



H&S Legal Update Thames Valley IOSH

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Agenda

- Where are we now ...
- Statistics
- Fee For Intervention
- Enforcement Notice Appeals
- Legal Privilege
- Fines – Update & Appeals
- Corporate Manslaughter
- Personal Liability



HSE Statistics

- **9,000** visits (7,800 in 2015/16 and 7,200 2014/15)
- **20,000** targeted inspections

	Year	Prohibition	Improvement	Total Notices
All industries	2015/16	2947	5829	8776
All industries	2016/17	2881	6614	9495

- More than **4,500** incident investigations begun
- **583** prosecutions (696 in 2015/16)
- Convictions in **95%** of cases (same as in 2015/16)

Fee For Intervention

- New regulations came into force on 6 April 2016 - FFI now £129 per hour!
- HSE's Annual Report and Accounts 2015/16 – income from FF1 £14.7m but cost of recovery £17.5m!
- OCS Group UK Ltd - Judicial Review re dispute process. Current process – suspended – lack of independence, very difficult to challenge.
- New process - in force from 1 September 2017!



Enforcement – Chevron

The Facts?

- 23 April 2013 - HSE took the view that stairways and gratings leading to helipad weakened by corrosion
- Prohibition Notice served
- Chevron ordered to stop using the stairways
- Some of the metalwork was removed for testing by Chevron and those tests confirmed that the metalwork met the relevant British Standard and was **not unsafe**

Enforcement – Chevron

Challenge?

- Chevron appealed against the Notice
- Employment Tribunal cancelled the Notice
- HSE appealed – but cancellation affirmed
- Conflicting E&W judgment :
 - *Rotary Yorkshire v Hague [2014] EWHC 2126 (Admin)*: “...only evidence available or which could reasonably have been available to the HSE Inspector could be taken into account when deciding an appeal”
- HSE sought leave to appeal to the Supreme Court

Enforcement – Chevron

Decision?

- Supreme Court upheld the previous decisions
- Ruled that later evidence **can be taken into account** when determining an Enforcement Notice appeal
- Lady Black said that:

*“When the inspector serves the Notice, section 22 makes clear that what matters is that he is of the opinion that the activities in question involve a risk of serious personal injury. If he is of that opinion, the Notice comes into existence. **However ... when it comes to an appeal, the focus shifts. The appeal is not against the inspector’s opinion, but against the Notice itself***

The Inspector’s opinion about the risk, and the reasons why he formed it and served the Notice, could be relevant ... but I can see no good reason for confining the Tribunal’s consideration to the material that was, or should have been, available to the inspector.”

LEGAL PRIVILEGE- INTERNAL INVESTIGATIONS

HSE v Jukes - Court of Appeal

- 23 December 2010 employee of Gaskells NW Limited was fatally injured in a baling machine
- He entered the compaction chamber to clear a blockage and was crushed by the movement of the hydraulic ram.
- Prior to the appellant's trial, Jonathan Gaskell (the managing director), Gaskells NW Limited and Michael Cunliffe (a fitter employed by the company) had pleaded guilty to H&S offences.
- H&S Manager Paul Jukes also prosecuted, pleaded not guilty.

HSE v Jukes - Appeal

- Prosecution relied on a signed statement the appellant gave to the company's solicitors which said "I took over formal responsibility for health and safety. I started a process of assessing the overall health and safety competency of the lads ... I'm responsible for daily housekeeping and health and safety on site, including the implementation of site safety and working practices".
- In his prepared statement to the HSE and Defence Statement he asserted he wasn't responsible for Health and Safety.
- Jukes also said he had signed it but under pressure from Gaskell (the MD)

HSE v Jukes- Appeal

- 22 September 2016, the appellant (Health and Safety Manager) was convicted of breaching section 7 HSWA.
- Sentenced to nine months' imprisonment and ordered to pay £7,000 prosecution costs.
- Matter appealed on the basis that the note to the company's solicitor was inadmissible as evidence, legal privilege also considered.

