

Building Control Regulations

Submission to the Department of the Environment, Community and Local Government in connection with the April–May 2015 review of the regulations

1 May 2015

SUMMARY

The defects in the present system of building control

- The present system of building control is one of “self–certification” with virtually no public oversight of design or construction. It allows residential developers and other building owners to nominate and, in effect, control the certification process. This model does not comply with international practice and has not worked in any other sector of Irish society. It will not protect the consumer.
- The role of the Building Control Authority is reduced to acting as a repository for lodged documents which will not be inspected by them for compliance with technical regulations. They have no obligation to inspect construction sites.
- The regulations are poorly drafted. They have caused confusion and difficulties in operation; with other unintended consequences such as making it impossible for self–builders to operate without risk, confusion over the thresholds for the application of the regulations and exclusion of certain groups from the marketplace.
- The regulations seek to impose strict liability on certifiers, leading to increased costs, defensive design, fragmentation of traditional project teams and unsustainable increases in the cost of the professional indemnity insurance upon which the system seeks to rely.
- The regulations have unnecessarily increased the cost of design and construction and caused delay and postponement of construction projects.
- There is no process for feedback on the operation of the system, no regularisation procedure for non–compliant construction, no system of dispute resolution and no system of ensuring compliance of materials.

Proposal for a Better System

- Instead of self–certification, establish a system based on independent inspection under the direction of the building control authorities. The system to apply to residential sector in the first instance, to be expanded later to other sectors.

- Independent inspectors should be experienced persons in the private sector, licensed by and responsible to the building control authority but employed and paid by the developer/client. Their duty is to inspect designs and construction in accordance with a code of practice and issue certificates confirming they have done so at commencement and completion of the project.

Why is this a better system?

- It will improve both design and construction by bringing independent expertise to bear on the design and construction process at no additional cost or liability to the State.
- It will operate much more efficiently and cost significantly less than the current system of self-certification, as demonstrated by experience in England and Northern Ireland where such a system has operated since 2007.
- It will level the playing pitch for compliant and non-compliant operators within the industry, spreading knowledge across the entire industry, allowing traditional contractual arrangements to be re-established while removing the constraints on self-builders and those classes of persons who are excluded from their traditional work.
- It will create the circumstances in which vital systems of latent defects insurance, feedback on industry problems and dispute resolution systems can be established.

How to implement it quickly

- For the first phase, appoint an independent expert group, similar to the Pyrites Panel, to consult stakeholders including all those who were excluded from the 2013 consultations and make recommendations for the structure and operation of the system within two months. The England/Northern Ireland system may be used as the default starting point.
- No primary legislation should be required. All of the functions are provided for in the current Building Control Act.
- Make preliminary arrangements for building control authorities to advertise for persons to act as independent inspectors. Retain the BCMS system and initiate its modification to cater for the simplified system of inspection and certification.
- Initially, apply the system to residential only as this is the sector with most risk for the consumer and most demand and need in order to get the construction industry re-started. Extend to cover other building classes as experience and resources become available.

- Request the expert group to propose a methodology and sequence for further expanding the system of inspection to other building classes, establishing systems of feedback, dispute resolution and latent defects insurance.

CONTENTS

- 1 Introduction**
- 2 What is wrong with the present system of building control?**
 - 2.1 Misguided objectives
 - 2.2 Self-Certification does not work
 - 2.3 Inadequate consumer protection
 - 2.4 Excessive Liability on Certifiers
 - 2.5 Professional Indemnity Insurance
 - 2.6 No latent defects insurance
 - 2.7 Increased Design and Construction Cost
 - 2.8 Delay
 - 2.9 Project Postponements
 - 2.10 Fragmentation of the project team
 - 2.11 Unintended effect on construction contracts
 - 2.12 No Dispute Resolution
 - 2.13 No Regularisation procedure for Non-Compliant buildings
 - 2.14 No Feedback on emerging defects
 - 2.15 Loss of livelihoods
 - 2.16 These defects in the system are endemic
- 3 Better control for less cost: an improved system of building control**
 - 3.1 Principles behind a new and better system
 - 3.2 A better system
 - 3.3 What this system is – and is not
 - 3.4 The “Independent Inspector”
 - 3.5 Paying the Independent Inspector
 - 3.6 The audit process – design
 - 3.7 The audit process – construction
 - 3.8 The audit process – use or occupation of the building or works
 - 3.9 Ancillary considerations
 - 3.10 Latent Defects Insurance
 - 3.11 “Prevention is better than cure”
 - 3.12 Comparison of the system proposed, with the financial auditing system
 - 3.13 Independent inspectors, independent auditors, and the UK building control system
 - 3.14 Getting the system started
- 4 The advantages: why is “Independent Inspection” a better system?**
 - 4.1 It will lower costs
 - 4.2 Independent inspection will drive better design
 - 4.3 Independent inspection will drive better construction
 - 4.4 The advantages to the “Consumer”
 - 4.5 The advantages to the State of a system of Independent Inspection
 - 4.6 The other outcomes of this system
- 5 Getting there: first steps to a better system of building control**

5.1 How soon?

5.2 To implement this system, what exactly needs to be done?

6 Conclusion

1 Introduction

This paper is a submission to the Department of the Environment, Community and Local Government on the Building Control Regulations in response to the announcement by Mr. Paudie Coffey T.D., Minister of State at the Department, of a review of the Building Control (Amendment) regulations 2014, S.I.9 of 2014, one year after these regulations were introduced.

The system of self-certification which S.I.9 of 2014 embodies in the Building Control regulations is fundamentally flawed. The scope of the review as outlined in the Department's public statements and as may be inferred from the consultation documents launched is not wide enough to address the serious deficiencies that exist in the regulations. Even if the issues such as the block on self-building, the 40 sq.m threshold, the cost of certification and the prevention of technicians and others from practicing are resolved in some way by tweaking the regulations, these changes will not improve the quality of design and construction, adequately protect the consumer, or remove the impediments to efficiency in the construction industry which S.I.9 has introduced.

