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# Joint Oireachtas Committee on Housing, Planning, Community & Local Government

## BUILDING REGULATIONS, BUILDING CONTROLS & CONSUMER PROTECTIONS

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### 1. BACKGROUND

#### 1.1 BUILDING CONTROL, BUILDING REGULATIONS AND PLANNING

This paper sets out the context of the legislation, the range of issues to be addressed and some solutions for a cost-effective and robust system.

Firstly, it is important to make a distinction between Planning and Building Control because they are often confused even though they are entirely separate systems and bodies of law.

*-Planning is about your neighbours, your community, the environmental impact, the economy (for example, the building location, density, height, size, transport, infrastructure, water supply, pollution, amenity space, parking, etc).*

*-Building Control is about the building, (your home, your business, places that you visit and occupy) and it relates to technical standards of construction (for example, structural design, fire safety, energy efficiency, disabled access, stairs, handrails, radon, ventilation, sound-proofing, materials).*

Within Building Control there are two strands- the first is the technical standards ("Building Regulations" standards) and the second is the administrative controls, the systems for approval, inspection and certification ("Building Control" system).

#### 1.2 BACKGROUND (Prior to 1990 and 1990-2014)

Prior to 1990 there was a system of local authority inspections (under Building By-Laws) in many urban areas. The local authorities inspected construction at appropriate stages. The 1990 Act<sup>1</sup> replaced this system and gave the Minister extensive powers to set technical standards and also to introduce a national regime of inspection and certification. This was not implemented, with the exception of two very limited areas – 'design approval' for Fire Safety and Disability Access. The other regulatory requirement was to lodge a short 'Commencement Notice' form to the local authority to alert them that building works were starting.

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<sup>1</sup> Building Control Act, 1990

<http://www.irishstatutebook.ie/eli/1990/act/3/enacted/en/html>

The local authorities had target inspection rates but were not obliged to inspect construction or to sign-off completion.

In the absence of the State introducing any inspection regime an 'ad hoc' private system was put in place between the lending institutions, the Law Society and the professional bodies. This is the non-statutory system of 'Opinions' that are often referred to. The system was wholly inadequate but it could be argued that it was transparent because if a professional was only paid for an hour to look over a completed apartment then that is what the Opinion said. The other shortcomings were that Opinions frequently referred to a unit (not the building) and that the developer may have engaged the professional for very limited, if any, involvement during the design and construction stages. Local Authority site inspections were not routinely carried out.

In parallel, was also a system of statutory inspection at completion (Floor Area Compliance Certificates<sup>2</sup> under the tax code) that was operated by the Department of Housing from 2004. This was a statutory inspection of compliance with set technical building standards. This system no longer operates.

### **1.3 BUILDING REGULATIONS & BUILDING CONTROL**

It is generally considered that the Irish technical standards are good, they change and develop, both with improvements and with changes in culture. Building standards are, therefore, not an exact science because materials change, design is innovation and society changes. For example, if we consider universal access- this is a building regulation that comes from cultural change about equality of access for all including those with disabilities; if we consider energy efficiency, this comes from concerns about climate, sustainability and occupant comfort. Standards evolve and they also have to be interpreted and adapted because there can be internal conflicts between regulations and unintended consequences. So, in some areas there is a large element of judgement and common sense in how regulations are applied and in which take precedence. In other regulations it is binary (pass/fail) and demonstrating the standard of compliance is more straightforward.

In this context, there needs to be a system for developing and reviewing standards, producing technical information and a feedback loop from practice for information sharing. There is currently no framework for this and relevant responsibilities are split across multiple departments and agencies. From 1990 to 2012 the Minister and his Department had the guidance and support of the statutory Building Regulations Advisory Board (BRAB), however this was disbanded five years ago, in the early stages of the BCAR controversy.

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<sup>2</sup> Housing (Floor Area Compliance Certificate Inspection) Regulations 2004, Irish Statute Book <http://www.irishstatutebook.ie/eli/2004/si/128/made/en/print>

## **1.4 “LEGACY ISSUES”**

In order to understand the background to the 2014 BCAR changes it is important to explain why house building is different and why this sector is very vulnerable to poor quality and defects. This is not unique to Ireland and it is a consequence of the way that housing is procured.

In the “contract build” sector (commercial, institutional buildings) there is a contract in place between the owner and the builder. There are contractual safe-guards (quality controls) in place in these commercial arrangements. The builder only gets paid every month if the work is built in accordance with the contract. So although there may be problems on site or latent defects after completion there are mechanisms to deal with this. Under contract there are protections and, generally owners and investors will mitigate the risks with a network of professional oversight, warranties, insurances and retention monies.

In this sector some State oversight is nevertheless required at certain stages particularly for critical areas of occupant safety and sustainability.

The “house building” sector is very different to the “contract build” sector. In the main, defect problems are most common in housing building and to some extent in non-traditional procurement methods (Design-Build, PPP).

