

Architects' Alliance of Ireland (AAOI)

The S.I.9 Review

PURPOSE • PROPORTIONALITY • COMPETENCE

REGULATION 1 & Q.2/3 PAPER 2 It is extraordinary that the dramatic failure of “professional” self-certification (MRIA certification of Priory Hall) has resulted in self-certification being elevated to become a Statutory mechanism under S.I.9/2014. In particular, S.I.9 promotes, and one might say protects, the status of the very class of architect that brought us to that dismal point.

What is specially discouraging is the absence of Latent Defects Insurance (LDI) in this “answer” to Priory Hall, Pyrites, etc.

The delivery of LDI has been delayed not for one year but for two – i.e. since the introduction of S.I.80/2013. This is a gross disservice to the public which further entrenches the incumbent self-certifiers.

It should be noted that the present pool of certifiers includes every category of Chartered Engineer including those who are never involved in the construction process, whilst at the same time ignoring non-chartered Engineers and Engineering Technicians with formal qualifications, direct experience and entirely relevant skills.

Overall, it is largely administrative convenience that drives the blanket recognition of only those named in an existing register. Yet, admission onto a construction professionals' register is not of itself evidence of competence in each and every construction related duty. This is most clearly the case where an entirely new duty, such as S.I.9 certification, has been introduced.

Proposed Change

1. End self-certification.

2. Broaden the skill base for certifiers:

(a) Facilitate the inclusion onto the Statutory Register of Architects of architects trained through actual experience. (See PQD 'Definitions' Article 3.1(b) '*professional qualifications*': *qualifications attested by evidence of formal qualifications, **an attestation of competence referred to in Article 11, point (a)(i) and/or professional experience***. Also see EC Memo 13-839, 2nd Oct 2013 "*The commission is therefore inviting Member States to review their restrictions on the access to professions and to access their proportionality*".)

(b) Cease to exclude architectural technologists. Their formal training is directly suited to the task.

(c) Include members of the Irish Building Control Institute – some members are in private practice.

(d) Include Clerks of Works (see the Institute of Clerks of Works and Building Inspectors in Ireland, and others). In regard to the notion of “a climate of compliance”, it is Clerks of Works, rather than formally trained architects, who possess the competence to observe when the skill level of trades people improves.

REGULATION 2 {COMMENCEMENT} n/c

REGULATION 3 {INTERPRETATION GENERALLY} n/c

REGULATION 4(B) & Q.2 PAPER 2 Despite the immense paper mountain raised by S.I.9., self-certification in any form is intrinsically unsatisfactory. Self-certification should be countenanced no longer.

Proposed Change

Require that Compliance Certificates are only to be accepted from persons who are not part of the relevant design or building teams.

REGULATION 5 Under what circumstances will an offence be prosecuted? What would motivate such action? How would prosecution assist in correcting a serious building fault?

Proposed Change

Provide a direct mechanism for actual redress following a building failure. That is surely what is needed "after Priory Hall".

REGULATION 6 A consolidated version of the Principal Regulations is much needed in order to consider this and similar Regulations. The amendment of a Title does not diminish the scope of the Article itself.

Proposed Change

Provide a consolidated version of the Principal Regulations.

REGULATION 7(2), ARTICLES 9.2.A/B & Q.1/4 PAPER 2 The exemption of specified works from mandatory certification is anticipated in the Act of 1990. But that is not an exemption from compliance with the Building Regulations. Regardless of S.I.9, all works must comply with the Building Regulations. Nonetheless, exemptions from mandatory certification, such as that provided through Article 9.2.b, should not be arbitrary or based simply on Planning exemptions.

Exemptions should be justified within the purpose of the regulations and should be applied consistently. Accordingly, a clearly applied method is needed for identifying works that warrant exemption from mandatory certification. For example, regulatory clarity and consistency can surely be achieved by applying the Part III Fire Safety Certificate exemptions.

An alternative rationale can be observed in Norway's "Classification of Works" which also answers the State's obligation to apply Proportionality:-

Class 1:

simple works with minor consequence

Class 2:

small degree of difficulty and medium consequences

medium degree of difficulty and minor to medium consequence

Class 3:

medium degree of difficulty and serious consequences

large degree of difficulty and minor, medium or large consequences

It is also important to consider the totality of building regulations and to introduce measures which correct difficulties such as those identified by Seamus Coughlan, Chief Fire Officer at the 2015 IBCI Conference.

