

Buildings regulatory framework not fit for purpose

Dame Judith Hackitt's much-anticipated final report on building regulations and fire safety was published on 17 May 2018. **Stephen Radcliffe** of **Walker Morris LLP** considers the report and the implications for the construction industry.

KEY POINTS

- The regulatory system covering high-rise and complex buildings is not fit for purpose – there is a need for a 'radical rethink' of the whole system and how it works
- A new, outcomes-based, regulatory framework is proposed – including the establishment by government of a 'Joint Competent Authority' to oversee better management of safety risks across a building's entire life cycle
- There is a strong focus on responsibility and accountability – demanding roles for identifiable dutyholders and more rigorous enforcement powers
- Key 'Gateway Points' would need to be met at different stages of a building project
- A 'golden thread' of key information would be passed on to future building owners
- Concerns raised over the lack of prescription and timescale, and the ability of the construction industry to effect major cultural change

The Grenfell Tower disaster cast a spotlight on how high-rise and complex buildings are designed, constructed and maintained. In the immediate aftermath, the government announced an independent review of building regulations and fire safety, led by a former chair of the Health and Safety Executive (HSE), Dame Judith Hackitt.

The review identified the following weaknesses: the roles and responsibilities of those procuring, designing, constructing and maintaining buildings are unclear; the package of regulations and guidance can be ambiguous and inconsistent; the

processes that drive compliance with building safety requirements are weak and complex with poor record-keeping and change control in too many cases; competence across the system is patchy; the product testing, labelling and marketing regime is opaque and insufficient; and the voices of residents often go unheard, even when safety issues are identified.

Dame Hackitt concludes that the regulatory system covering high-rise and complex buildings is not fit for purpose and there is a need for a 'radical rethink' of the whole system and how it works. She calls for major cultural change.

A new regulatory regime

The 156-page final report sets out numerous recommendations to address these weaknesses, with the potential to significantly impact on current practices in the construction industry (available at www.gov.uk/government/publications/independent-review-of-building-regulations-and-fire-safety-final-report).

It envisages a new regulatory framework designed to: create a more simple and effective mechanism for driving building safety; provide stronger oversight of dutyholders with incentives for the right behaviours and effective sanctions for poor performance; and reassert the role of residents.

This outcomes-based framework attempts to make the regulatory regime 'significantly more straightforward and comprehensible whilst also making it more rigorous and effective'. Appendix B sets out a map of the framework which is focused – for now – on new and existing high-rise residential properties which are ten or more storeys high (including mixed-use buildings which are partially residential). These are defined in the report as higher risk residential buildings or HRRBs.

Recommendations – for both government and

22 Building regulations

industry – for the new framework and key elements of change are set out in ten chapters, covering:

- ◆ *Key parameters and principles*, including the establishment of a new Joint Competent Authority (JCA) to oversee better management of safety risks across a building's entire life cycle.
- ◆ *Improving the focus on building safety during the design, construction and refurbishment phases*, including rigorous and demanding dutyholder roles and responsibilities to ensure a stronger focus on building safety, and more rigorous enforcement powers.
- ◆ *Improving the focus on building safety during the occupation phase*, including having a clear and identifiable dutyholder with responsibility for building safety of the whole building, and clearer rights and obligations for residents.
- ◆ *Giving residents a voice in the system*, including providing greater transparency of information on building safety, better involvement in decision-making, and the ability to escalate fire safety concerns through an independent statutory body.
- ◆ *Setting out demanding expectations around improved levels of competence*, including the development of a competence framework and oversight body.
- ◆ *Creating a more effective balance between government ownership of building standards and industry ownership of technical guidance*, including moving towards a system where ownership of technical guidance rests with industry (but with continuing oversight from a government-prescribed organisation).
- ◆ *Creating a more robust and transparent construction products regime*.
- ◆ *Creating a 'golden thread' of information about each higher risk residential building*, by mandating the creation of a digital record from initial design intent through to construction and including any changes throughout occupation.
- ◆ *Tackling poor procurement practices*.
- ◆ *Ensuring continuous improvement and best-practice learning through membership of an international body*.

How will it work?

A key recommendation is the establishment, by the government, of the new JCA to oversee better management of safety risks across a building's entire life cycle. The need to consider each building as a single, coherent, inter-locking system is a recurring

theme. The current regime involves different regulators operating under separate (but sometimes overlapping) pieces of legislation and in different combinations at different stages of a building's life cycle.

It is easy to see how safety considerations in such a fragmented system might fall through the gaps. The report notes that Sch 1 to the Building Regulations 2010 and its associated suite of around 20 approved documents can lead to design and construction being seen as a set of 'siloed' requirements, which can result in changes being made to one aspect of a building without consideration of the effect on safety. Dutyholders will be required to present their case to the JCA for the layers of protection they are proposing to have installed.