HSE v Jukes - Appeal

- CA stated the following must be satisfied for litigation privilege:
 - litigation is in progress or reasonably in contemplation;
 - the relevant communication or document is made or created with the sole or dominant purpose of conducting that litigation; and
 - the litigation is adversarial, not investigatory or inquisitorial.
- When the statement had been made there was no prosecution, only an investigation
- An investigation is not adversarial litigation (SFO v ENRC)

HSE v Jukes- Appeal

- Court held there was no evidence company had knowledge of what would be unearthed during the investigation- even though workplace death likely to result in prosecution.
- If there was privilege it would belong to the company or the Managing Director , not the defendant.
- Points to note:
 - Legal privilege has become much stricter.
 - Be careful what statements you give to who!
 - Be aware that internal investigations may be disclosable to Regulators.

SENTENCING- CASE UPDATE

Statistics – Sentencing

- Twelve months to October 2017:
 - **146** fines of at least £100,000:
 - **22** fines of at least £1m;
 - **27** fines between £500,000 and £999,999
 - **38** fines between £250,000 and £499,999
 - **59** fines between £100,000 and £249,999
 - **65** custodial sentences for offences related to health and safety at work (excluding manslaughter) including **29** involving immediate custody



Sentencing Guidelines – Update

Tesco Stores Limited

- Over a 29 hour period 23,500 litres of petrol leaked from a filling tank at the company's petrol station into the sewer system and watercourse.
- Local residents required medical attention and leak had serious impact on the nearby environment.
- Joint prosecution by Environment Agency and Lancashire County Council
- **Turnover:** £39.8bn

Sentencing Guidelines – Update

Tesco Stores Limited

- **Sentence:** £8m fine (£5m for the breach of DSEAR 2002 and £3m for environmental offence) plus £57,434.30 costs.
- **Commentary:**
 - Suggests high culpability, harm category 1.
 - Significant fine for non-fatality case.
 - The number of people exposed to a risk of harm is also likely to have been significant feature in this case.
 - Very Large Organisation?

Sentencing Guidelines – Appeals

Tata Steel Limited

- Two employees injured, five months apart, at same site due to inadequate machine guarding.
- Guilty plea to two breaches of Section 2 HSWA 1974.

High culpability Harm category 2	£1,100,000	£550,000 – £2,900,000
Medium culpability Harm category 2	£600,000	£300,000 – £1,500,000

- Turnover: £40bn
- Fined £185,000 + £1.8m = **£1.985m**

Sentencing Guidelines – Appeals

Tata Steel Limited

1. Judge made errors in sentencing for the first offence.

Court of Appeal: fine not manifestly excessive.

2. Judge should not have moved outside the category range for the second offence.

Court of Appeal: Judge was entitled to do so to ensure the fine had a real impact on management and shareholders.

Sentencing Guidelines – Appeals

Tata Steel Limited

3. Judge should have made a downwards adjustment to the fine because the business was making a loss.

No evidence the fine risked putting Tata out of business.

4. Judge had incorrectly concluded the offence involved a “high” likelihood of harm.

Agreed “medium” likelihood of harm.

Fine reduced to £1.5m (£185,000 + £1.315m)

Whirlpool UK Appliances



- **Facts**

- Whirlpool Factory, Bristol, tumble dryer manufacture
- Sub contractor moving a heat detector, standing on elevated platform between two conveyors with baskets hanging down
- Elsewhere in the factory maintenance of the conveyor was ongoing
- Conveyor maintenance workers could not see injured
- Conveyor was started and a basket hit the platform toppling it
- Fatal injuries

Whirlpool UK Appliances

- Breach
 - S3(1) HSWA 1974
 - Inadequate risk assessment for maintenance and inadequate permit to work for heat detector
- Sentence
 - Low culpability, harm category 3
 - **Fine: £700,000**
 - **Reduced to £300,000 on appeal**

Whirlpool UK Appliances- Appeal

- Issues on appeal:
 - Death resulting: Justified moving to top of next category range.
 - Identification and treatment of ‘very large organisation’: Fine increased further due to very large status.
 - Arithmetic approach discouraged.
 - This reduction was very much on the facts of this case.

