

APPENDIX 1 – BUILDING BETTER FEEDBACK FROM LEGAL CASES THROUGH TO PRACTICE AND REGULATION

The consultation is largely concerned with better implementation and enforcement of regulations, at the design and operational stages. However, there are also instances where regulations have been followed, but the health and safety of occupants is compromised by building design or operational issues. This is the topic of this appendix, which focuses on one particular area which we think merits attention in order to allow a quicker and better system of continuous improvement of regulations and practice: **how to draw better and quicker lessons from legal cases.**

Concerns about the current situation

Health and safety issues found in occupied dwellings take a number of years to become widely known in the industry, and even longer to come to the attention of the regulator. A stark example is the occurrence of overheating, on which expert witnesses have told us they have been working “for 20 years”; the industry has devoted significant attention to the issue in the past 10 years, and only in the past year have MHCLG acknowledged it as an issue to be addressed as part of the upcoming review of Building Regulations Part L & F. One of the reasons for the current lack of speed is the natural rhythm of construction and operation of buildings, however 20 years is clearly beyond this and is an inadequate length of time; issues should be able to be recognised and addressed by regulations much quicker.

One of the reasons we have identified is the use of out-of-court settlements: while collectively, the industry has known for a number of years that occurrences of overheating are increasing, the actual body of publically available evidence is relatively small: this applies to industry case studies (as consultants and developers and housebuilders are understandably reluctant to publicise such stories) but also to legal case studies: while anecdotally many consultants and expert witness departments report being involved in legal cases, very few of these cases are publically available as they are settled out of court, before an actual court case. This makes it difficult to quantify the preponderance of the issue, and we understand this perceived lack of evidence has been one of the reasons for slow action by MHCLG to address overheating risk in regulations.

In the spirit of contributing to the creation of a robust and comprehensive building safety system which would allow continuous review and improvement of regulations, CIBSE have carried out a small number of informal enquiries with designers (architects and engineers) and expert witness departments. Our recommendations here are informed by the feedback we received; examples are also provided at the end of this document. Key points from the feedback we have received are:

- **The use of out-of-court settlements is very common** in the industry. Individual homeowners are particularly likely to resort to this rather than a court case, as they are faced with potentially very high legal fees, have limited experience on how to approach court cases, fear losing a legal case against the much better equipped legal teams of the housebuilders, and worry that any legal case (particularly if it was lost) would devalue their home. The pressures to choose an out-of-court settlement are therefore very significant.
- Out of court settlements can cover **very significant health and safety issues**: the cases we have been told about include fire safety risks, structural defects, legionella, and serious overheating (see examples at the end of this document).
- Our respondents agreed that the common use of out of-court settlements contributes to **preventing or delaying issues coming to the attention of the regulator.**
- Two particular topics singled out by our respondents are overheating risk in dwellings, and legionella risks in buildings such as hospitals and care homes. Both these cases arise from a combination of factors including not only regulations but also the broader environmental, industry and societal context: overheating risk is exacerbated by climate change and the increase in dense urban living. Instances of legionella in hospitals and care homes are occurring due to a combination of changes to health and social care practices: more patients have their own en-suite rooms (i.e. more fittings, for the same number of patients); the number of patients with dementia, who tend to wash less often, has increased; and the use of sanitizing gels has reduced handwashing. All of these factors have led to much lower water circulation through individual fittings, and the problem is often compounded by water circulating (or stagnant) through tight ceiling spaces in very warm corridors. These examples highlight the fact that regulations, designers and builders may not be at fault, but **the system of regulations and guidance does need to be more responsive.**
- Legal cases are typically covered by **non-disclosure agreements (NDAs)** which restrict the ability of the experts involved to disclose details of the case, or even, by measure of precaution, the existence of a case and the nature of the issue itself. Only after many years and with a large volume of schemes may experts feel they can raise the issue in general terms.

We would highlight that **this is a well-known problem (if not often openly talked about) in the industry.** The difficulty is how to address it, given the pressures that legitimately constrain what homeowners and expert witnesses can and will do. Expert witnesses, by definition, hold extremely valuable knowledge on the design, construction and operation of buildings. The experts we have talked to would be keen to contribute to industry knowledge and regulations, but are currently understandably wary of doing so without legally breaking their NDAs and/or undermining their position with clients.

We recommend a working group should be created, including MHCLG, the upcoming regulator (or parties that will contribute to its creation), legal experts, and CIC representatives. As a starting point, CIBSE are proposing that the following ideas should be explored; these are only tentative and others would surely arise from a working group:

- Requirement on expert witnesses to disclose the type of issues they have had to deal with, for example as annual **reporting to a central repository.** The system should not be burdensome, and the descriptions could be brief (e.g. “5 out of 7 cases this year were about overheating in new build high rise apartments”, or a similar level of detail as in the examples we have provided at the end of this document). The expert witnesses (individuals and their companies) would be anonymous and the schemes would be anonymised, though potentially one could imagine a system where the regulator could send a request for more details. The focus would not be on individual schemes; instead, the objective would be to identify issues occurring frequently and which therefore warrant attention by industry and the regulator. To some extent, this could be seen as an extension of whistleblowing proposals in this consultation, but it is important to understand that this system would not simply be about flagging up cases of non-compliance, but instead to identify whether some issues are occurring which are not properly dealt with by existing regulations. The central repository should be managed by the regulator, but the information should be accessible to the industry: we think this would be crucial to allow professional bodies and the industry visibility on the issues, allowing them to gather lessons and create or update their guidance to professionals.
- Requirements to disclose, for example to the above central repository, should come with **legal assurances to protect expert witnesses** against legal pursuits, where disclosure has been anonymous (e.g. requirements to disclose should trump overly onerous NDAs)
- Clear mechanisms ensuring that the feedback from expert witnesses finds its way to **national competence schemes and to the 5-year reviews of regulations**, whether through nominated individuals or via their professional bodies.