Housing is ‘high risk’ construction that requires immediate and sustained focus, particularly spec-build<sup>3</sup> and self-build<sup>4</sup>. This is because the contractual quality control safeguards described above generally<sup>5</sup> do not exist. The owner and builder, for all practical purposes, is the same entity.

## **1.5 SHORTCOMINGS OF THE PRE-2014 SYSTEM**

Buyers of defective homes have three problems- their homes are defective (poor regulation), there are no funds available (inadequate insurance), and there are few rights and no mechanisms for resolution (absence of consumer protections).

The failings in the system resulted from an lack of oversight of design and construction, un-regulated housing developers (many are limited liability companies that have since ceased trading), and a lack of adequate consumer rights and protections.

The absence of historic documentation (which has been the principle focus of BCAR), shortcomings in the warranty systems, and registration are secondary issues.

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<sup>3</sup> Speculative house and apartment building by developers for sale

<sup>4</sup> Self-build usually refers to individual houses directly procured by owners, possibly undertaking some labour/ management and arranging works by direct labour, trades, sub-contractors etc.

<sup>5</sup> A small percentage of private sector housing is procured under these types of commercial contracts.

## 1.6 THE PURPOSE OF BUILDING CONTROL

The 1990 Building Control Act<sup>6</sup> sets out the scope of Building Control in Ireland. It is important to refer to this in the context of any discussion because there are many different (and conflicting) assumptions and misunderstandings being made about the purpose and range of building control:

*Building regulations may be made for all or any of the following purposes:*

- (a) making provision for securing the **health, safety and welfare** of— (i) persons in or about buildings, and (ii) persons who may be affected by buildings or by matters connected with buildings;*
- (b) making provision for the special needs of **disabled persons** in relation to buildings;*
- (c) making provision for the **conservation of fuel and energy** in relation to buildings;*
- (d) making provision for securing in relation to buildings the **efficient use of resources**;*
- (e) making provision for the **encouragement of good building practice**; and*
- (f) making provision for such other matters as appear to the Minister to be necessary or expedient and are specified in the regulations.*

Technical compliance doesn't only affect the homeowner and occupants; it can have wider economic and environmental impact in local contamination (septic tanks) and failure to meet commitments on climate change (energy efficiency).

There are financial consequences for the State from an ineffective Building Control system. There are legacy issues with design, construction, materials and workmanship that have not been quantified, and also future risks to be mitigated.

Building Regulations are there to protect life, not property. To explain what this means: Fire Regulations standards ensure that people can escape from a building safely, that the stairs are wide enough, that there is signage and emergency lighting, that the fire does not spread.

They are not standards to prevent a building burning down or to protect the asset value of the building. That is a matter for the owner and he can put in place insurance to compensate for potential loss, if he chooses.

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<sup>6</sup> Building Control Act, 1990 Irish Statute Book  
<http://www.irishstatutebook.ie/eli/1990/act/3/enacted/en/html>

Building Control is not an appropriate mechanism of redress for materials of lower quality or poor durability (once they meet the legal minimum standard). Neither can it address issues of poor maintenance and upkeep.

These are often confused because defects in buildings can take many years to appear and at that point the origins and responsibility for the problem can be very complex and difficult to unravel- It is for this reasons that effective and readily accessible redress for consumers is critical<sup>7</sup>. The legal costs and delay of tracking responsibility and apportioning liability can be far in excess of fixing the problem. It is not unusual for the legal cost to be many multiples of the cost of repairing the defect, aside from the delay and stress for the owner. For robust consumer protection, the priority should be a means to solve the problem first and to settle the claim later.

### **1.7 DISPROPORTINATE LIABILITY**

The Civil Liabilities Act<sup>8</sup> (whereby someone who is 1% responsible could be liable for 100% of the claim) adds to the legal complexity of problems and to the insurance burden of all of the parties.

For the purpose of the developing a workable regulatory framework it is very important that clarity be brought to this. In many of the homes with 'legacy issues' building regulation compliance is only part of the problem.

The non-compliance may have been due to design (*the responsibility of the architect or engineer*) or due to construction (*the responsibility of the builder, sub-contractor or supplier*).

In addition to building regulation compliance, there can be 'legacy issues' from poor quality workmanship and materials at the time of construction, latent defects (*these are in the control of the developer*) and poor maintenance (*this is in the control of the owner/management company*). Defects can result from errors in coordination, material failure, environmental conditions, a technical error in manufacture or an error in the standard itself.

We need to consider this as two separate issues:

- a technical safety compliance (suitable for occupation) as a State control;
- a building guarantee arrangement as a safeguard and system of redress for homebuyers (for example, through a warranty, a state fund or bonding of housing developers).

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<sup>7</sup> This section refers to Building Control in the house-building sector only, for reasons that are explained later.