Proposed Change

Omit Articles 9.2.a & 9.2.b

reference docs :

<http://www.i-b-c-.ie/docs/conferences/2003/Building.control.in.Norway.and.the.Norwegian.regulatory.system.pdf>

http://www.i-b-c-i.ie/docs/conferences/2015/07_Seamus_Coughlan_Chief_Fire_Officers_Perspective.pdf

REGULATION 8 {MISC} n/c

REGULATION 9 A consolidated version of the Principal Regulations is much needed in order to consider this and similar Regulations. The amendment of a Title does not diminish the scope of the Article itself.

Proposed Change

Provide a consolidated version of the Principal Regulations.

REGULATION 10 The paper mountain described here does not excuse the failure to support independent building certification.

Proposed Change

Cease self-certification.

REGULATION 11 {MISC} n/c

REGULATION 12(1) Permission to open, occupy or use a building is only allowed upon the validation and registration of a Certificate of Compliance by the Building Control Authority (the BCA).

However, Art. 21 of the 1990 Act is relevant - *Limitations on civil proceedings: 21.—A person shall not be entitled to bring any civil proceedings pursuant to this Act by reason only of the contravention of any provision of this Act, or of any order or regulation made thereunder.*

Thus, the critical issue for those who wish to physically open, occupy or use the building, is the authorization to open, use or occupy it, rather than the Certificate of Compliance. Accordingly a duty of care devolves upon the BCA when it ceases to disallow the bringing into use of the building.

[It can be seen that the absolving of a duty to “any person”, given under Art. 4 of the 1990 Act, relates to the registration of the certificates by the building control authority and not to other matters such as the lifting of an incidental, consequential or supplementary ban on the opening, use or occupation of a building. 1990 Act:-

(4) Where a certificate of compliance, or a notice to which subsection (2) (k) relates, is submitted to a building control authority, the building control authority shall not be under a duty to any person to—
(a) ensure that the building or works to which the certificate or notice relates will, either during the course of the work or when completed, comply with the requirements of building regulations or be free from any defect,
(b) ensure that the certificate complies with the requirements of this Act or of regulations or orders made under this Act, or
(c) verify that the facts stated in the certificate are true and accurate.]

Does Regulation 12(1) also mean there will be never be any “certificates of approval” as provided for by Art. 6(2)(iii) of the 1990 Act?

It should be noted that this arrangement is different from that for the related matter of Fire Safety Certificates. Permission to open, occupy or use follows a positive assessment of the documents by a Fire Officer and of course their duty of care is not shirked.

Proposed Change

“Less is More” - Replace mandatory certification with mandatory LDI.

REGULATION 12(2) & Q.1/4 PAPER 2 See response to Regulation 7(2) above.

Proposed Change

Omit regulations 12(2)(a) & (b).

REGULATION 13 How will anyone benefit from the records in this register?

Proposed Change

“Less is More” - Replace mandatory certification with mandatory LDI.

REGULATION 14 {BCA ADMIN CHARGES} n/c

REGULATIONS 15, 16 & 17 The multiplicity of certification does not assist. Instead it obscures.

Who benefits when we see this in the Act of 1990:-

Limitation on civil proceedings 21.—A person shall not be entitled to bring any civil proceedings pursuant to this Act by reason only of the contravention of any provision of this Act, or of any order or regulation made thereunder.

Proposed Change

“Less is More” - Regulations are necessary but S.I.9 should be reassessed in respect to appropriateness and proportionality.

REGULATION 18 {REVOCATION OF S.I.80/2013} n/c

S.I.9 EXPLANATORY NOTES There is actually no "greater accountability" of certifiers to suffering parties. Improved means for tangible redress would be far more to the point than professional accountability as a certifier.

Proposed Change

"Less is More":- Replace mandatory certification with mandatory LDI.

reference docs : See paper by construction lawyer Deirdre Ni Fhloinn :
<http://www.bregsforum.com/2014/03/14/will-bcar-si-9-bring-any-benefit-to-consumers/>

RELATED REFORMS

BCMS n/c

FRAMEWORK FOR BCAS On page 3 of Info. Doc. 2 is this curiosity:-

"The empowerment of competence on professionalism in the design and execution of construction projects"

What is it that you are trying not to say?