This country needs a proper system of building control. The system presently in force is unique to Ireland. Nowhere else in the developed world is there such a system. Until a system of independent audit of designs and independent inspection of building sites is put in place, where all parties to the project can expect such independent audit and inspection, there will be no lasting improvement in construction standards.

This paper identifies what is wrong with the Regulations. It sets out a system that can and would provide for better building standards and proper consumer protection at reasonable cost that will not fall on the State. It will ensure that all parties involved in building design and construction shoulder a proportionate measure of responsibility for their work and can work together efficiently. It will empower building control authorities throughout the State to oversee the process cost-effectively.

Some elements of the current Building Control system as introduced by S.I.9 of 2014 are progressive. These include the provisions for electronic lodgement of documentation, and the requirement for certain confirmations to be made to the building control authority before a building or works can be opened, used or occupied. The changes to the system which are advocated below are not intended to remove those provisions and emphatically not to revert to some sort of "status quo ante". The system which resulted in defective construction such as Priory Hall, Longboat Quay, Newbridge and the Pyrites scandal, needs to change.

2 What is wrong with the present system of building control?

2.1 Misguided objectives

The Building Control (Amendment) Regulations 2014 are based on objectives that are misguided. They seek to introduce a system of light-touch regulation that has as its primary objectives:- the distancing of the Department of Environment, Community and Local Government (DECLG) from any liability for defects that might arise in construction; the elimination of any need for additional resources required for an effective system of building control; and the avoidance of a system that might reflect badly on the absence of an effective system of building control in the past.

We have a system that has been devised in collaboration with a limited number of industry stakeholders, in which the needs of the Department are secured by promoting the interests of those institutions, rather than the public good.

As a result, the system is one that will not protect the consumer, unnecessarily increase costs and delays in construction, prevent some sections of the construction industry from operating and place intolerable liability and cost on others.

The following outlines the main deficiencies in the system, which deficiencies have been detailed elsewhere in separate submissions to the Department.

2.2 Self-Certification does not work

The system introduced by S.I.9 of 2014 envisages that each designer, contractor and sub-contractor provides a certificate to say that what they have done complies with the Building Regulations. An Assigned Certifier, relying on these certificates, then certifies that the building complies. It is a system of self-certification, no better than the system it sought to replace. It contravenes recognised best practice for such systems of certification such as that set out in ISO 17000. This best practice requires that certification can only be carried out by someone or some entity that is independent of the designers and those who make the product.

In the case of S.I.9, the certification is entirely carried out by those who design and construct the buildings being certified. In the situation which has evolved – against the expectations of Departmental officials prior to the introduction of the regulations in 2013 and again in 2014 – third party certifiers are indeed retained by building owners in many instances. But those third party certifiers are not answerable to any public body.

Again in the case of S.I.9, the system allows a speculative house-builder to employ and pay his own “in-house assigned certifier”. This system of “speculator self-certification” offers no safeguards against the re-occurrence of disasters such as at Priory Hall.

Documents lodged with the Local Authority before and during construction are there, in the words of Minister Hogan to “give home-owners clarity, traceability and accountability”, but not to check the quality of the material submitted. The certifiers certify their own work, and the local authority minds the certificates.

The proven practice, not only across the State but internationally, is for independent scrutiny – “oversight” is the term usually used – of all exercising duties of public importance. Those duties are imposed in private and public sector alike. Ireland is no exception. Like most other countries, Ireland has maintained independent inspection systems in schools, agriculture, health and safety, food safety, to mention but a few. In recent years the State has established the Garda Síochána Ombudsman Commission to monitor An Garda Síochána; the Health Information and Quality Authority to monitor standards at the Health Service Executive; and the considerably strengthened Central Bank to replace the (failed) Financial Regulator and police the banking sector.

“Speculator self-certification” is set to deliver a repeat of Priory hall, Longboat Quay and Newbridge, until some intervention is made from outside the actors who profit from the system. The Independent Inspector is the only realistic way of getting change in the consumer interest.

It is beyond comprehension that the Government could believe that the Irish construction industry should be left to its own devices in a role of such significance to the national economy and safety health and welfare of the citizens.

2.3 Inadequate consumer protection

Of most concern, the building control system enshrined by S.I.9 of 2014 does not and will not adequately protect the consumer. Although the problem exists across the whole spectrum of construction, the consumer most at risk in this context is the person who buys a house or apartment

from a speculative developer. Not only do we have a system whereby each participant in the process certifies their own work, in the case of builder/ developer, they can appoint the key roles of Design and Assigned Certifier from among their own employees. At the completion of a project, they can still liquidate the development company and leave purchasers of properties with no practical means of redress.

Instead of preventing the defect in the first place and providing an efficient, non-adversarial system of redress and rectification, all S.I.9 does is to provide a paper trail which the consumer is expected to use so as to apply to the courts to have their problem resolved. Whether consumers who have suffered damage will be able to recover anything by this system is very doubtful, not to mention the financial risks in having to go to court in the first place. This is not a system that will protect consumers.

2.4 Excessive Liability on Certifiers

This is a complex issue but in effect, SI.9 requires that at the completion of a building and before it can be occupied, one person (the Assigned Certifier) certifies that every single aspect of the building complies in full with the building regulations. In doing so, that person is taking on the liability for any defective design, materials or construction even though he or she may have had no role in design, selection or construction of the defective element. It is asking people to certify matters in circumstances where they could not possibly know whether they are correct. This places an intolerable burden of personal liability on the certifier, which is a risk that the majority of diligent professionals are understandably reluctant to take. This burden is not imposed accidentally. The regulations set out to improve design and construction by having the certifier certify everything, and by having the certifier backed by professional indemnity insurance. But this will not work, because of the impossibility of seeing everything; and because those who actually build or supply elements of the work, may distance themselves from the consequences of their own non-compliance.

2.5 Professional Indemnity Insurance

As a means of providing redress to consumers in the event of defective construction, SI.9 envisages a process whereby consumers who suffer damage as a result of defective construction will take action in the courts against the Assigned Certifier and recover from that person's professional indemnity insurance (PII). This is a wholly inappropriate means of providing redress to consumers. Aside from the risks of going to court in the first place, PI insurance operates on a "claims made" basis. That means that if the

insured person ceases to pay the premium after the building is completed, the insurance ceases to exist. The consumer is then left with no redress.

