

CICAIR¹ Sanctions Framework Review – Consultation on Approved Inspector sanctions

by Simon Tolson

Building Regulations are under the microscope following the tragedy of the Grenfell fire in June which exposed them as unfit for purpose in their requirements on cladding, sprinklers, escape routes and fire safety. Experts have been warning for years². The Government announced an independent review on 28 July 2017 to look at the current building regulations³; it is perhaps not surprising that the body which oversees the private sector Approved Inspectors (AIs) undertook some introspection.

Within days, on the 1 August 2017, the CICAIR announced it was undertaking a further programme of work to strengthen the robustness of the regulatory activities that it is responsible for overseeing.

This programme has over the past few years included the introduction of annual monitoring and a formal audit process of AI, which came in to effect in January 2015⁴. This was followed by the introduction of a new Code of Conduct for AIs in January 2017. The current phase of this programme is a review of the sanctions framework that CICAIR operates⁵. A CICAIR sanctions review working group began this work in March 2017 and has produced a proposed revised sanctions framework and indicative sanctions guidance to support this framework. It is now consulting with industry and seeking views⁶.

Starting a consultation in August for 6 weeks is never a great plan. I raise it here as the consultation expires on 15 September 2017 and yet it has received very little coverage. The Association of Consultant Approved Inspectors (ACAI) website does not even refer to it.

The CICAIR is responsible⁷ for and maintains and operates the Construction Industry Council AI Register.

Currently the CICAIR *Code of Conduct*⁸ sets out the fundamental principles of behaviour that AIs are expected to adhere to in operating to appropriate professional and ethical standards of professional conduct and practice. AIs are also required to follow the *Building Control Performance Standards*.

Disciplinary proceedings that result from a proven breach of the current Code of Conduct do not provide for financial penalties against AIs or the awarding of costs or financial redress to complainants. I beg to ask why?

Currently legal action involving an AI or a complainant in relation to the subject matter of a complaint bars the CICAIR complaints handling procedures being progressed until that legal action has been concluded. Legal action, for the purposes of the CICAIR complaints handling process, covers disputes that are subject to adjudication, arbitration, litigation or mediation.

Disciplinary action may currently be pursued against an AI for non-compliance with the Code of Conduct. Such disciplinary action will be conducted in accordance with the 'suite of protocols' that CICAIR has hitherto published.

Sanctions Guidance, Issue 1 – January 2017 sets out the range of sanctions available to CICAIR if a complaint is upheld and/or disciplinary proceedings against an AI proved. The present sanctions available to the Registrar are based upon a recommendation from a complaint panel, disciplinary panel or appeal panel. They currently are as follows:

| Sanction Level | Sanction Type | Sanction |
|----------------|---------------------|--|
| Level 1 | Minor Breach | <ul style="list-style-type: none"> • Caution recorded on file |
| Level 2 | Serious Breach | <ul style="list-style-type: none"> • Formal reprimand recorded on file • Sanction published on the CIC website for a minimum of 12 months |
| Level 3 | Unacceptable Breach | <ul style="list-style-type: none"> • Withdrawal of approval and removal from Register • Sanction published on the CIC website for the period of withdrawal |

The new proposals go far further in an ominous way; they appear to my reading to be fundamentally flawed and will not deliver positive outcomes for the industry. This proposed sanction framework is based on systems designed to regulate the individual rather than any generally accepted malaise and fail to accommodate larger AI businesses that increasingly includes significant corporate organisations. Something I expect to increase not decrease given the inevitable growth in regulation and prescription which will follow Grenfell in the coming years.

If it is adopted in its current draft form, the effect will be to create an unbalanced sanction system delivering unintended and unsatisfactory outcomes. The content of this draft, its architecture, its language and its accessibility leave me thinking it was drafted by some Kafkaesque autocrat wanting to cure some ill others do not see at AI level and take over peoples businesses in the name of 'public good;' and 'public confidence'.

Given the seriousness and controversial nature of these proposals, I am sure there will be real concern about a number of other issues relating to this consultation such as:

- The consultation appears too narrow. I consider further steps should be taken to publish these proposals widely across all the stakeholding parties within the industry.
- The consultation period is short and pitched squarely in the holiday season. The consultation period should be extended to allow all concerned parties sufficient opportunity to fully consider the issues raised.
- The CICAIR need to explain what future steps are proposed to properly consider the consultation responses including meetings with AI Members and their legal representatives.
- Conflict of interest is an extremely important issue in the industry at present. It appears to me the drafters were thinking too narrowly and lacked a balanced understanding of the diverse constituents making up the AI community.
- CICAIR must ensure the proposals are externally scrutinised.

- External regulatory expert review and comment must be sought and the draft final proposals provided to lawyers for review and comment before Ministerial sign off on this work. I just hope the consultation feedback happens.

It appears the draft sanctions proposal is trying to adopt a DVLA driver penalty points type system and problems arise where systems designed to be applied to the individual are being applied to corporate organisations of all sizes, as a one size fits all approach never works satisfactorily.