Poundstretcher

- January 2018
- 24 breaches of HSWA 1974
- Emergency exits blocked
- Stock stored dangerously
- Blame of local management by corporation 'extremely unattractive'
- Complacent attitude to HSE by senior team
- Lack of co-operation reflective of attitude to regulator
- **£1m fine, £65k costs**

CORPORATE MANSLAUGHTER

Latest Corporate Manslaughter cases

Large organisation Turnover more than £50 million		
Offence category	Starting point	Category range
A	£7,500,000	£4,800,000 – £20,000,000
B	£5,000,000	£3,000,000 – £12,500,000

Medium organisation Turnover £10 million to £50 million		
Offence category	Starting point	Category range
A	£3,000,000	£1,800,000 – £7,500,000
B	£2,000,000	£1,200,000 – £5,000,000

Small organisation Turnover £2 million to £10 million		
Offence category	Starting point	Category range
A	£800,000	£ 540,000 – £2,800,000
B	£540,000	£350,000 – £2,000,000

Micro organisation Turnover up to £2 million		
Offence category	Starting point	Category range
A	£450,000	£270,000 – £800,000
B	£300,000	£180,000 – £540,000

Latest Corporate Manslaughter cases

Martinisation (London) Limited

- Two workers died after fall from height in 2014.
- Lifting operation performed without supervision, training, method statement or risk assessment.
- Advice from lifting company ignored.
- **Turnover:** £9.7m ('small' organisation)
- **Pre-tax profit:** £2,400

Latest Corporate Manslaughter cases

Martinisation (London) Limited

- 19 May 2017: found guilty following a trial of two counts of Corporate Manslaughter and H&S offences. Director Martin Gutaj also found guilty of H&S offences.
- Sentence: £1.2m fine (CM) plus £650,000 (H&S) and costs £71,923.
- Director also sentenced to 14 months' imprisonment and disqualified from being a director.
- Company already in liquidation.

Latest Corporate Manslaughter cases

JTF Wholesale Limited

- Three members of the public died from Legionella in 2012 allegedly contracted from a hot tub at the company's warehouse and 18 others required hospital treatment.
- Charged with two counts of CM as there was insufficient evidence regarding one of the deaths.
- **Turnover:** £73m ('large' organisation).
- **Pre-tax profit:** £856,000.

Latest Corporate Manslaughter cases

JTF Wholesale Limited

- Trial was expected to begin on 19 June 2017.
- Company instead pleaded guilty to one H&S offence.
- Fined £1m plus prosecution costs of £85,000

	Starting point	Category range
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000

PERSONAL PROSECUTIONS

New Sentencing Guidelines On Gross Negligence Manslaughter

- **Gross Negligence Manslaughter**

Breach of a duty of care which amounts to a criminal act or omission and causes death:

- Medical - a practitioner falls far below the required standard in the treatment of a patient.
 - Work - employers who disregard the safety of employees.
- **Expected to come into force: December 2018**

New Guidelines

Culpability			
A	B	C	D
Starting point 12 years' custody	Starting point 8 years' custody	Starting point 4 years' custody	Starting point 2 years' custody
Category range 10 – 18 years' custody	Category range 6 – 12 years' custody	Category range 3 – 7 years' custody	Category range 1 – 4 years' custody

Personal Prosecutions

- Rise in prosecution of directors in recent years:
- In 2014/15 – 15 prosecuted;
- In 2015/16 – 46 prosecuted
- 34 of those 46 found guilty (~73% - lower than usual!)
- 12 of those 34 given custodial sentences;
- 4 of which were immediate custodial
- 2 were disqualified from being directors (for 2 and 10 years respectively)
- S 37 - Consent, connivance and neglect

