Building Control (Amendment) Regulations 2014 and
The New Regime

It is now a year since the Building Control (Amendment) Regulations 2014 (“the Regulations”) came into force on 1 March 2014. In this article, we briefly outline the new building control regime, highlight some practice points and issues that may arise and look at the legal and professional indemnity insurance implications. This is not intended to be a replacement or a summary of either the Regulations or the Code of Practice. Both require careful consideration in their own right.

The New Regime

The new building control regime finally brings into being a system to improve compliance with the Building Regulations which was envisaged by the Building Control Act 1990. It is underpinned by a system of statutory certification which is intended to allow Building Control Authorities to prioritise and devote their resources for inspection and supervision to those projects deemed to present the greatest risk. The new regime applies to most building works (dwellings, extensions to dwellings other than those of 40 m² or less and works which require a fire safety certificate) and importantly imposes duties on owners (clients) and builders as well as construction professionals.

These changes are widespread, have been controversial and are of great significance. Ultimately they should, in time, deliver their stated goal of better construction. Mandatory wording, enforcement, front loading of costs, Inspection Plans and a new Building Control Authority all mean though that these are very much changed times for construction professionals.

Code of Practice

A Code of Practice has been published by the Department of Environment, Community and Local Government which provides a detailed guide to the operation of the new regime including the Inspection Plan. Compliance with the Code of Practice is not mandatory but it has a statutory status such that inspection and certification carried out in accordance with the Code will be regarded as prima facie evidence of compliance with the requirements of the Regulations.

Everyone involved in any aspect of the building control regime would be well advised to become intimately acquainted with the Code.
Commencement Notices

The new regime relies on an online Building Control Management System operated on behalf of all Building Control Authorities. A Commencement (or a 7 day) Notice must be filed together with:

- plans, calculations and specifications showing how the proposed works or building will comply with the Building Regulations;
- an online assessment;
- a Preliminary Inspection Plan prepared by the Assigned Certifier;
- a Certificate of Compliance (Design);
- a Notice of Assignment of person to inspect and certify works (Assigned Certifier);
- a Certificate of Compliance (undertaking by Assigned Certifier);
- a Notice of Assignment of builder;
- a Certificate of Compliance (undertaking by builder); and
- the prescribed fee.

The Design Certifier must be a registered architect, a chartered engineer or a registered building surveyor. The form of Design Certificate is mandatory and the certifier must give an unqualified opinion that the design complies with Building Regulations. This should be contrasted with the old regime’s non-statutory opinions on compliance that have been in common use under which the certifier generally only certifies ‘substantial compliance’ with Building Regulations.

The Certifier (who will normally be the lead consultant) may, however, rely on other members of the design team and specialist designers whose activities they have coordinated and who have issued Ancillary Certificates. It should be noted that there is no statutory specified or mandatory form of Ancillary Certificate.

The Assigned Certifier role is also new and like the Design Certifier, the Assigned Certifier must be a registered architect, a chartered engineer or a registered building surveyor. There is no requirement that they be a member of the design team and freestanding appointments are being made. The Assigned Certifier must be appointed before the Commencement Notice is filed and has a significant role in the project from the outset as they are responsible for preparing the Preliminary Inspection Plan including an Inspection Notification Framework which must accompany the Commencement Notice.
Completion

On completion, a Certificate of Compliance on completion must be signed by both the Builder and the Assigned Certifier. Again, the form of certificate is mandatory and must provide an unqualified opinion that the building has been built in accordance with the designs filed with the Commencement Notice (together with such amendments as may have been notified); that the Inspection Plan drawn up having regard to the Code of Practice has been implemented using reasonable skill, care and diligence and that the building "as-constructed" complies with the Building Regulations. The Assigned Certifier may rely on Ancillary Certificates provided by others. This was a critically important negotiated change to the Regulations as a result of industry stakeholder engagement which Engineers Ireland participated in.

Enforcement and Liability

The Building Control Act 1990 provides for enforcement by means of an enforcement notice procedure by Building Control Authorities supplemented by the criminal law. Failure to submit certificates as required by the new Regulations is a criminal offence (committed by the building owner).