One of the most frequent reasons for discontinuing to provide PII, is the cost of that insurance. Since the regulations came into force last year, the cost of PII has increased steeply. On a like-for-like basis at renewal time, architects are being charged year-on-year premium increases of up to 37% on pre SI.9 costs.

Of more concern will be the time, which is coming, when the underwriters refuse to provide professional indemnity cover in respect of “Assigned Certifier” and “Design Certifier” services. Such a situation occurred some years ago when the PII insurers decided to no longer offer cover to architects involved in the handling of asbestos products on construction sites and more recently Pyrites. The basis for Insurers’ decision to withdraw cover will be a loss on their underwriting activity connected with these risks. At that point, the Certifiers will be faced with no cover for certificates written in past years, for, as has been noted PII cover is on a “claims made basis” and lapses if a policy is not renewed or if the policy exclusions are changed.

We advise that the Department’s “Information Document No. 3 – Professional Liability in the context of the Statute of Limitations and the Building Control Act 1990”, published in connection with this review, is gravely flawed. It shows little understanding of the realities of construction sector liability or of how construction sector litigation is conducted. It shows no knowledge of how professional indemnity insurance underwriters conduct the defence of and settle claims, whether or not these are justified, because to settle claims is frequently cheaper than to defend them; it shows no understanding of how – when several defendants are involved – the one with professional indemnity insurance is the principal target, and the principle of joint and several liability ensures that the “last man standing” – who is invariably the insured professional – pays for the entire; it shows no awareness of the commercially driven nature of insurance and how premium income must rise to cover the cost of settlements. The paper seems more concerned to “show there’s no problem with liability” than to examine the issue calmly and openly.

The Information Document’s averral that the Building Control Act prohibits civil proceedings on the grounds of non-compliance with the building regulations (alone) is correct. However, litigants are as aware of this as everybody else. Proceedings are brought on grounds such as the cost of remedial works required to achieve compliance.

The ultimate irony of this situation is that the system of insurance on which SI.9 relies to protect the consumer is being rendered unaffordable by the

excessive liability that the system imposes on those who act as certifiers. It is self-defeating.

2.6 No latent defects insurance

The primary objective of any system of building control should be to prevent defects from occurring in the first place. In addition to that, it is normal in all developed countries to have a systems of latent defects insurance that protects the consumer from the cost of repairing defects with a “no-fault” insurance that also covers the loss of finance in the event of the developer going bankrupt or otherwise failing to complete a development. Such a system is known as Latent Defects Insurance. The cost of this insurance is borne by the developer at the outset of the project and usually covers the building for 10 years after it is complete. Defects in buildings that manifest themselves after the building is complete are rectified by the insurer, without the building owner having to go to court. This is a vital element in any system that seeks to protect consumers.

Not only has the Government failed to promote the establishment of such a system in the context of the renewal of the building regulations , there is reason to believe that major international financial institutions are unwilling to back such a system in Ireland. All the “talk” in late 2013 and the early part of 2014 about LDI underwriters entering the Irish market has evaporated. Those underwriters have decided that the risks of defects in construction in Ireland are so high as to prevent them from establishing in this market. There can be little doubt that the absence of a proper system of building control has contributed to this obviously jaundiced view of the construction process in Ireland. Thus the Irish consumer is denied a protection that is deemed to be essential in other countries.

Until the self-certification system in S.I.9 is replaced by a proper system of independent audit and inspection, there is no chance of an affordable, sustainable system of Latent Defects Insurance being available to home-builders in Ireland. This is truly a scandalous situation.

2.7 Increased Design and Construction Cost

It is accepted that an improvement in the quality of buildings may of itself lead to an increase in cost. SI.9 has however imposed unnecessary additional cost because the workload on the certifiers in assembling papers, and because – no matter what the Department say to the contrary – the liability on the certifiers, results in the certifiers having to charge for the additional time, liability and the cost of some future professional indemnity insurance policy premium.

It has also imposed unnecessary cost due to “defensive design”. When a designer knows that they will be required to certify compliance, and when faced with the option of an innovative design or one spelled out in one of the Technical Guidance Documents, they will choose the defensive option. There is every incentive to do so, and no incentive for them not to.

These costs when added together have been demonstrated to amount to as much as 10% of smaller projects and 4% on larger ones. These costs are not only on “self-build homes” which the representatives of that sector have spelled out in detail. The evidence is also in the statements of the Planning and Buildings section of the Department of Education and Science.

This unnecessary cost is imposed on consumers and tax payers, to be sure. However, it is also imposed on small businesses which have the extra specification and certification costs resulting from S.I.9 – even though fit-outs, for example, have neither resulted in any widespread construction defect, nor cost to the taxpayer. A hidden – because dispersed – cost on many.

2.8 Delay

Problems such as lack of credit, shortage of serviced land, and development control difficulties are playing their part in hindering the re-start of the Irish construction sector. However, the building control regulations are resulting in smaller projects being postponed or in falling out of the regulatory net, in high charges being imposed for certification roles, when indeed these roles are being assumed at all, and in significant project delays.

It has caused delay because the time periods imposed for validation of the “Certificate of Completion” before a building or works may be opened, used or occupied must be added onto the end of short-timescale jobs such as many fit-outs; and must be factored onto all projects, no matter the timescale. Other elements of the Building Control system such as the separate need to obtain a Fire Safety Certificate and a Disability Access Certificate need to be properly integrated into a single streamlined process is long overdue. The opportunity to do so was lost in the drafting of S.I.9. It is little wonder that Ireland has slipped further down the World Bank league table comparing “ease of construction permits”. It is now ranked at 119th in the world, well below the UK, which is ranked at 24th.