Personal Prosecutions- Custody Threshold

	Starting point	Category range
Medium culpability		
Harm category 1	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 2	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 3	Band E fine	Band D fine or low level community order – Band E fine
Harm category 4	Band D fine	Band C fine – Band D fine
Low culpability		
Harm category 1	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 2	Band D fine	Band C fine – Band D fine
Harm category 3	Band C fine	Band B fine – Band C fine
Harm category 4	Band A fine	Conditional discharge – Band A fine

Personal Prosecutions – example cases

R v Master Construction Products and Mr Singh
(Micro Company)

- Employee Mr Safi Kahn killed after becoming entangled in a waste trommel.
 - No Safe System of Work;
 - Essential guards missing;
 - No emergency stop button;
 - Machine in a dangerous state.
- Company convicted of Corporate Manslaughter;
- Mr Singh convicted of the Section 2 Health and Safety at Work Act offence

Personal Prosecutions – example cases



Personal Prosecutions – example cases

- Company paid £225,000 fine (plus costs);
- Mr Singh:
 - 12 months imprisonment, suspended for 2 years;
 - 300 hours of community service;
 - Disqualified as a director for 8 years
 - Breach of this order is a further criminal offence; and
 - Ordered to pay £12,500 in costs personally
 - Plus his own legal fees, reputational damage etc.



DAME HACKITT'S REPORT NEW APPROACH- OVERVIEW

Dame Hackitt's Final Review- May 2018

- Review of fire and building Regulations in light of the Grenfell Tower tragedy on 14 June 2017.
- Interim report published in December 2017 Found:
 - Roles and responsibilities for those procuring, designing, constructing and maintaining unclear
 - Package of regulations and guidance ambiguous and inconsistent
 - Processes which drive compliance are weak and complex
 - Competence across the system is patchy
 - Product testing, labelling and marketing is inconsistent
 - Voices of residents go unheard



NEW APPROACH- OVERVIEW

New Approach- overview of themes

- New Approach:
 - Report is based around principles for a new framework which will drive culture change and new behaviours
 - Report recommends a clear model of risk ownership- clear responsibilities for Client, Designer, Contractor and Owner
 - Duty holders to be overseen and held to account by Joint Competent Authority
 - Outcomes based- not prescriptive rules and complex guidance

New Approach- overview of themes

- ‘Real Teeth’- criminal consequences
- Requires competence
- Avoids siloed thinking
- Risk Based approach to regulatory oversight- complex systems for residential multiple occupancy must be subject to a higher level of regulatory oversight.
- Transparency and audit trail
 - Current system of ‘certification’ is disjointed, confusing and not transparent
 - Classification and testing of products needs a radical overhaul