The policy underlying the Building Regulations and the new building control regime is to secure and improve quality in construction and health and safety in buildings for the benefit of the public generally. It is not intended to confer private law rights of action and for that reason the Building Control Act 1990 specifically excludes civil liability. As such there can be no claim by a private individual against a certifier for breach of statutory duty.

That does not, however, rule out claims brought in negligence or for breach of contract. Clearly, both Designers and Assigned Certifiers owe duties to their clients. If the client suffers loss in consequence of an error or misrepresentation in a certificate, the Designer or Certifier is at risk of being held liable. Indeed this would generally have always been the case with non-statutory certificates under the old regime. The difference is that the statutory forms of certificate contain mandatory wording and cannot be altered or qualified to suit particular needs of the team or the circumstances. For that reason claims in the future will be considered against the backdrop of the mandatory certificates and the newly defined roles.

We deal with claims against construction professionals every day. They were brought before the Regulations and will be brought after the Regulations. It is important to note that if bringing a claim the Plaintiff must still overcome a number of hurdles to bring a successful claim. Essential elements for a successful claim remain that the Plaintiff has to establish a duty of care, breach of that duty, that the
breach by the professional (as distinct from anyone else) has caused a loss, what the cause of the loss is, whether damages flow from that loss and whether they bear any responsibility themselves or have mitigated their loss appropriately.

Clients/Building Owners are likely to have contractual arrangements with the Builder, Design Certifier or the Assigned Certifier and many Ancillary Certifiers and could sue to enforce their rights or claim damages under their contracts both in contract or tort.

Purchasers and possibly also subsequent purchasers and indeed members of the public may also assert that they relied on the Certificates to their detriment. This has happened in the past, is still happening, in claims being brought under the old regime, and will continue to happen.

If Certifiers are named in proceedings in the future, they may have to join other design team members. The procedural and costs versus benefits considerations in Third Party Actions are likely to be a matter for consideration in the future. That does not mean however that they face a greater ultimate liability exposure.

**Individual Capacity**

Certifiers should be aware that they are required to sign the statutory certificates in their own names and showing their individual registration numbers. This is not the case with the non-statutory Ancillary Certificates.

It is and always has been the position however, that individual employees can be sued for their own acts across a variety of causes of action and we have seen several cases of this. Just because the employee signs in their own name does not alter this. It does however place them more in the spotlight and concerns are being raised by employees about signing the statutory certificates in their own name.

The principle of vicarious liability will always apply. Employers are responsible for the acts of their employees but understandably these employees are concerned about personal liability in the event that their employers are no longer either trading or that their employers do not or may not in the future have appropriate or responding insurance.

If claims are brought in respect of errors in certification it is therefore possible that claims could be brought against the individual certifier in addition to his employer. Employers need to be alive to this and have commercially sensible strategies in place to provide comfort to their employees.
PRACTICE POINTS AND RISK MANAGEMENT

The new building control regime has brought in new roles, new procedures and possible traps for the unwary but practitioners should not lose sight of the fact that the Building Regulations themselves have not changed. What has changed is simply the framework and the rules on compliance. We set out below some practice points for those undertaking the new roles.

Design Certifier

Provided that the lead consultant for a project is appointed Design Certifier (which will normally but not necessarily be the case) the fundamental role of the lead consultant is little changed under the new regime albeit they may be exposed to the risk of possible additional liability by virtue of signing the Design Certificate. The certifying of the design buck stops with them. They can and will of course rely on other Certifiers but ultimately they are the signing party.

If, however, the proposed Design Certifier is not the lead consultant, practitioners should consider very carefully how or whether they will be able to coordinate the design team and whether they will be in a position to sign-off on the overall design.

Practitioners should also consider:

- What role are they being asked to undertake? If the Design Certifier role is to be undertaken that should be clearly established from the outset. If members of the design team have started work before the Design Certifier is designated, that could lead to problems in design coordination and possible gaps in design responsibility;

- As a corollary of establishing the role, the Design Certifier should insist on a written appointment which clearly sets out the scope of his duties. It will generally be advisable for engineers to use one of the standard forms of appointment agreed by Engineers Ireland and ACEI;

- Who are the other members of the design team and what Ancillary Certificates will be required? It is worth repeating that the Design Certifier has to sign off on the entire design, not simply those elements of the design that they personally have produced. Effective representations were made by the professional bodies, including Engineers Ireland, during the course of drafting of the Regulations in an effort to ensure that the Design Certifier and the Assigned Certifier would be able to rely on Ancillary Certificates provided by others. It is hoped that the final form of the Design Certificate will achieve that end although as with any new legislation there can be no absolute certainty until claims start to reach the courts.
• The Design Certifier is responsible for coordinating the design activities of others and they should ensure that they have Ancillary Certificates from all other members of the design team as well as any specialist designers. If they do not do so they may have to take responsibility for elements of the design which they have not produced.

