



**ENGINEERS IRELAND SUBMISSION TO THE
DEPARTMENT OF ENVIRONMENT, COMMUNITY AND LOCAL GOVERNMENT
ON THE PROPOSED BUILDING REGULATIONS 2012**

24TH MAY 2012

Overview

As the body representing engineers and the engineering profession in Ireland, Engineers Ireland is in agreement with the declaration of the Department of the Environment, Community and Local Government that the Building Control System needs to be significantly strengthened.

We support the stated measures in broad terms, namely

- (a) The introduction of mandatory certificates of compliance confirming that the statutory requirements of the Building Regulations have been met;
- (b) The lodgement of drawings at both commencement and completion of construction, demonstrating how the building has been designed and built to comply with all parts of the Building Regulations;
- (c) More efficient pooling of building control staff and resources across the local authority sector to ensure more effective and meaningful oversight of building activity;
- (d) Standardised approaches and common protocols to ensure nationwide consistency in the administration of building control functions;
- (e) Better support and further development of the building control function nationwide.

We also believe that the further building control reform measures referred to in the public consultation document, namely

1. A Register of Approved Inspectors/Certifiers
2. Registration of Builders/Contractors
3. Electronic Lodgement of Design Drawings at Commencement

must also be implemented to strengthen the building control system, and ultimately to provide the quality of outcome from the building process that the end user is entitled to expect. We believe that it is extremely important that progress and improvement in all of these areas is achieved in the same timeframe.

However, we are very concerned that the exclusive focus in the current public consultation document on the role and responsibilities of construction professionals without progress in the other areas will not yield the desired improvements for the end user.

We are fully supportive of the intention to have competent individuals involved in the design and construction stages. We believe that only Chartered Engineers or other registered building professionals should be in a position to sign off on the relevant design area in which they are competent. It is appropriate that there should be recognition of the qualifications and training required to assess the risks, to comply (as designer) with all of the relevant standards and building regulations, to supervise and test (assess) the construction as being in compliance with the designer's requirements and to examine and collate the certification of the materials/parts supplied. There must be reward for the application of due skill, care and diligence, and also an explicit recognition of the limits to the assumption of risk and responsibility.

The design and construction of buildings is a complex area, involving interactions (varying significantly between projects depending on the circumstances of the project) between many players, including design and construction professionals, developers/owners/end users, contractors and subcontractors, material suppliers, and local and building control authority inspectors. Material and component suppliers must be held responsible to provide materials that are fit for purpose and meet the relevant European and Irish specifications. They should not be able to shed this responsibility simply because the materials or components have not been rejected through the supervision or testing process. Similarly, builders and contractors must be seen to be held to account for the consequences of their actions.

An appropriately strong and active inspection/auditing function being delivered by the appropriate state authorities is equally critically important in strengthening the existing Building Control System.

In summary, we are in agreement that measures are required urgently to strengthen the Building Control System. However, we believe that there are a number of critical areas of concern within the Draft Building Control (Amendment) Regulations as currently drafted that must be re-considered, in consultation with the representative bodies of construction professionals. In the absence of this engagement and re-evaluation, we believe that the amendments as currently drafted are not practicable, will not achieve the desired outcomes, and, in the final analysis, may even significantly worsen building standards.

The main areas of concern are set out below. The summary of concerns is not intended as a definitive listing of all of the potential difficulties contained within the current draft amendments. There is simply not sufficient time allotted within the consultation process to allow such a summation. Rather, it is intended as an aid to the Department in identifying areas where further intensive interaction with Engineers Ireland and the other representative professional bodies will lead to changes to the Building Regulations that do achieve the desired outcomes laid out in the Consultation document.

Defined Competencies of Designer

The “Designer” is not defined within the regulations or in the Building Control Act. It is anomalous that the “Designer” must certify the design and hold Professional Indemnity Insurance (PII), but does not have a requirement to be a registered professional, while the person appointed to inspect and certify the works must be a registered professional. Under the revised regulations, we must have competent registered professional requirements at both design and construction stages.

Insurances

There is a proposed substitution of the existing Form of Commencement Notice with a revised form to be accompanied by the new forms of Certificate of Compliance (Design), Notice of Assignment of Person to Inspect and Certify Works and a Certificate of Compliance (undertaking by person assigned to inspect and certify works). This must be signed by the owner of the building (this was not previously

required) and including details of Project Insurance/Professional Indemnity Insurance for those providing certificates of compliance. This effectively introduces new obligations on insurance cover which were not previously required under the Building Control legislation 1990-2007.

Although not specified in the proposed regulations, the pro-forma certificates require details of the “Designer” to disclose details of professional negligence insurance. It is not specified what level of insurance is expected, and apparently the insurer must express satisfaction with the level of insurance in place.