New Approach- overview of themes

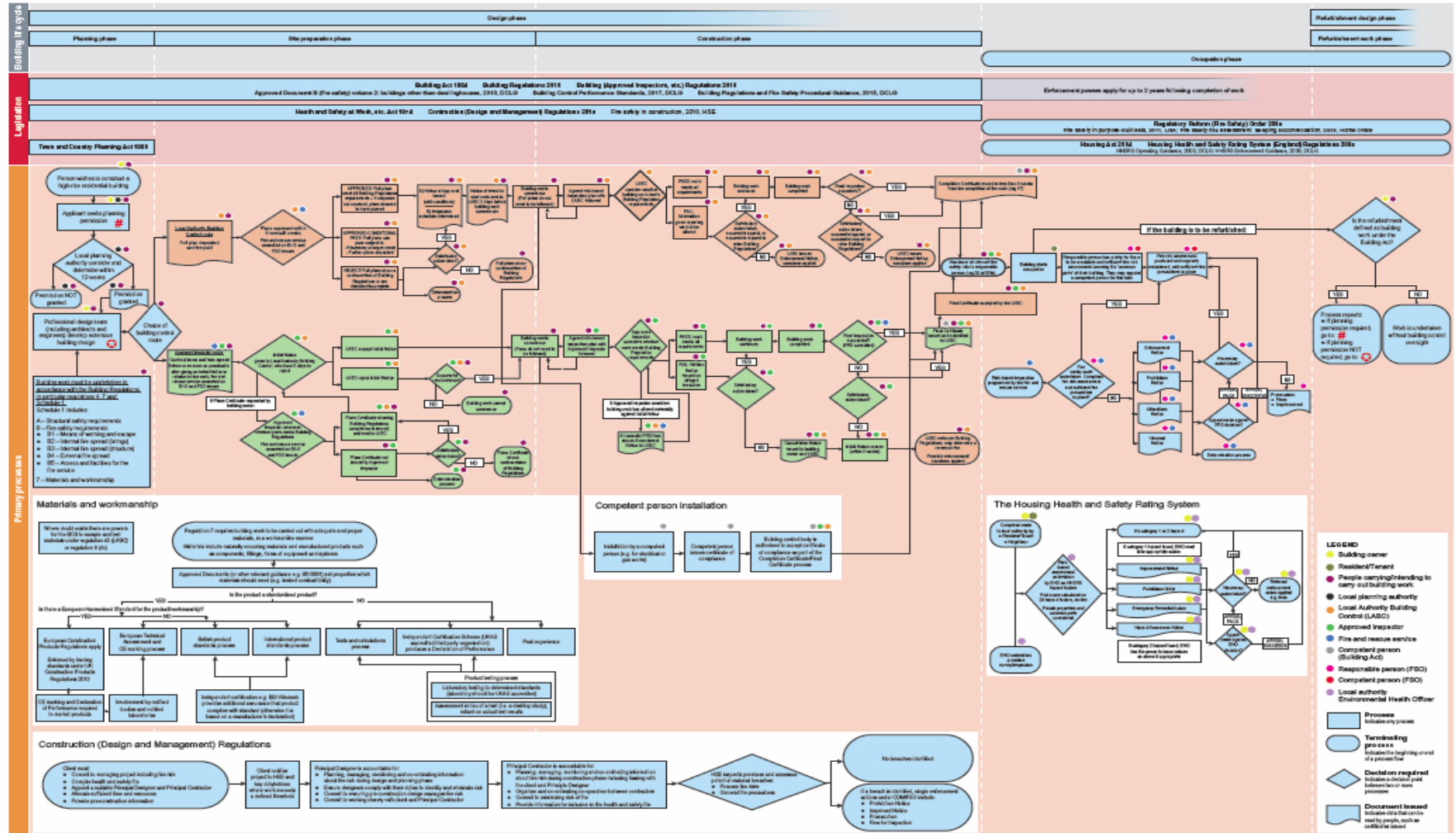
- Comparison with CDM 2015 which has delivered cultural and behavioural change in the same sector
- Report describes an integrated systemic change
- This will require legislative change and will therefore need time to implement
 - No need to wait for legislative change to start behavioural change
 - Sense of urgency and commitment is needed
- Must be applied to existing complex high rise residential buildings
- Points out a moral obligation to change and the need for collaboration and partnership

Key Parameters of new framework

- The following will be established:
- **A new regulatory framework**
 - Based in the first instance on multi-occupancy, higher risk residential buildings, 10 stories or more in height.
- **A new Joint Competent Authority comprising:**
 - LA Building Standards
 - Fire and Rescue Authorities
 - HSE
- A mandatory **incident reporting** mechanism for duty holders

Old Framework Map

Mapping the building and fire safety regulatory system – high-rise residential buildings