Proposed Change

Improved candour would aid transparency.

STATUTORY REGISTER OF BUILDERS & CONTRACTORS It is in the public interest that there be no additional State-awarded registration monopolies.

It is in the interests of all construction professionals that there be no State-awarded registration monopolies.

In addition it is unnecessary and unwise to name a body/company/private entity in the legislation. Let Statutory construction registers be operated by prescribed bodies.

The multiplicity of construction registers serves the "consumer" poorly.

It makes difficulty in attributing blame for defects and the suffering party is pushed from one, self-administered, professional conduct committee to another.

This and other obstacles can be greatly reduced by the making of a single register for all construction professionals – whose obligations to fulfil their duty of care are really the same. A single register would bring the clarity and certainty which is missing from the present arrangements.

Proposed Change

For now, support the making of more than a single builders' register and thus, among other benefits, facilitate the de-prescription of a wayward registration body.

"Less is More" - Move towards the making of a single register for all construction professionals.

LATENT DEFECTS INSURANCE There appears to be a lack of understanding as to the scope of LDI policies offered outside the State and the high level of protection they afford to building owners. The LDI methodology should be appreciated:-

LDI insurers reduce their exposure and hence the risk of building failures by satisfying themselves, through controls and their own inspections, that the construction proceeds in accordance with Statutory Regulations and good practice. The intention is to minimise the risk of defects for the full term of the policy (10 years or more).

The insurance applies to the property and transfers automatically to subsequent owners. The insurance premiums are very slight both in relation to the tangible benefits and to the costs for S.I.9 certification. And the latter brings no tangible benefit to the owner, especially when that person is not the first purchaser.

LDI inspections are independent of the builder and the design team. The insurers have a direct commercial interest in ensuring the integrity of the buildings. Accordingly, LDI actively promotes and monitors compliance and good practice. This is rather better than merely creating "*a climate of compliance*".

If this description of LDI is correct, then it can be seen to be a total, secure answer to effective redress and compliance with building regulations. The Department is urged to make its own, independent enquiries.

(Warnings that LDI has failed in Australia, where building control is in any case managed differently from Europe, are unlikely to be relevant. Of genuine relevance is the good history/experience of LDI in Europe.)

It is being said that the reluctance of LDI insurers to enter the Irish market is due to the special terms that have been put to them by one industry partner. Government should be aware there can be a substantial commercial aspect to the brokerage of LDI. Accordingly, transparency and impartiality are essential when "*exploring the potential for reliance on insurance policies ...*".

Certainly such reluctance is exceptional. After all, it is the very business of insurers to assess risk and to sell insurance. Even film-stars legs are insurable.

Proposed Change

"Less is More":- Replace mandatory certification with mandatory LDI.

NEW SINGLE DWELLINGS & Q.1/4 PAPER 2 We ask that the data on failures in single dwellings be scrutinised in order to identify how many of those are not Building Compliance failures (i.e. take account that regulations have changed and what was built as compliant at the time may fail a modern test), how many are single dwellings not built as part of a development, and how many of the balance were self-built.

Proposed Change

Scrutinise all statistics and especially those derived from industry sources.

Q5 Paper 2 A plot ratio exemption should commence with an exemption change under the Planning Acts – because that can be argued as being consistent with good planning (residential amenity, etc).

The exemption limits of say 40sqM should not be cumulative. In other words any subsequent 40sqM extension should also be exempt from mandatory certification.

The logic is plainly given by the Norwegian Classification of Works outlined in the Reg. 7.2 response above, where it is the nature and scale of the works in hand that has relevance.

MINISTER'S LIST

The Ministerial announcements of the 2nd April 2015 are greatly welcomed by the Architects' Alliance of Ireland:-

"To make recommendations that will strengthen and improve the arrangements in place for the control of building activity in keeping with the principles of good and fair administration..."

Another issue to be examined in the review is the option of establishing a "Minister's List" for practically trained architects, whereby they could be facilitated to continue in their work, subject to defined criteria."