The Certificates for Inspection/Supervision, (undertaking by person assigned to inspect and certify works), do not refer to professional indemnity insurance for such persons; it seems a little incongruous that the designer should be insured but the person inspecting the works (with a registered professional requirement) should not carry an insurance requirement.

Professional indemnity insurance is implied on the certificates of compliance, but there is no suggestion that the person inspecting the works should be insured. There is no suggestion that the person constructing the works should be insured. Project insurance must be disclosed, if it is in place, but is not required. The only required insurance appears to be the Designer’s PII. There is very serious concern that this arrangement is unbalanced.

The revised Commencement Notice will now require a designer to provide details of his/her professional indemnity insurance cover and effectively a statement that their insurer is satisfied that the cover is adequate for the development. The act of seeking approval from insurance companies, specialising in risk as opposed to having specialist construction knowledge, will ultimately only drive up premiums and provide little or no benefit to building quality.

Active engagement with the insurance industry as part of the further detailed consultation with the professional bodies is essential to ensuring that a workable and equitable system of insurances is in place.

Legal Liability

It is the wording of the Certificates of Compliance on Completion by the person assigned to Inspect and Certify that is the cause of most concern. It is stated that “notwithstanding the legal responsibility of other persons or firms in relation to the works I accept responsibility and legal liability for the inspection of all works as necessary to ensure that they are neither defective nor contravene any requirements of the Second Schedule to the Building Regulations”. The combination of “ensure” and “legal liability” is exceptionally onerous. As drafted it does not suggest any derogation allowed. Read in the context of it being a statutory document, the certificate is also unclear whether the assigned person is accepting liability for the work of the designers as well as the work of the builders. The Building Owner’s Undertaking at the commencement regarding the assigned person is also onerous as it implies that the assigned person accepts legal liability at the commencement stage in similar fashion.

The wording should be focussed on minimising the risks that buildings will be noncompliant and also, because there will always be residual risks, who, in equity, should bear which residual risks (see e.g. the Abrahamson Principles of risk allocation).

The word “defective” is undefined in the Building Regulations and a very significant cause for concern, as the wording of “...neither defective nor contravene any requirements of the Second Schedule to the Building Regulations” is extremely wide, and seems to imply that “defective” covers issues other than compliance with the Building Regulations. It is strongly suggested that “defective” should be either removed from this wording, or be very clearly defined within the regulations.

Multi-person Certification

In short, there appears to be no capacity in the proposed Amendments for multi-person certification, yet in reality, it is extremely unlikely that a single person will have the competence to sign off on all aspects of the building design or building construction process.

The “Designer” is required to certify that the design of the proposed building or works is not defective or does not contravene any part of the second schedule of the regulations. This gives rise to a number of points:

The second schedule of the regulations contains 7 parts, representing seven areas of expertise; therefore no single “Designer” is competent to provide such a certificate. The certificates need to be amended to reflect this reality. Engineers Ireland submitted to the Department some years ago (and more recently) for discussion a draft possible form of multi-person certification.

The Certificates for inspection/supervision, (undertaking by person assigned to inspect and certify works), suggests that a single person shall carry out inspections; for reasons similar to the design situation, this does not reflect the reality of the range of skills needed for such monitoring of all aspects.

The use of certificates that are signed by a single designer would require that person to be in a position to be an expert on all elements of the building regulations (or to rely on other designers to confirm to them that they had carried out their works correctly if such is to be statutorily permitted). Such arrangement may not be acceptable to insurance providers and, even if insurable, are likely to require high premiums.

The issue of a certifier being able to rely on assurances from others is likely to be a crucial issue but very difficult. Who remains responsible and what value is the

certificate if it relies on such statutorily undefined assurances from a disparate and statutorily undefined group? It will be difficult to define what is permissible – in other words, will the certifier simply be a collector of other people’s assurances? To put it in the Code of Practice may not be sufficient unless the wording on the certificate itself recognises that.

Code of Practice

It is apparently envisaged that the Minister will publish a Code of Practice for Inspection and Certification of Building Works to address the following:

- the role of those persons assigned to inspect and certify building works
- the standard of acceptable inspection arrangements
- the documentation to be retained by the assigned person in addition to the certificates submitted to the local authority
- The duty to maintain records demonstrating compliance with the Building Regulations.

All of this has yet to be published, and we understand that the compilation of the Code of Practice is at a very early stage. **The Code of Practice is a key document as it contains all the details of how the certification process is intended to work.**

This Code of Practice is not yet published but should be published before the regulations are enacted. Without the text of the new Code of Practice being available, and clarity on its legal status, the current consultation period is premature. We are only seeing one part of the equation and without all the elements we cannot offer meaningful or credible solutions.

Consequences of Proceeding in a Piecemeal Fashion with Building Regulation Amendments

The consultation document indicates that..."Under the Act of 1990 responsibility for compliance with the requirements of the Building Regulations is placed first and foremost on the owner and the builder/developer of a building. The onus is on the builder /developer and owner to demonstrate compliance with the Building Regulations when required to do so by the relevant local building control authority. Failure to do so is an offence under the Act which may if successfully prosecuted in court lead to a fine and/or a term of imprisonment".