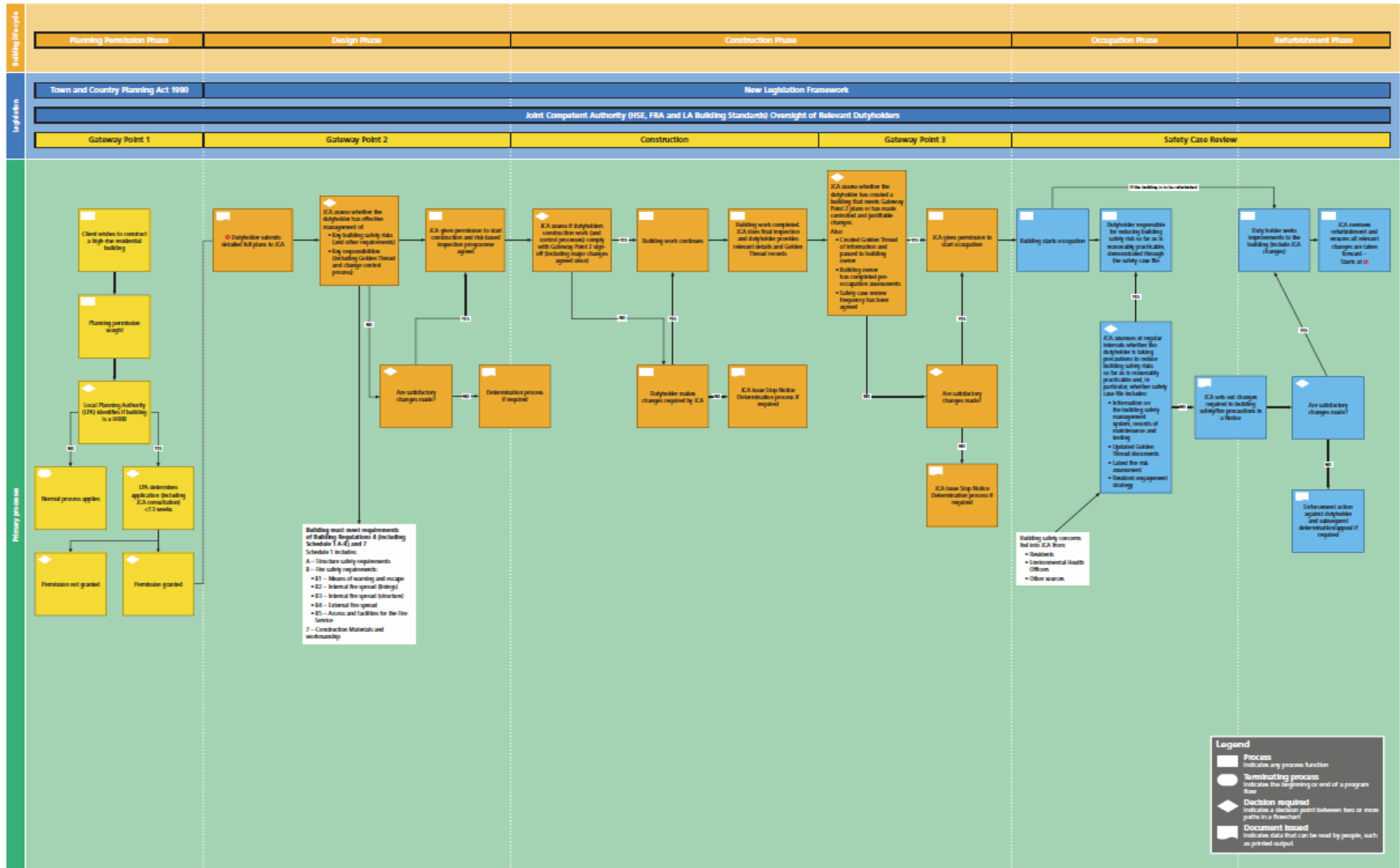


New regulatory framework

- JCA oversees building safety across the lifecycle
- One legislative framework across lifecycle
- Overlaps between legislation and regulators removed
- Specific JCA intervention points along the building lifecycle
- Self certification processes whereby those doing the work sign off on it have been removed

New Framework Map

Mapping the new building safety regulatory framework – construction and occupation of a higher-risk residential building (HRRB)