2.9 Project Postponements

The system of regulation embodied in S.I.9 has caused projects to be postponed because the cost and timescale factors discourage many building owners to comply with their statutory duty. The evidence for this is in a

situation where the number of Commencement Notices lodged in the first three months of 2015 is just 3% above the recession–bottom figure of 2013; and where 8,900 dwellings were completed last year, close to the lowest number ever recorded since 1964, and to be compared with the target of 25,000 houses set in 1976 by the then Minister, Mr. James Tully, T.D., when the Irish population was 40% smaller than it is today and the Irish economy was less than one–third today’s size.

2.10 Fragmentation of the project team

In order to function efficiently, construction project teams must work as a team, co–operating with each other to the maximum extent. The need was identified most clearly in the Latham Report, “Building the Team”, on the UK Construction industry which had descended into gross inefficiency and low productivity through the pervasive influence of disputes and litigation that afflicted the industry in the 1990s. SI.9 has all the ingredients to generate a similar climate of disputes and litigation in Ireland. Instead of creating an environment of trust and co–operation among the members of the design and contractors, it is destructive by setting one participant against another, each trying to protect themselves against liability for the mistakes of others. The evidence for this is to be seen in the alternative wordings of the “Ancillary Certificates” being fought over by design consultants, main contractors, sub–contractors and suppliers. Those “certifying” want wordings to shrug their liability off; those relying on the certificates want wordings which impose – as in the Certificate of Completion – strict liability for all defects, no matter how trivial. This is no way to run a 21st century construction sector.

Seeking to transfer the liability of some participants onto others in the team, because those others may have insurance, is neither equitable nor will it work.

2.11 Unintended effect on construction contracts

The implications of the S.I.9 system for construction contracts (“RIAI” and “GCCC” alike) and for design services agreements are only now being addressed. The complexity of ramification is not yet understood by those responsible for these agreements. What happens if the Assigned Certifier, who is also the architect and contract administrator, refuses a Certificate of Practical Completion or Substantial Completion?

2.12 No Dispute Resolution

Recognising that the construction process is complex and highly technical, other countries have statutory systems of arbitration and mediation. These

are staffed by people who are technically qualified and specialised in the legalities of construction contracts. Disputes that are referred to them are dealt with efficiently and at a fraction of the cost and delay that full court hearings would entail. The opportunity to introduce such a system was provided in the drafting of SI.9 but instead, the matter was ignored and the industry and aggrieved consumers are left with no alternative but to go to the courts in cases of dispute.

2.13 No Regularisation procedure for Non-Compliant buildings

In the event that a building or the extension or alteration of a building, to which the Building Control Regulations apply is constructed but the procedures, such as submitting a commencement notice in time, are not complied with, there is no means of regularising the mistake afterwards, even though the building may comply with all of the technical requirements of the Building Regulations. The only way to regularise the building is to demolish the building and start again. A system such as “retention” should have been included.

2.14 No Feedback on emerging defects

An essential component of all effective building control regimes is a system of feedback whereby repeated instances of non-compliant design, materials or construction are reported to a central authority and action can be taken before they become widespread. Catastrophic events such as the Pyrites problem could have been intercepted and preventative action taken at a much earlier stage than actually happened, had such a system been in place in Ireland. Today, the problems with low-cost imports of Oriented Strand Board (“OSB”) and of Water and Boil-proof Plywood (“WBP ply”) should be being flagged to the sector by a competent central agency. This is not happening. Conscientious designers and contractors are forced to compete with those using cheap shoddy materials which are storing up trouble for years to come.

The system of self- certification imposed under SI.9 where individual designers and contractors may be unaware of their own mistakes will not be reporting them to anyone. Aside from that there is no provision within the system for such reporting and co-ordination of action.

2.15 Loss of livelihoods

SI.9 has resulted in the exclusion of many qualified technologists and others from the provision of design services. The Chartered Institute of Architectural technologists, the Architects’ Alliance and others have highlighted these “unintended consequences”. But admitting these persons,

so damagingly shut off from their facility to earn a living, to some sort of “extended certifiers’ register for small projects” will not solve the problem of high cost or indeed of better building. This is because those people, too, like the 65% of RIAI Members not acting as Assigned Certifier, will come quickly to realize that the cost and liability attaching to providing Assigned Certifier services isn’t “worth it”.

2.16 These defects in the system are endemic

“Tweaking the system” as is implied by the limited scope of the documentation issued in connection with this review will not solve the problems listed in this paper. S.I.9 embodies fundamental contradictions at its heart, as follows:

The system relies on the Certifier accepting total liability. The less clear this liability, the less use is the system to the affected consumer. But the clearer the liability, the less likely the Certifier is to be able to get PII – and without PII, the Certifier is useless to the consumer.

The system allows the contractor to shelter behind the designer and the Certifier. This allows responsibility for defective materials to be moved from the person supplying those materials. Nowhere, ever, has the distancing of a person from responsibility for their actions made their acting responsibly more, and not less, likely.

It is accepted that if the present system of building control is continued, these contradictions at its heart will yet take some little time to emerge. But an unbiased reading of the problems is sufficient to see them. In years to come, when the disasters of Priory Hall or pyrite-infected material recur in buildings now being built, let nobody say “we didn’t know”.

3 Better control for less cost: an improved system of building control

3.1 Principles behind a new and better system

An amended system of building control should deliver better standards of design and of construction.

It should cost the consumer or building owner less than the present system.

It cannot result in an increase in public sector employment numbers, however desirable in terms of raising standards this would be.

The solution must be self-funding. No solution which imposes further direct cost on the State will be acceptable. This includes fully funding the building control authority for any and all cost it incurs in administration.

The system should not place primary responsibility for construction defects on the State. Each actor in the design and construction process must be identifiably responsible for their own work and answerable for what they do.

A solution must be clear, identifiable, and command the support of all interested groups, most particularly those that were excluded from the consultation process which led to S.I.80 of 2013 and S.I.9 of 2014.

A changed system should not require primary legislation, as this will take too long. (Legislative change planned for statutory registration of contractors need not be delayed, but need not hold up a new and better system of building control.)

The solution must be now. These problems need to be sorted now to make an identifiable impact in 2015 on construction sector output, in particular for speculative dwellings in Dublin and for self-build homes elsewhere. There isn't time to wait a year for a detailed in-depth review of a system which everybody already knows isn't working. It is suggested that the solution in this paper could be implemented within three months of a decision to do it.