• The Design Certifier also needs to consider whether other members of the design team and specialist designers have the appropriate skills and experience to produce their allotted elements of the design. Of course the Design Certifier cannot be expected to second guess the designs produced by other designers in different disciplines but neither can they rely blindly on Ancillary Certificates. There is a strong argument that the reliance of the Design Certifier on Ancillary Certificates must be reasonable. If they have reason to doubt the professional competence of other designers for the project in question a Design Certifier will need to consider very carefully whether they can or should sign the Design Certificate.

• Although Ancillary Certificates are explicitly referred to in the Design Certificate, the Certificate on Compliance and the Code of Practice, there are no statutory forms of Ancillary Certificate. The four professional bodies concerned (Engineers Ireland, ACEI, RIAI and SCSI) have produced a suite of Ancillary Certificates for use by members. Design Certifiers are very, very strongly advised to accept only those forms. Regardless of the form of Ancillary Certificate used, it is of course crucial that it should encompass the whole of the design produced by the ancillary certifier concerned. Mind the gaps and watch out for hidden qualifications.

• Design Certifiers will doubtless come under pressure from clients to issue Design Certificates in circumstances where not all of the identified Ancillary Certificates are to hand. It cannot be emphasised too strongly that such pressure should be resisted at all times. It is the Design Certifier who is signing off on the Design Certificate and it is to them that attention will be directed if the required Ancillary Certificates are not produced or are unsatisfactory.

Ancillary Certifiers

Most of what has been said in relation to Design Certifiers applies with equal force to Ancillary Certifiers. Ancillary Certifiers need to be clear from the outset as to the scope of their appointments and the certificates that they will be expected to provide. If in doubt seek clarity at the outset.
Assigned Certifier

The role of Assigned Certifier is entirely new. A good deal of guidance is contained in the Code of Practice on this role which was the subject of consultation with the professional bodies. Careful study of this will be its own reward.

Again most of the suggested practices that we have suggested in relation to Design Certifiers apply with equal force to Assigned Certifiers. Assigned Certifiers need to be clear from the outset as to the scope of their appointments and the certificates that they will be expected to provide and seek clarity at the outset if required.

The Inspection Notification Framework and the Inspection Plan that must be produced by the Assigned Certifier are central to the new regime. Provided that they are carefully prepared and executed as well as recorded, they will provide an audit trail which will enable the Assigned Certifier to demonstrate they have fulfilled their role.

Like the Design Certifier, the Assigned Certifier will rely on inspections and Ancillary Certificates provided by others. They should be aware that if there are any gaps in those inspections or missing Ancillary Certificates that it is to them that attention will be turned, at least in the first instance.

In our view it is desirable for the Assigned Certifier to have a separate appointment even if they are also the lead consultant. The Assigned Certifier role will in practice overlap with other roles commonly undertaken by the lead consultant such as the engineer under an IEI contract or the architect under an RIAI building contract. Nonetheless, the roles are quite distinct and it is likely to be easier to delineate the roles if there are separate appointments.

If there are separate appointments it may also be easier for the Assigned Certifier to show that the role must be properly resourced and to justify an appropriate fee!

The Assigned Certifier has a role in coordinating the inspection activities of others during the construction and coordinating the procurement of ancillary certification from members of the Design Team and relevant others. A failure to so properly coordinate could also give rise to a legal liability. Pay very careful attention to co-ordination obligations.

Provided that the Inspection Notification Framework has been carefully thought out, the Assigned Certifier should be notified by the Builder so that necessary inspections can be made at all appropriate stages. At risk of stating the obvious, the Assigned Certifier should not tolerate any failure
to notify which means that an inspection cannot be carried out before the relevant work has been covered up.