Primary responsibility may be with the owner and builder, but this is not reflected in the insurance requirements or certification requirements. There are no certificates required under the proposed regulations from contractors. The contractor is the organisation with the contractual responsibility for implementing the design. If the contractor does not have to provide a certificate under the regulations, there is no incentive for the contractor to provide any sort of quality assurance as the statutory responsibility for inspections will be vested in others.

This is where we see a deficiency in the proposed documentation. The designer and those charged with inspecting the works are subject to further regulation, yet the contractor/constructor appears to remain outside the proposed legislation in relation to certification. Failure to ensure compliance with the Regulations by the Contractor/Constructor/Developer will render the Regulations ineffective in bringing about the desired changes to the Building Control process.

Most modern construction and building companies are essentially management companies who employ sub-contractors to implement the works. The sub-contractor should be required to certify that his part of the works has been constructed in accordance with the design and otherwise with the building regulations.

Under Scottish Building Control, the purpose of the building standards system is summarised as being ‘...pre-emptive, designed to check that the proposed building work meets the standards. Inspections during construction and on completion are limited to the minimum necessary to discourage avoidance of the legislation. The inspections do not provide a system to control work on site, that is a matter for the contracts and arrangements put in place between the client and the builder’. The Certificate of Completion that the owner is required to submit to the building control authority may be supported by one or more certificates from an Approved Certifier of Construction relating to specific aspects of drainage, heating, plumbing, electrical etc. rather than the whole of the project. Approved Certifiers of Construction are contractors or trade bodies rather than consultants.

Without additional levels of enforcement it is difficult to see how the proposed regulations will increase compliance by rogue builders. It seems only to attempt to provide an additional target for legal proceedings when things do go wrong.

In the Future Focus section of the Consultation document, it is indicated that ...” The Department has had informal discussion with the Construction Industry Federation in relation to the establishment of a voluntary registration process for house builders / contractors... The Department has indicated that the scheme should be in keeping with competition law, include strong quality assurance checks, provide strong consumer protection, have the cover of professional indemnity insurance and not add excessively to the economic cost of house purchase/rental”. We strongly support this proposal, although it clearly should not be confined to house builders / contractors, and believe that the implementation of the registration process with associated insurances should proceed in tandem with the revisions to the design professionals’ duties and responsibilities.

Other Areas of Note

The exclusion of domestic extension, office and shop fit outs, etc from the regulations would appear to water down the intention of the regulations by removing significant areas of construction work from the regulations. Given that one of the

intentions of the regulations is to protect the unwitting 'domestic' consumer, omitting house extensions seems rather short sighted. In addition, there are often elements of the building regulations that are overlooked during fit out work.

In the current economic climate with the absence of major development or housing schemes from the market place, the decision to exclude these categories of work would appear to fly in the face of the objectives of the new regulations – namely to apply greater circumspection to building activities of all types and to ensure a more robust system of inspection and quality assurance compliance. Protection of the end-user is surely most relevant in domestic and small commercial developments where the interaction between designer, contractor, inspector and client is more likely to be a “one-on-one” arrangement.

Submission of documentation, with a fee, in order to demonstrate compliance with regulations is generally to be welcomed. There appears to be some overlap with submissions for fire safety certificates and disabled access certificates. Perhaps these certificates could be incorporated into one submission with one set of documentation and a single fee.

There is a practical difficulty in relation to 'as-constructed' drawings. These may be desirable but are not currently produced for building works (for cost and/or other reasons). It is not clear under the proposed regulations if these drawings are to be produced, and if they are required, who will produce them.

Another suggestion to help enforce better standards of construction would be for the Local Authorities or DECLG to operate a yellow/red card system for contractors. This will require a list/framework of certified contractors to undertake projects to start with followed by regular updating to build a track record for those contractors in satisfying the building regulations in their constructions. If they breach the regulations, that will be placed on the record of the contractors for all to see akin to Health and Safety

legislation where reportable instances are tracked. If this type of system is adopted and referred to in judging contractors for work this will lift standards on site.

In relation to the proposed Code of Practice, it is important that there is adequate policing / supervision of the works to confirm compliance with design. If policing is by inspection, it should be carried out at important milestone stages of the building, for example:

- Confirmation of sound foundations
- Confirmation of adequate reinforcing
- Confirmation of concreting with reinforcement in place etc.
- Confirmation that the materials are to spec
- Test Results – Documentation etc...

If the project is substantial in cost, full-time supervision of the Works at the Client's cost should be factored into the Bill of Quantities.

A handwritten signature in black ink, appearing to read 'John Power', written in a cursive style.

John Power
Chartered Engineer
Director General

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