3.2 A better system

It is respectfully suggested that a system of independent inspection of design and construction under the control of the State is the core principle on which an efficient and effective system of building control should be established. Were such a system to be adopted, it would allow the development of the other elements (regularisation, disputes resolution, escalating intervention and latent defects insurance) to take place. It can be set up and operated in a manner that will have no significant cost to the State and would also protect the State from primary liability for defects in building design and construction.

Independent inspection of designs and of construction sites, by trained inspectors paid for by the building owner, and reporting to the building control authority.

3.3 What this system is – and is not

The system which this paper proposes is about reducing cost to the consumer and to small businesses. It is about better auditing of design, better inspection of construction, and about better delivery of good building. It is about reducing the future cost to the State of remedying future defects. It is about getting home-building moving again.

This proposal is not about reducing standards of design or of construction.

The system is not the “self–certification” of the present system. It is not the “self–certification by speculative developers” which the present system facilitates. It is not the “Third Party Inspector” system which some building owners are adopting in response to construction professionals’ unwillingness to operate the present system.

The system proposed involves the Building Control Authority (BCA) to oversee the whole system, to select the best inspectors on a competitive basis, to monitor the inspectors’ performance, and to build up a repertoire of experience over many building designs and construction sites. The BCA would also keep a register of commencements and completions using the BCMS system, co–ordinate the timely feedback and information on materials and defective materials to be disseminated to the industry nationally.

3.4 The “Independent Inspector”

The key to getting better designs and better buildings at a sensible price is to **re–involve each local authority in a meaningful way in the control and enforcement of the system** for inspecting designs and construction works.

A number of building control authorities have already established ad hoc panels of independent inspectors to review, report and make recommendations on applications for Disability Access Certificates.

It is proposed that new regulations provide for a register of “Independent Inspectors”, maintained by and answerable to each Building Control Authority. Such a register could be county–by–county or nationwide.

This register to be open to architects, architectural technologists, appropriately qualified engineers, and building surveyors, with appropriate qualifications and adequate experience. Admission to be competence–based, with knowledge of building regulations, building control regulations, and building construction.

Many state agencies, including local authorities, already operate panels of professionals, chosen on a competitive basis and with cost as a factor in any admission to the panel.

The new regulations to require the building owner/developer to appoint and pay for an Independent Inspector from the register and to notify the local authority of the appointment.

As a condition of being registered, the Independent Inspector would be required to carry an appropriate level of professional indemnity insurance for this work.

The Independent Inspector audits those residential designs to which the regulations apply for compliance with building regulations; and inspects the corresponding residential construction works for compliance with building regulations.

Audit of designs includes audit of compliance with Parts B and M for one-off houses.

3.5 Paying the Independent Inspector

In all circumstances, the cost of the system should be borne by the Owner/ Developer. Several methods of paying the Independent Inspector can be envisaged. The most appropriate model would be developed in conjunction with the building control authorities.

One straightforward model for payment would be for the building control authority to place a charge on the building owner at the stage of commencement notice or, levy an annual licence charge on the Independent Inspectors as a condition of their being on the relevant panel in order to cover the cost to the Building Control Authority. The licence charge should cover the cost to the Building Control Authority, not only of managing the panel, but also of random audit by the BCA of the Inspectors and their work. In all cases the building owner would pay the Independent Inspector directly for inspection of drawings and construction sites.

3.6 The audit process – design

As is now the case, the building owner would appoint whatever designers they see fit.

Those designers would design in accordance with their brief and in compliance with the building regulations.

The contractor will continue to build in compliance with the contract documents and in compliance with building regulations, as routinely happens on well-organized buildings. The system should also require periodic inspection of the construction works by the designers as would be normal for other sections of industry.

The building owner will choose an Independent Inspector from the building control authority panel.

To have the design audited, the building owner pays a “design audit fee”.

On all projects subject to these regulations, a set of full technical design drawings and specifications will be needed for the Independent Inspector’s audit. The building owner will be free to choose who prepares these

documents, and where a full design service has been commissioned, this will be the design team; but the documents will have to pass examination by the Independent Inspector. This will inevitably bring better design, more consistently applied across the country.

The Independent Inspector, having carried out an inspection of the design documentation, issues his or her report to the Local Authority along with a commencement notice, confirming that he has inspected the design and construction and found nothing wrong. If the Independent Inspector finds non-compliant design, he refuses to issue the Design Report until he has been given amended design drawings.

If the design does not pass the design audit, the building owner must pay a “repeat design audit fee” to have the design vetted a second time. Such a device will rapidly improve the compliance of building designs with the building regulations.

3.7 The audit process – construction

The building owner serves a Commencement Notice and pays the appropriate fee.

Depending on the building type, there will be a set of milestones for inspection. (This is the system which prevailed for many decades under the Dublin Corporation and other local authority building bye-laws.)

The Independent Inspector carries out milestone inspections of all of construction sites to which the regulations apply. The number and extent of inspections will vary from one project to another. The appropriate number and nature of inspections should be risk based, having regard to international best practice and incorporated in a code of practice.

To the extent that is reasonable, the site inspections involve the works, materials, components and paperwork for compliance with building regulations. If the Independent Inspector finds non-compliant construction, he informs the contractor and the architect in the first instance.

Non-compliant construction requires a repeat inspection, and incurs a “repeat construction audit fee” to be paid. This device will sharply and quickly result in building construction becoming compliant with the building regulations.

In the event that no satisfactory action is taken to rectify the problem, the Independent Inspector should have an obligation to escalate the problem by reporting it to the Building Control Authority who in turn should have the power to issue an enforcement notice, stopping the works and requiring the defective construction to be rectified.

In addition to this, the Building Control Authority profiles risk, and inspects a small number of designs and building works as indicated by its risk analysis, to ensure that the overall system is working properly. This keeps the Independent Inspectors on their toes.