Key Considerations

If acting as Design Certifier, Assigned Certifier, Ancillary Certifier or participating in any Inspection Plan, engineers should be paid appropriately. All engineers should be aware of the additional obligations and inform and educate clients appropriately. Clients need to appreciate all the additional requirements and accept the costs. Proper and fair remuneration is essential for the new roles and for professionals to fulfil all of the additional duties under the new regime to have the desired effect.

Meticulous record keeping is essential and all parties should keep good records at all times and always follow up oral advice in writing. Retain notes of conversations, instructions, meetings, plans, inspection records, testing and designs/calculations as they are invaluable if issues arise at a later date, together with copies of certificates and the relevant Code of Practice on file. Documents created and retained have to be ‘sufficient’ to demonstrate that the Building Regulations have been complied with.

Always provide services in compliance with the applicable professional standards. Professional standards will be used as a benchmark when assessing the reasonableness of conduct and in particular whether an engineer has exercised “reasonable skill, care and diligence” in the context of any certification.
Professional Indemnity (PI) Insurance

Whilst it is hoped that the Regulations will promote a culture of compliance, improve oversight and ultimately deliver better buildings, Insurers are mindful of the increased responsibilities for construction professionals.

In this section of the guidance note, insurance brokers and professional risk management advisers, Griffiths & Armour, consider some of the questions they have encountered on the Regulations, Insurers’ response to the changes and the cover available in the PI insurance market:

What key lessons do Insurers feel we can learn from the mistakes of the past?

The problems experienced by construction professionals and their PI Insurers in recent years have been well documented. From 2008 there was a dramatic rise in both the frequency and severity of claims and over a ten year period many Insurers were reporting loss ratios (premiums received -v- claims paid and reserved) up to and exceeding 200%. In real terms, there were tens of millions of Euro in the difference between claims paid/reserved and premiums received and to some extent the legacy issues persist as reserves continue to increase and problems continue to emerge.

Claims activity was, in part, driven by developments in the wider economy. PI claims have always been contra-cyclical and it was almost inevitable that we would see a rise in claims in response to a fall-off in construction activity - but what we witnessed in Ireland was unprecedented and there are recurring themes, such as the following, that might provide some insight into what was going wrong:

- Limited involvement of professionals during construction.
- Inferior quality of design/construction team.
- Contractor failure.
- Uncertainty surrounding the scope of services.
- Lack of project records.

In many instances, a key underlying factor was the failure to invest in design. Professional services were relegated to a commodity purchase as greater emphasis was placed on short-term savings rather than sustainability and life-cycle cost.

The Regulations set out to improve standards, recognise the importance of design input and achieve greater transparency and accountability - in that sense; the interests of all parties are aligned. Whether these objectives are achieved, only time will tell but something had to change and the Regulations are perhaps a first step in rebuilding Insurer confidence. How they play out in practice
and to what extent those procuring construction are prepared to invest in quality, is something Insurers will be watching with interest.

**What PI insurance cover is available to members of Engineers Ireland?**

Cover for potential liabilities associated with the Regulations is provided under Griffiths & Armour’s PI insurance Scheme for members of Engineers Ireland, with the full policy cover applying. It has not been necessary to amend current policy wordings, which offer broader protection than that generally available in the insurance market.

Those not placing cover through Griffiths & Armour’s facility should speak with their PI broker or insurer to ascertain whether, and to what extent, cover is being provided. In particular, it will be important for insurers to be aware where you are taking on the roles of Design Certifier or Assigned Certifier.

**What PI insurance cover are we required to hold under the Regulations?**

There is no requirement for PI insurance set out under the Regulations or the Code of Practice although clearly cover will be required to cater for the liabilities imposed. Engineers’ clients will also look to establish what they see as appropriate insurance requirements and suggested levels have been outlined in procurement advice issued by the Office of Government Procurement.

**What cover should we have?**

For a number of reasons, it is important for firms to maintain a broad basis of policy cover. The extent of protection available can differ significantly between policy wordings and insurers and it is important to establish that there are no inner limits, conditions or exclusions applying to liabilities associated with the Regulations.

Again, you should seek advice from your broker or insurer.