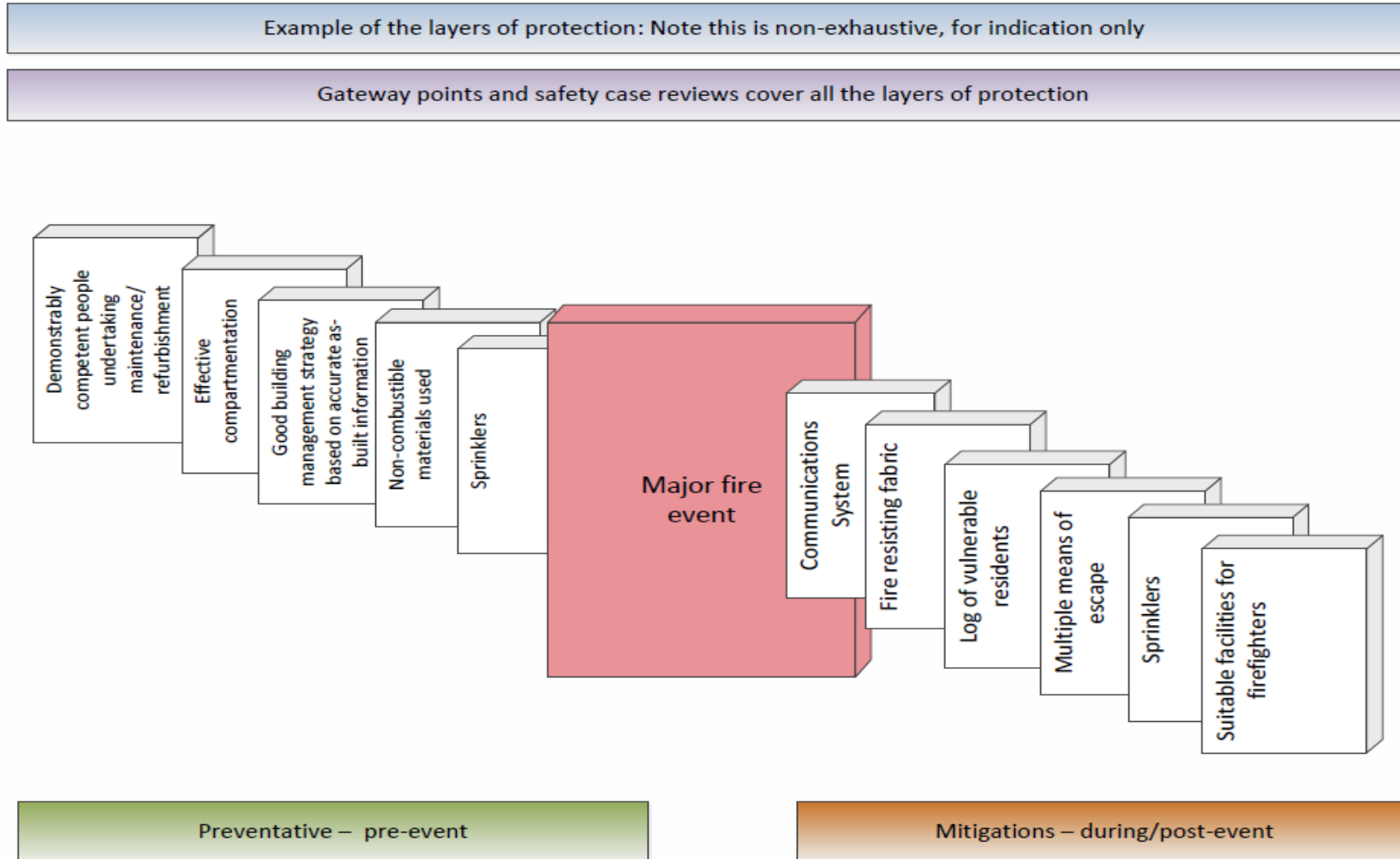


Applicability

- New and existing high rise residential properties 10+ storeys
- Estimate 2000-3000 in existence
- Some recommendations apply to a wider set of buildings:
 - Other multi occupancy residential buildings (eg less than 10 storeys)
 - Institutional Residential Buildings:
 - Hospitals, care homes, hotels, prisons, halls of residence, boarding schools.

Systemic Approach

Diagram 1 – Example layers of protection for a HRRB



Questions?

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