The duty of the Independent inspector is to carry out the inspections of the design and construction in accordance with the code of practice and to issue a report that he has found nothing wrong. He should not be required to give a “guarantee” of compliance but merely to have used reasonable skill and care in carrying out his tasks. If he is negligent in respect of those duties he can be sued under his PI insurance and removed from the register of Independent Inspectors.

3.8 The audit process – use or occupation of the building or works

No building or works may be opened, occupied or used until the Independent Inspector has issued his report to the building control authority, with a copy to the building owner, to confirm that in his opinion the premises is so fit.

This simple device will drive better construction standards for the consumer – the private home-buyer and in particular the first-time home buyer. Under S.I.9, the developer’s in-house engineer, building surveyor or “tame architect” can issue a Certificate of Completion with no independent verification of the condition of the building. The independent issue of a Certificate (or Declaration) of Habitability is seen in other Common-Law jurisdictions and for good reason.

3.9 Ancillary considerations

The system should involve the Independent Inspector signing Declarations, not certificates. A certificate is a document to be issued when the person signing it is certain of what it says. The “certainty” in the S.I.9 system is an attempt to arrive at better quality by imposing a degree of liability intended to focus the mind of the certifier. This will not work, firstly because it is not possible to be certain of something where one is relying on the word of others, and not possible to be certain where one has not seen with one’s own eyes. It also will not work because the system currently in place requires the Certifier to take responsibility for the construction work, and allowing anybody evade responsibility for their actions is not conducive to having them act better.

If it is felt that to incorporate Declarations in the revised system would require primary legislation – they might be titled “Certificates” – the same as Fire Safety or Disability Access Certificates – but with an appropriate wording

that the person signing has audited the design or the construction and observed nothing which is not in compliance. The wording of the “Declarations” to replace the present certificates should be clear, unambiguous, and sensible. The models used in other Common-Law jurisdictions might readily be used with little adaptation.

3.10 Latent Defects Insurance

The purchasers of all speculatively developed houses and apartments should be protected by a credible system of insurance against financial collapse of the developer/builder or non-completion or significant defect arising within 10 years of the completion of the building by a mandatory scheme of latent defects insurance.

Latent Defects Insurance, paid for by the developer with a one-off up-front payment, is put in place to pick up any defects which get past. This insurance should be compulsory in the speculative residential sector. It might not be compulsory in the “self-build” residential sector, although many self-builders might welcome its availability. The detail of such insurance needs further discussion.

It is widely known that stakeholders have sought in the past year to interest LDI Underwriters from abroad in the Irish market arising out of S.I.9 and that the underwriters have not advanced any plans to invest. A primary reason for this is the extent of the liability attaching to the Certificates as currently worded and to the lack of meaningful involvement on the part of the building control authority. The underwriters have concluded that they cannot offer LDI at any reasonable price which is still commercially advantageous. It is submitted that this will not change, and that no reputable LDI underwriter with a long-term commitment to the Irish market will appear, until the S.I.9 system is changed to a model along the lines in this paper.

3.11 “Prevention is better than cure”

In addition to enforcement, the Building Control Authority should oversee a system of prevention of defects based on feedback from the independent inspectors and other sources. This could be set up readily with an extension of the BMS management system. If such a system existed, it could “flag up” the difficulties now emerging with shoddy materials: the OSB and WBP ply mentioned above: difficulties which the present system leaves to the diligence of the individual architect or engineer to uncover.

What practical chance is there for single professionals to become aware of the problems with such materials? A practical national system of control of

building materials needs to be established, in conjunction with the warning system for emerging construction problems.

3.12 Comparison of the system proposed, with the financial auditing system

The system of Independent audit of building design and construction resembles the system of independent audit of company financial accounts in Ireland and elsewhere. A company has an internal accountant. In small companies this may be a part-time or unqualified bookkeeper. In large companies it can be an entire accounting branch. These people “keep the books” and prepare the annual accounts.

In simple building projects, there is now often a less-than-fully qualified designer. In other projects, there may be a full design team. This parallels the company accountant system.

Backed by law, the independent financial auditor (chosen and paid by the company) inspects every company’s annual accounts. If the auditor is satisfied, he signs off on them. If not, the company must provide more or better information and, if necessary, pay for this. It would be the same with the building design. If the Independent Inspector is satisfied, there is no problem. Otherwise, the building owner must provide more or better information and, if necessary, pay for this.

The financial accounts are lodged to the Companies Registration office. The auditor is paid for by the company but is answerable to the State. The auditor is not responsible for the complex task of preparing the accounts in the first place: their sole task is to check for financial probity.

3.13 Independent inspectors, independent auditors, and the UK building control system

A developer wants to build a building. The Independent Inspector inspects the design and the construction and signs off on them. The designs are lodged at the Building Control Authority. The Inspector is paid for by the developer, and is answerable to the Building Control Authority. The architect, engineer and builder have the complex task of designing and building the building; the Inspector’s task is to focus exclusively on compliance with building regulations.

The Independent Inspector would prepare a **periodic report to the local authority on “systemic faults” identified**. The local authorities would collate, summarise and publish these reports. This would act as an early-warning system in the event of particular faults emerging. Such a reporting mechanism would have “caught” the fire-stopping and aggregate problems which led to Priory Hall and the pyrites failures at a far earlier date.

The Independent Inspector system proposed in this paper is not an untried system. It resembles the “Independent Inspector option” in the building control system in Northern Ireland, as well as that in England and Wales, where it has been in operation for many years.

3.14 Getting the system started

To start with, the system would apply in the speculative residential sector. This is because the main failures which led to the introduction of S.I. 9 arose there, and because the private buyer of a speculatively-built dwelling is the most vulnerable person in the entire construction sector.

The system could apply also to the self-build dwelling and one off private dwellings although this should be the subject of discussion with relevant stakeholders. Fire safety and disability access certificates would still be required for apartments.

Subject to review in say 5 years, all other building design and construction work to remain subject to building regulations, fire safety certificates, disability access certificates and the full pre-2014 regime.

Otherwise, suspend the present self-certification system, with a view to rolling out the independent audit system as soon as it has been bedded down for residential projects.