Examples

Note – as part of our enquiries, we were also provided with many cases where worrying health and safety issues were found on new dwellings, which related to non-compliance by the developer / designer / housebuilder, and poor enforcement by the building control authority. We have included them here, but identified them separately from issues which occurred despite regulatory compliance; we are aware that systemic compliance and enforcement issues are addressed in the consultation proposals, however it is possible that, should a central repository (or other system) be created, there would be value in including non-compliance issues too: this could help identify topics where non-compliance was found repeatedly, and which would therefore benefit from better guidance to project teams and building control bodies.

Date	Building Description	Description of issues
ISSUES PRESENT DESPITE REGULATORY COMPLIANCE		
Varied	Hospitals and care homes (several)	Legionella due to little draw from appliances, and water circulating or stagnant on warm spaces – see combination of causes described above
Practical Completion (PC) circa 2017	recently completed town houses in London	Overheating - We measured room temperatures that were often ten degrees warmer than outside. When the outdoor temperature reached 25 deg.C it reached 35 deg.C in some bedrooms. On a particularly hot day, during the 2018 heat wave, we measured maximum air temperatures of 40 deg.C when it reached 30 deg.C outside. Mean bedroom air temperatures were 26 deg.C. Reasons for overheating included: <ul style="list-style-type: none"> a. Large areas of glazing (east and west facing, so difficult to protect from overhangs. b. Poor internal air movement c. Inadequate window openings to provide purge ventilation d. MVHR took fresh air from a hot roof location so supplied hot air into the accommodation
PC circa 2010	College Building, northern England	Overheating of rooms due to inadequate ventilation from restricted windows.
PC circa 2008	300 apartments in two blocks in NW England	Overheating due to window restrictors.
PC circa 2017	Student accommodation block, midlands	Overheating due to variation to seal windows and inadequate mechanical ventilation.
ISSUES CAUSED BY NON-COMPLIANCE AND INADEQUATE ENFORCEMENT		
PC circa 2015	10 storey residential tower NW England	Fire, smoke ventilation - Numerous life safety defects including inappropriate over-cladding material, defective smoke ventilation, defective fire stopping all signed off by AI and building guarantor.
PC 2007	Hotel, northwest England	Fire - Serious defects with fire stopping.
Various over last 5 years.	Numerous housing developments nationwide.	Gas safety - Flues installed with inadequate support and facilities for annual inspection.
PC circa 2010	12 apartment block in NW London	Fire - Serious fire separation issues especially between basement carpark and apartments above due to poor workmanship.
PC circa 2012	200 bedroom hotel and 3 residential towers, NW London.	Fire & life safety - Serious defects with fire alarm installation to hotel. Serious defects to electrical supplies to life-safety systems. Apartment towers communal LTHW distribution insufficient pressure rating giving rise to safety risk. No action taken by Developer as no legal case initiated. Defects still exist?
PC 2006	Hospital NW England	Fire - Significant fire stopping defects.
PC in last few years	third floor flat in a block of new flats, southern England	Fire, mould, drainage, life safety – we were supporting the client (an prospective home owner) in the purchase of a flat. The whole block of flats was found to be lethal in the event of fire. Service penetrations to the escape corridor were not protected, service risers were lethal, a doorway from a carpark was non-compliant. There were mould problems, drainage problems and a large cantilevered balcony designed to be bolted to the structure with 16 bolts, had only 6 of the bolts tightened effectively. The balcony was sagging and is in our view lethal. Settled out of court, and the prospective owner managed to have their deposit returned and cancel the sale. An unofficial visit a few months later seems to show the defects have not been rectified.
	3 storey detached house, part of larger development, southern England	Fire, life safety, airtightness -we were supporting the client (an prospective home owner) in the purchase of a house. We carried out a survey at a property on a new development. We found numerous fire and safety problems. We found a strong breeze in the ceiling void over the utility room, there is clearly a major air leakage problem that means the building could never have achieved the airtightness it claimed. We also calculated the u-value of the walls of these houses according to the information provided by the contractor; the walls failed to meet the u value requirements of the Building Regulations by a long way. When we and the client's lawyer told them of our calculations and asked for comment, nothing was forthcoming and we were not allowed to see any detailed drawings. After some bargaining, our client received a full refund of their deposit in order not to buy the property.
Last few years	Penthouse flat, London	Envelope defects, airtightness - At the request of the homeowner, I visited a flat. I went on a windy day and the wind was literally whistling through the ceiling cavity beneath the insulated curved metal roof. The bathroom had a flat false ceiling with some plant above it. The access hatch to the void space was lifting in the wind. The client said they had complained to the housebuilder who referred them to the warranty provider. The warranty provider didn't visit but said the building was totally compliant with regulations and pointed out that the warranty period had nearly expired anyway. I told the client that there is no way this was compliant and I would be happy to argue the case against the warranty provider. The client instead decided to sell the flat, probably because they found they would need to fight the warranty provider's lawyers by employing their own. If the dispute was not resolved, the failed dispute would need to be declared in any sales questions.

Date	Building Description	Description of issues
Last few years	Flat, London	Air quality and ventilation - inadequate and non-compliant ventilation and air tightness, leading to health issues of the occupant