the BSRs) put forward any convincing reason why an undertaking in the narrow terms we are seeking could materially hamper the criminal investigations or any prosecutions that may result from them. It is hard to see how any prosecution could be impeded by an inability to make use of oral answers given by the accused to the Inquiry. Given the vast volume of documentary evidence and witness statements already available to the police, any admissions or inconsistent statements, although a potential bonus, are unlikely to provide the foundation for a decision to prosecute or significantly advance a prosecution case. The nature and width the offences created by the 1974 Act makes that even less likely.

The scope and terms of the undertaking

The undertaking we are asking you to give is relatively narrow and focused.

First, it is co-extensive with, and no wider than, the scope of the privilege against self-incrimination likely to be claimed by the witnesses.

Secondly, it extends only to oral evidence and does not extend to any of the very substantial number of documents or statements already in the Inquiry's hands, although we recognise that if a specific and significant problem were to emerge later in that regard we might have to ask you to extend it.

Thirdly, at this stage we are only seeking an undertaking to cover the evidence to be given in Modules 1, 2 and 3, because it is in those Modules that there is the clearest and most present risk that the privilege against self-incrimination will be invoked by witnesses across a wide front. Although it may be necessary to seek an extension of the undertaking at a later stage in respect of other Modules, it is not yet necessary to do so.

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Finally, there is the question whether the undertaking should cover the oral evidence of natural persons alone or whether it should extend to the oral evidence of persons given on behalf of, or which would be attributable to, corporate entities. There is no question that a company can claim privilege against self-incrimination but there is a long-standing controversy in the authorities about the precise circumstances in which the privilege may be taken on behalf of a corporate entity. The question was expressly left open in *Rio Tinto Zinc Corp v Westinghouse Electric Corp (Nos.1 and 2)* [1978] A.C. 547 (see Lord Wilberforce at 617E, Viscount Dilhorne at 632B-C and Lord Diplock at 637-8), and was examined but left undecided by Gross J in *Kensington International v Congo* [2007] 2 Lloyd's Rep. 382, at [39]-[47]. That the question remains an open one is reflected in the leading textbooks, for example *Phipson on Evidence* (19th Edn., 2017) at para 24-44 and *Matthews & Malek, Disclosure* (5th Edn., 2018) at para 13-15. It may be the case that a company enjoys no privilege where a witness does not also enjoy it co-extensively and personally, as Gross J. suggested in *Kensington*, but that cannot apply here in situations where the questions to be asked will be directed at witnesses in both their personal and their corporate capacities and where the witnesses themselves enjoy such a privilege personally.

Moreover, teasing out any distinction between these capacities on a question by question, witnesses by witness, offence by offence basis will be wholly impracticable.

Given those practical difficulties and the controversial nature of the issue on the present state of the law, we would urge that the undertaking should clearly cover both natural and legal persons.

Timing

As you may be aware, this Inquiry has so far proceeded at pace. I began hearing the evidence in Phase 1 in May 2018, within a year after the fire, and was able to publish my first report in October 2019, only 10 months after the end of the evidence in Phase 1. The hearings of Phase 2, which is complex, started only three months after that. The matter is urgent, not only because in the aftermath of the fire there is considerable concern among the public about fire safety in high-rise buildings, but also because the evidence my team has uncovered in its investigations suggests that significant risks to public health and safety will continue to be created until the full extent of what happened at Grenfell Tower is brought into the light.

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As a consequence of the application, we have been forced to postpone the start of the oral evidence in Module 1 pending the outcome of this request. However, we should like to begin hearing evidence as soon as possible and we should be grateful, therefore, if you would treat this request as a matter of urgency.

The Inquiry team and I will be pleased to assist with anything further you may require.

Yours sincerely,

Martin Moore-Bick

**The Rt Hon Sir Martin Moore-Bick
Chairman**