Under the new proposals, a 'Serious Breach' or accumulation of 6-8 points over any five year period will attract a Level 3 sanction and special measures respectively, and in such circumstances CICAIR will be entitled to suspend the AI's Notice of Approval. In the case of many AIs a suspension allowing no new work to be undertaken and hence, no new income to be earned, would quickly result in the business becoming not just unprofitable but going bust¹⁰. It is plainly naive to believe that applying a suspension sanction to an Approved Inspector with the intention of generating improvement will achieve CICAIR's objective.

The prospect of an organisation of c120 surveyors accruing five minor cautions, potentially by five different surveyors, in the course of carrying out say 100,000 inspections at a failure rate of 0.005% could, not unreasonably, be regarded as exemplary. This proposed system would result in such an organisation losing their licence and say 200 people becoming unemployed overnight.

Having caused the closure of an AI it is foreseeable that the individual would then be free to join another building control business or even to apply to become an AI in their own right, and in many instances, CICAIR would be seemingly powerless to prevent this under its proposed system.

At the other end of the spectrum, a single Approved Inspector may individually accumulate 9 points in 5 years in four sanctions in the course of carrying out only 750 projects, at a failure rate of 0.53%, and be free to carry on practising. An effective penalty regime should be assessed both by its ability to firmly discourage undesirable conduct, while also ensuring that the sanction imposed in any individual case are fair and just.

Applying the same aggregated penalty points system to the largest and smallest Approved Inspector organisations is neither fair nor proportionate.

The sanctions framework is fundamentally misguided if based on the premise that closing down a Corporate AI predicated upon the actions of its employees or consultants will improve the provision of Building Control Services and the protection of its consumers.

The Building Control Performance Standards Advisory Group (BCPSAG) indicators are always judged proportionally to volume of work or number of surveyors. Any sanctions system should, I suggest, follow the same values of proportionality if it is to be equitable and fulfil the declared CIC objectives.

It is from this perspective that in my view the system fails in two of its key requirements of fairness and proportionality.

I would advocate a system capable of imposing sanctions on the individual in respect of restricting their work / practice as an employee or consultant for an AI. This is what occurs in Australia, every Building Control Surveyor has to be "accredited". A better focus on any individual who failed to meet an appropriate standard, rather than affecting an organisation as a whole save in case of gross negligence or complicity obviously.

It makes no sense for an AI to be able to simply “take the points”. If there is a problem with the actions of either an individual or a corporate body then those actions must be addressed if the objectives of the sanctions guide, being to protect consumers and improve the quality of the service provided, are to be achieved. Remedial measures should be put in place.

This proposal seems overkill. There is no apparent evidence that there are widespread abuses of the Code of Conduct¹¹ yet the draft framework and Indicative Sanctions Guidance refers to protection of the public as if AIs were pariahs²³. Given the small number of current published sanctions on the CICAIR website why require the introduction of the proposed draconian sanctions?. A system of punishment must not overlook the requirements of fairness in seeking to secure effective regulation. Seeking to limit the geographical area within which an AI can operate if an employee of an AI is convicted of “any civil, criminal or regulatory offence” has shades of parking violations being used as a pretext to walk in and take over a business.

Read the draft Sanctions Framework and the Indicative Sanctions Guidance and make up your mind.

Footnotes

1. Construction Industry Council Approved Inspectors Register.
2. Such as the Coroner after the inquest into the deaths resulting from the 2009 fire at Lakeland House who recommended a major regulatory overhaul The Building Regulations represent minimum standards - the Callcutt Review of Housebuilding Delivery (2007) said that compliance was “necessary but not sufficient, to ensure good quality.” In addition, Knowsley Heights fire 5 April 1991; Garnock Court fire 11 June 1999 lead to causes for concern.
3. It will examine: (i) the regulatory system around the design, construction and on-going management of buildings in relation to fire safety; (ii) related compliance and enforcement issues; (iii) international regulation and experience in this area . It will report jointly to the Communities Secretary Sajid Javid and the Home Secretary Amber Rudd.
4. Before this unless any complaints were lodged with CIC about its performance, once an AI is designated there was no further monitoring of its performance until it is required to apply for re-approval after five years. That to maintain the standards expected of an AI there needed to be a more regular monitoring of its performance. From my experience, I am aware that audit teams may well be other AIs and this is a concern that gives rise to conflicts of interest, as the auditors have access to information that may be regarded as sensitive or commercially confidential despite suggestions to the contrary.
5. Two documents a Sanctions Framework and the Indicative Sanctions Guidance.
6. Visit www.surveymonkey.co.uk/r/sanctionsreview
7. As the body designated by the Secretary of State in England and Welsh Ministers in Wales under section 49 of the Building Act 1984 and regulations 3 and 5 of the Building (Approved Inspectors etc) Regulations 2010.
8. Code of Conduct for Approved Inspectors revised 2.6 2011
9. It seeks to have the right (Special Measures) to co-opt specified individuals onto the management board of an AI. I can think of no other business where this could happen!
10. It is hard to envisage that following withdrawal of an AI's Notice of Approval, or following a period of suspension which results in say administration, the orderly and successful handover of potentially huge volumes of work/projects. Who would take on the work? And how would they obtain a fee for the work?
11. The CICAIR website sanctions pages are testament to this fact.
12. Numerous references to the need to maintain, among members of the public, a well-founded confidence that any Approved Inspector with whom they interact will be of unquestionable integrity, probity and trustworthiness.