4 The advantages: why is “Independent Inspection” a better system?

4.1 It will lower costs

It is now accepted that the system which S.I.9 has set up is resulting in additional costs of up to €40,000 on a private once-off house. This is due to a combination of (a) fees to the Assigned certifier; (b) increased costs of “defensive design” to comply with regulations; (c) certification charges by contractors and subcontractors; (d) management costs by main contractors.

To seek to impose a cap on Assigned Certifier fees will not solve this problem. This is because the Assigned Certifier fee is only part of the problem. Unless the workload and liability of the Assigned Certifier role is codified and reduced, any new Assigned Certifiers will soon be charging as much as the present ones. (Information Document no. 3, dated April 2015, issued by the Department of the Environment, Community and Local Government in connection with this review, understates significantly the reality of the liability attaching to the Assigned Certifier role. Professionals considering undertaking this role have come to realise as much, and this Information paper will not make them change their minds in this regard.)

By setting up a panel of Independent Inspectors, linked to agreed fees (as already happens where building control authorities retain Part M DAC inspectors or where An Bord Pleanála retains private-sector planning inspectors or fire consultants to review projects for compliance with Part A) the fee can be equitable; the Independent Inspector removes the impetus to defensive design; and the main contractor management cost for the self-builder can be eliminated.

The cost to the State is minimal. The developer or building owner pays the fee of the Independent Inspector. The only cost to the State is to maintain the register and monitor the operation of the system. This could be funded through an appropriate application fee and could probably be achieved with no increase in resources over those currently employed in this sector.

4.2 Independent inspection will drive better design

Currently, architects and others engaged in the design of buildings only spend a small fraction of that time studying the building regulations which in some instances are very complex. They also have numerous other pressures on them in relation to the project. Independent inspectors on the other hand whose sole duty is to check for compliance with the Building Regulations are much more knowledgeable on the requirements and become quite adept at identifying where defects are likely to occur. In order also to carry out an audit of the design, it is necessary to prepare a full set of design documentation, a practice which is easily avoided in the present system. The **learning experience for a young designer** of having their designs audited by an experienced architect or engineer will be intense and immensely fruitful. This will drive better design standards, especially where the young architect's client has to pay a "repeat design audit fee" to the local authority. Experienced inspectors will raise the standard where it is clearly below the norm, they can also help reduce costs by suggesting alternative solutions that are known to work well for complex construction details. This levelling of the pitch and the transfer of knowledge and information is a compelling reason for adopting independent inspection.

4.3 Independent inspection will drive better construction

As in the case of the designers, the **learning experience for a contractor** is to have the experienced local authority-backed Independent Inspector, who has inspected many such sites and knows what to look for, arrive on site, and concerned with nothing except building regulations compliance.

This inspection will be extremely effective in direct enforcement, and by the imposed raising of standards on non-performing sites and contractors will go a very long way to preventing a recurrence of the defective residential buildings which have blighted the country. Most importantly, it will also level the playing pitch and protect good contractors from having to compete with those who cut corners.

4.4 The advantages to the “Consumer”

By “Consumer” is understood:- the private person buying or long-term renting their own home. The private citizen with limited financial resources, for whom the purchase of a new home is a huge commitment, with huge emotional and social importance. The changes to the building control system which S.I. 9 brought into effect were precisely to provide this person with additional protection. The system in this paper is better for that person than the system in S.I. 9. This is the ultimate and only justification for changing the system.

The system delivers better building in the first place. The person who buys or rents a new home is certain of getting independent third-party audit by experienced professionals, answerable to the local authority. This makes the likelihood of building defect more remote.

The consumer has neither the resources, either financial or emotional, to engage in litigation over building defect. S.I. 9 requires this, as it relies upon the consumer proving negligence by the assigned certifier – or on the certifier’s insurers deciding to settle a claim without it going to hearing – and relying on the certifier’s professional indemnity insurance policy to then pay for making good any defects. The proposed system protects the consumer from loss with a no-fault system of redress and no litigation is needed.

By reducing the incidence of defect, and by reducing the need for litigation, these proposals will reduce the risk of defective building and create the environment in which Latent Defects Insurance will become viable. It will reduce the cost of the insurance needed to make good defects and to pay the legal costs. This reduces the costs in the entire system which, in the speculative residential sector, the house purchaser must ultimately pay for.

4.5 The advantages to the State of a system of Independent Inspection

The system makes the **best use of the existing building control officers** whose inspection and enforcement powers are augmented by colleagues working side-by-side with them and reporting to the local authorities. Building Control Authorities will re-establish a meaningful role in the whole process.

Because the inspections are undertaken by licensed professionals from the private sector and at no cost to the State, there will be no significant cost or employment burden on the State.

The primary liability for defects will still fall on those who designed and constructed the building and, where appropriate, on the inspector who carried out the inspections on the design and construction. This will remove the Building Control Authority and its staff from primary responsibility for defects, which would otherwise arise.

The system will establish a culture of compliance across the whole industry which will encourage the introduction of proper systems of Latent Defects insurance.

A less bureaucratic and more straightforward system will help restart construction, particularly housing.

The system will allow the self-build sector to re-start their activity on the same basis as the rest of the construction industry.

4.6 The other outcomes of this system

S.I. 9 was introduced to solve problems in the residential sector but affects all construction projects of any significance. The unintended adverse consequences have now been identified as considerable. Revoking S.I. 9 and reverting to the status quo ante for all non-residential projects **solves all of those problems.**

The system will deliver better design and construction, not just more paperwork. This is its key and over-riding advantage. Experienced Independent Inspectors, working across a multiple of sites, designs and contractors, will spot problems and give advice. This is better than the self-certification of design and construction in law since the introduction of S.I. 9.

It gives the State an **additional layer of protection.** The Independent Inspector with annually renewed and proven professional indemnity insurance stands between the building defect and the State.

It is only since the publication of S.I. 80 of 2013 – as since revoked and replaced by S.I. 9 – that many problems latent in the present system have become apparent. This new system solves those problems, as follows.