**How much cover should we have?**

There are a number of factors which need to be taken into account when considering what constitutes an adequate Limit of Indemnity. It should reflect the maximum probable claim that could be made against you after making due allowance for claimant’s damages and costs. This, in turn, will depend upon a number of inter-related factors, such as the role being undertaken and the size and complexity of projects you are involved in.
For those interested in obtaining further information on this topic, Griffiths & Armour have a separate guidance document covering factors to be considered when deciding upon an adequate limit of indemnity.

**Who is covered under a PI insurance policy?**

This will depend upon the definition of ‘Insured’ under the policy wording. Most policies will cover the firm, its partners, principles and Directors and will extend to cover employees and former employees in respect of work undertaken on behalf of the firm.

You should check your policy document or seek confirmation of the definition from your broker/insurer.

**How long are we covered for?**

PI insurance policies are generally annually renewable which is in stark contrast to the long-term liabilities to which you can be exposed. With that in mind, it is important that you seek to maintain a long-term relationship with brokers and insurers have who have a proven track record in this class of insurance.

**What is the impact of the ‘claims made’ nature of PI insurance?**

‘Claims made’ means cover is provided by the policy in force when you first notify a claim to your insurers, not by the cover in force when the alleged act of negligence occurred, or when the contract was being performed. If cover is withdrawn or cancelled for any reason, then you have no protection against any future claims arising out of work undertaken in the past.

For that reason, it is vitally important that cover is maintained into the future.

**Is there a problem if we take on additional obligations?**

It is very important that you resist any attempt to impose obligations that go beyond those established under the Regulations or a basis of certification that is not in line with the mandatory forms of certificate (or industry standard in the case of Ancillary Certificates). While most insurers would be expected to cover liabilities flowing from the Regulations, liabilities that are voluntarily accepted under contract (or otherwise) could well fall outside the scope of PI insurance and lead to uninsured claims.

**Should we check that other parties also hold PI insurance?**

Where you are relying on information provided by others or engaging sub-consultants, it would be prudent to look for confirmation that such parties are maintaining PI cover. It may be difficult to elicit
information from parties where there is no contractual link but requests could be made through your client.

Given the ‘claims made’ nature of PI insurance, it would also be important to ensure that cover is being maintained into the future.

**What should we consider when renewing our PI insurance?**

Some insurers have amended their proposal/renewal forms and include specific questions relating to the Regulations. Where that is the case, such questions should be answered accurately and in detail in order to comply with the disclosure requirements under your policy.

It should also be appreciated that decisions on insurer selection have consequences that run well into the future. The liabilities that can attach are long-tail and claims can take many years to reach a conclusion. Insurance solutions have been tested in recent years and many consultants have suffered from not receiving the right support when they needed it most. Surely the lesson is that decisions on insurer selection should not be guided by what insurers are prepared to promise but on their ability to deliver on those promises now and into the future.

**What should we do if a claim arises?**

Even with the best risk management systems, you will not be able to eradicate the possibility of a potential claim. The plan for dealing with any such matters, whether under the new or old Building Control regime, should be incorporated into your legal risk management strategy. Lessons should be learned and future exposures reduced wherever possible.

A ‘no blame’ culture will support early referral and ideally all firms should have an individual dedicated to handling any potential claims and their notification to insurers.

From a PI insurance perspective, there will be specific requirements relating to the notification of circumstances that could give rise to a claim and these will be set out within your policy wording. It is important that you familiarise yourself with these requirements and ensure that they are complied with.

In terms of what and when to notify, the usual guidance applies. This is dealt with in detail in a separate Griffiths & Armour guidance document ‘Claims notification procedures’ and Griffiths & Armour would be happy to provide a copy of this upon request.
Conclusion

We hope the above provides some useful guidance. By their nature, these notes cannot be exhaustive and where appropriate, advice should also be sought from both your insurers and legal advisers.

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Acknowledgements

Griffiths & Armour

Established in 1934, Griffiths & Armour are a specialist firm of professional indemnity (PI) insurance brokers and risk managers. They operate a number of market leading PI insurance facilities that have achieved global recognition and currently look after the interests of approximately 3,000 consultancy firms.

Griffiths & Armour have worked with Engineers Ireland since 1997 and have acted as advisers on a range of PI and liability issues affecting the profession.

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Beale & Company

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