The JCA would comprise Local Authority Building Standards (the proposed name for local authority building control services), fire and rescue authorities and the HSE. There is no intention to merge these organisations. Drawing on their combined areas of expertise, they would work together to maximise the focus on building safety. Key responsibilities of the JCA are set out on p 23 of the report. To support the oversight of the JCA, the report recommends a system of mandatory occurrence reporting with additional whistleblower protections for those drawing attention to poor working practices and corner cutting.

The proposed regulatory framework during the procurement, design and construction phases has two purposes: to oblige and incentivise the dutyholder to focus on building safety upfront and to take responsibility for ensuring that the building will be safe; and to set out a clearer and more robust oversight approach to hold dutyholders to account.

Dame Hackitt's interim report (published in December 2017) found that responsibility is often handed down through sub-contracting arrangements. The final report criticises design and build contracts and value engineering which it says can often result in uncontrolled, undocumented and poorly designed changes being made to the original design intent.

The report recommends that government specifies the key roles for prioritising building safety – the identifiable dutyholders. The key roles under the Construction (Design and Management) Regulations 2015 are set out as the minimum. Key responsibilities would be allocated to these roles, and all dutyholders required to implement arrangements to ensure that sub-contracted work is delivered to the required standard. It is expected that dutyholders would be able to demonstrate to the JCA that they have the

required leadership, management and competence capabilities to routinely deliver their responsibilities.

There would be four 'key information products' – the digital record, the Fire and Emergency File, Full Plans and the Construction Control Plan – forming a 'golden thread' of key information to be passed on to future building owners. It is recommended that the creation, maintenance and handover of these documents, as a minimum, is made an integral part of the legal responsibilities of clients, principal designers and principal contractors.

To strengthen regulatory oversight, three 'Gateway Points' are proposed – at the planning permission, full plans approval and completion stages – all of which require approval by the JCA before progressing to the next stage.

The report also calls for wider changes to support dutyholders and regulators, including a clearer, statutory change control process requiring the relevant dutyholder to notify regulators of significant changes post-Full Plans sign-off, and the JCA fully overseeing building work carried out by 'persons in a competent person's scheme'.

There are also recommendations to address weaknesses in the current structure of building control, including that it should not be possible for a client to choose their own regulator or for a regulator to be unable to apply sanctions against a dutyholder where such action is warranted.

In relation to the refurbishment of existing buildings, the report recommends a new 'safety case review' system. Details are set out in Ch 3 of the final report.

Recommendations are proposed to tackle perceived poor procurement practices, including that: principal contractors and clients should devise contracts that specifically state that safety requirements must not be compromised for cost reduction; and tenders should set out how the solution that is proposed will produce safe building outcomes, approaching the building as a system.

Will it work?

The ambitious report is admirable in its vision for a long-term solution to a deeply flawed system. But in some quarters it has faced considerable criticism and is being seen as a missed opportunity. For example, there are no specific recommendations for the re-writing of building regulations or guidance, there is no suggested ban on flammable cladding (the government swiftly announced that it would consult on this), and no clear timeline for implementation.

The review recommends that industry be given the freedom to develop the detail sitting underneath the government-set regulatory framework. Dame Hackitt is very clear in her view that an outcomes-based approach to building safety, as opposed to a prescriptive one, is the way forward – a view which is certainly not shared by everyone. She argues that a totally prescriptive system:

'... creates an over-reliance on the system by those working within it, discouraging ownership and accountability for decisions ... the cumulative impact of the Approved Documents changes an outcome based system of regulation to one that is often inferred by users to be prescriptive. The suite of guidance is very slow to adapt and update as new technologies and techniques become available in the sector. This creates significant scope for gaming of the system in a variety of ways. The aim of this review is to move away from telling those responsible for HRRBs "what to do" and place them in a position of making intelligent decisions about the layers of protection required to make their particular building safe ... An outcomes-based model relies more on robust competence regimes with appropriate levels of assurance.'

It is clear that every element of the framework needs to work if it is to be a success, and that is a major undertaking for both government and industry – a government busy preparing for Brexit, and an industry that must work together to effect the major cultural change needed. In any event, change is unlikely to happen quickly. Changing the law takes time. Government is asking for comments by the end of July on how a change in culture and practice can be achieved. This will inform a detailed statement to Parliament in the autumn on how it intends to implement the new regulatory system. In the meantime, those who were hoping for clear answers on what action to take now are not much further forward and the construction industry is left to a certain extent in limbo.

However long it takes to implement the recommendations, there is no doubt that all eyes are on the construction industry. The focus of the Hackitt review is that complacency, shortcuts or a dismissive approach to compliance will not be tolerated. However, there is a difficult balance to be struck between those intentions and the need to provide the industry with certainty in early course as to the detail of the new regime. **CL**