These EC documents are specially relevant:-

PQD Article 3.1(b) {Definitions}

'professional qualifications': *qualifications attested by evidence of formal qualifications, an attestation of competence referred to in Article 11, point (a) (i) and/or professional experience.*

EC Memo 13-839, 2nd Oct 2013

"Member States may reserve the right to access certain professional activities to the holders of specific qualifications (e.g. design of new buildings reserved to architects) for reasons of general interest. Such restrictions make the mobility of professionals within the single market more difficult. In addition, these measures may limit employment and competitiveness in the economic sectors concerned. The Commission is therefore inviting Member States to review their restrictions on the access to professions and to assess their proportionality."

As the making of a new Minister's List is now open for examination, the Alliance makes these introductory points:-

Architects on the original Minister's List were accepted into the Royal Institute as full members. Alliance architects do not expect similar automatic admission via the new Minister's List.

Architects on the original Minister's List have automatic rights of recognition under the PQD. Alliance members do not expect to enjoy that means of recognition. We will continue to rely on the General System for access into the profession elsewhere in the EU (apart from one member who is already recognised through Table VI despite suffering disenfranchisement at home in Ireland and others who were recognised under Table V until the Irish requirements were pointedly altered in 2011).

Alliance architects have one central goal which is our re-instatement as architects in accordance with our pre-BCA2007 status. To achieve that requires no more than our inclusion on the Statutory Register of

Architects which was created in November 2009. An appropriate mechanism, delivered through a new Minister's List makes that a possibility. We say: **Better Regulation – YES, Closed Shop - NO**

The Alliance campaign is for architects disenfranchised by the BCA2007. We are professionals who commenced lawful and successful careers as architects long before the register was created. (Which, for some of us means before the 1985 Architects' Directive). Registration through a validation process to ascertain that we have genuinely acquired a right to remain in practice would be appropriate.

In accordance with best practice, we promote the making of an independent regulator for architects - as recommended by the Competition Authority, the Environment Committee and recently in the Fennell Review. Additionally, we would be pleased to see the creation of an affix for use by all registered architects, such as SRA (State Registered Architect).

Resistance to a new Minister's List is to be expected particularly from the RIAI with its well documented aversion to competition.

Its objections will surely be set against a back-cloth of its status as the registration body, which is undeniable. However, in recent times it has taken to declaring itself the Competent Authority for Architects in Ireland, which is an exaggeration of its lawful status.

S.13.2. of the BCA2007 reads:

“For the purposes of the Directive, the registration body is the competent authority in the State as respects architects.”

It is important to understand that the Directive does not address any Member State's internal registration regime, nor indeed its absence.

The scope of the Professional Qualifications Directive (PQD) was summarised by Commissioner Barnier thus:

“Directive 2005/36/EC facilitates the free movement of architects in the single market by establishing rules according to which Member States which limit access to the profession of architect to holders of particular qualifications must recognise qualifications which were obtained in another Member State.”

In other words although RIAI(Ltd) is the registration body and S.13.2 applies, the Royal Institute is not the State appointed regulator of architects in Ireland.

Nonetheless, a new Minister's List must not conflict with EU law – notably the PQD. Of course, as the modernised Directive does not yet apply, it is the PQD in its current form that is of relevance. But in fact a new Minister's List need not have a bearing on either the current or the modernised PQD, because the Alliance is not expecting automatic EU recognition to apply to those who succeed through a new Minister's List.

Under what is called “the Dutch system”, which the original Minister's List followed, technical competence was recognised on the sole basis of proven establishment of either 5 or 10 years. Those who succeeded under the Dutch system are specifically recognised in the Professional Qualifications Directive (see Art. 49 & Annex VI). Dutch and other EU “grandfather” architects enjoy all the benefits of mutual recognition.

That means they are free to work in Ireland as architects and must be automatically admitted onto the BCA2007 Register of Architects. Any notion of standards being diminished under a new Minister's List can therefore be disregarded.

It is particularly instructive to note recent developments in the UK which are directed at creating alternative routes into the architecture profession. This opening of the market can be seen as a rational and pro-Europe response to EC Memo 13-839, 2nd Oct 2013.

Proposed Change

Facilitate the inclusion onto the Statutory Register of Architects of persons who can demonstrate the possession of an Acquired Right to make their livings as architects in the State.

MISC : Restore BRAB

The Alliance is pleased to note and to support the case made in favour of a Minister's List process given in the submission to the review by the Group of Independent Architects of Ireland (GIAI).