The system is competence-based. It allows **experienced architectural technologists** whose livelihoods are undermined by S.I. 9, to register and act as Independent Inspector. For this reason, **the proposal is better for the architectural technologist.**

The system solves the self-builder issue. It gives the self-builder a straightforward independent inspection system which he pays for, the same as anybody else. If his designs are good enough – they pass, at no cost to him. If they are not good enough, he must prepare an adequate design the same as anybody else, however he so chooses. If his building is good enough when the Independent Inspector arrives – that is fine. If not, the self-builder must rectify the defects the same as anybody else. For this reason, **the proposal is better for the self-builder.**

The system solves the FDI issue. By revoking S.I. 9, it allows the technologically advanced FDI project proceed under the old system of self-certification, as is better for many reasons: protection of intellectual property; facilitation of technically advanced design; removal of uncertainty around project completion, handover and occupation. For this reason, **the proposal is better for FDI projects.**

The system is better for small businesses. By revoking S.I. 9, it allows the straightforward fit-out, extension and other non-residential projects proceed under the old system of self-certification where there is no evidence of widespread problems of non-compliance. This is better for many reasons: lower cost; removal of uncertainty around project completion, handover and occupation, not only for premises such as hotels, pubs and shops where certainty of opening date or around licensing hearings is vital, but for all such businesses.

The system of independent inspection would require **no change to existing construction contracts** and hence will remove the delays (and impact on sector employment) which were predicted and which are already emerging. The Independent Inspector operates independently of the contract administrator (Architect or Engineer) and has statutory authority.

Thresholds for the application of the regulations to put this system into effect should be subject to review at some pre-determined date: say, in 5 years from initial implementation.

5 Getting there: first steps to a better system of building control

5.1 How soon?

There is no more time to waste.

The number of dwelling completions in 2014 was about 8,900. This is the lowest number of completions since the nineteen-fifties. On a “rate per 100,000 inhabitants” it seems the lowest for decades more. There is a crisis

of housing affordability which is driven by shortage. If the banks were lending more openly, the shortage would be even more acute.

The system is broken, and it needs fixing now.

5.2 To implement this system, what exactly needs to be done?

In order to properly study the proposal in this paper, it is essential that it be taken forward by a new task group of experienced people under an independent chairman, as was done with the Pyrite Panel. This task group should take into account the views of a wider cross section of those involved in and affected by the construction industry than was the case in the last review. (The “S.I.9 stakeholders” created the problems embodied in the present system. It is not realistic to think that those who spent three years negotiating the present non-functioning system are capable within three months of changing it to work.)

The task group to consult all stakeholders, including those not consulted prior to the existing legislation. These include the Departments of Finance, Health, and Education and Skills; the Irish Building Control Institute; the Competition Authority (now including the National Consumer Agency), IDA Ireland, Enterprise Ireland, NESC, ISME, the Self-Builders, practically-trained architects and the architectural technologists. The task group should produce a report within two months.

It is respectfully suggested that had all these groups been consulted before the draft 2012 statutory instrument, before S.I. 80 of 2013 and before S.I. 9 of 2014, the Minister and his predecessors would have been spared a lot of trouble.

Write the two Declarations of Conformity, having regard to the wordings used in Northern Ireland and to the wordings of the present Fire Safety and Disability Access certificates.

Rewrite the Commencement Notice Form, Certificate of Compliance (Design) and Certificate on Completion to incorporate “declarations” and not certificates.

Help the City and County Managers to prepare advertisements for their framework panels of Independent Inspectors. Admission to these panels to be competence-based, with knowledge of building regulations, building control regulations, and building construction. The Inspector to carry an appropriate level of professional indemnity insurance.

Draw up a simple but robust “Audit Framework” for use by the Independent Inspectors.

Draft the Statutory Instrument to replace S.I.9 and S.I.105 of 2014.

6.0 Conclusion

In an RIAI survey of its members in November 2014, 85% of RIAI Members consider that “**Independent Audit of Design**” was important or very important, and 75% consider “**independent Inspection of Construction**” to be important or very important.

In its submission on the draft regulations in early May 2012, the National Consumer Agency called for a system of independent inspection of design and construction as follows: **"While the new certification system is a welcome improvement, it will be of limited use without an accompanying, fit for purpose audit and inspection system as well as appropriate penalties for those in breach of the legislation. The Agency therefore strongly requests that the Draft Regulations be amended to ensure that a situation cannot arise where one entity can design, build, inspect and certify a building while no inspection by a Building Control Authority takes place and also that all possible resources be allocated to ensuring that the highest possible proportion of buildings are inspected."**

The Pyrite Panel published their report in June 2012. This was after the Department of the Environment published their draft building regulations including “self-certification”. The Pyrite Panel would have known that. Nonetheless, the Pyrite Panel report said:- (1) **“The system of independent inspections, carried out by the building control officers, should be strengthened”** and (2) called for:- **“A requirement for project-related insurance whereby cover for each specific project is available and adequate and is related to the project only”**.

An Taoiseach, Mr. Enda Kenny T.D. said in the Dáil on 1st October 2013: **“It is very simple really. If we had a system of having independent clerks of works on these jobs with the authority to say, "Sorry, what you have built there is not in accordance with the requirements, knock it", that would take out rogue operators in some areas and the word would spread very quickly that such operators will not get away with it in Ireland.”**

The system proposed implements the recommendations of the NCA and of the Pyrites Report, and meets the aspirations of An Taoiseach. S.I. 9 does not.

The proposed system is not only better for the State and the consumer; it is better for the entire construction sector. It will drive higher standards through dedicated experienced inspectors, who with larger and recurring

workloads, and increasing overview of patterns of construction and any recurring “system failures”, will feed-back into better design and better building. Good designers and builders will welcome the system as it levels the playing field, and impacts most on those who hope to escape.

A system as outlined above can be set up quickly. It involves no major change in existing contractual and legal structures. It needs no primary legislation: the Building Control Act already provides for the designation of such persons to act in this capacity.

Such a system will have the support of the consumer organisations and the public. Until such a system is introduced, the disasters of Priory Hall, Longboat Quay, Newbridge and above all the Stardust can be expected to recur. The people of Ireland and the Irish taxpayer alike deserve better.

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