<sup>8</sup> Civil Liability Act, 1961

<http://www.irishstatutebook.ie/eli/1961/act/41/enacted/en/html>

## **2.0 THE CURRENT SYSTEM**

### **2.1 BCAR (BUILDING CONTROL AMENDMENT REGULATIONS) 2014**

From March 2014, BCAR<sup>9</sup> put the previous 'ad hoc' Opinions of Compliance on a statutory basis. Owners were required to put in place an inspection and recoding system for construction and to lodge records with the local authorities through the Building Control Management System (BCMS).

This new system of privatized statutory self-certification is unique to Ireland and does not operate in any other country. It reinforces the previous failed system and does not accord with international best practice<sup>10</sup>. 'Certification' by definition requires third party involvement at design and construction stages either by local authorities, by private regulated entities under State control or a hybrid. In many countries a 'warranty' (insurance) system for defects is also in place to protect consumers.

To return to the very particular areas of concern in the housing sector, namely speculative build by developer and self-build by owner. In some ways they have the same challenge and the conflict arises because the owner and builder are the same entity. This is a clear conflict of interest. It is also at the root of many of the problems that we think of as 'legacy issues' under a self-certification regime where the process is closed and there is no opportunity for any independent outside intervention.

The current BCAR regulations rely entirely on the 'owner' to put in place (and decide how much to pay for) an inspection regime. If the owner is also the builder there is a conflict of interest. The 'inspector' (certifier) does not have any statutory powers, and has no control over the process other than to threaten to withhold a certificate at the end. The certifier can be an employee of the developer and the developer can replace the certifier at any time. The level of inspection is open to negotiation and interpretation. This is why there is much debate about the costs.

In the commercial sector, the regulations do not give statutory powers to the inspector (certifier) to enter the site, inspect documents or take samples. Consequently, owners have had to introduce additional contractual arrangements, an unnecessarily complexity that adds cost and leads to delay and disputes. There is also a three week administrative delay at completion. This impacts on competitiveness.

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<sup>9</sup> The BCAR administrative building control arrangements and regulatory requirements are discussed elsewhere and have not been included in this paper

<sup>10</sup> World Bank Dealing With Construction Permits Best Practice (2016) <http://www.doingbusiness.org/data/exploretopics/dealing-with-construction-permits/good-practices> and International Standards Organisation (ISO) <https://www.iso.org/certification.html>

An 'Opt Out' for one-off houses and domestic extensions was introduced in 2015<sup>11</sup> due to concerns about cost and the exclusion of self-build as a procurement option. This opt out (from controls, not standards) has been widely adopted.

This change also brought an 'Opt In' for all local authorities, not only to BCAR but also to all of the other Building Control administrative requirements.

In summary, the three key failings of the 1990-2014 system have not been addressed in the BCAR system:

- absence of independent third party oversight of design and construction (professionals and builders can 'self certify', they are directly appointed by the builder, certifiers can be an employee of the builder);
- an absence of regulation of housing developers (who may or may not be builders);
- inadequate consumer protections for owners (there are no new legal rights).

## **2.2 REVIEW OF BCAR 2014-17**

The system has been in operation for three years and a review of the system is now appropriate. In considering the effectiveness of BCAR, there are a number of questions to ask:

- Does BCAR work in theory (is it in accordance with best practice<sup>12</sup>)?
- Is BCAR working in practice (does it level the playing pitch, are the systems adequate, is it achieving the stated aims)?
- Is BCAR cost effective (what are the current and future costs to the construction industry and does this justify the benefits?)?
- What changes are now necessary?

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<sup>11</sup> SI 365 of 2015, Irish Statute Book

<http://www.irishstatutebook.ie/eli/2015/si/365/made/en/pdf>

<sup>12</sup> World Bank: Good Practices For Construction Regulation And Enforcement Reform : Guidelines For Reformers (2013)

<http://documents.worldbank.org/curated/en/662881468170967367/Good-practices-for-construction-regulation-and-enforcement-reform-guidelines-for-reformers>



### **3. ISSUES FOR DISCUSSION**

#### **3.1 RESOURCES AND SKILLS**

This is particularly critical as resources are constrained, not only in local authorities, but also among design professionals, builders and trades. A catastrophic collapse and 10 years of inactivity has impacted on skills and experience throughout the construction sector (lack of opportunities for up-skilling, fall off in apprentices, emigration, retirement, changing standards etc.). There are still 150,000 fewer people employed in construction than there were 10 years ago and the industry is more fractured than it was then; 95% of individuals and trades are in micro-enterprises. There is an expectation that 80,000 more people will be employed in the construction industry in the coming years, the majority will be employed on a casual or contract basis. This is high risk for low standards and a repetition of past problems.

The local authorities similarly have fewer staff and they lack training and adequate support systems. (There are more dog wardens in the local authorities than building control officers).

There is duplication of effort and inefficiency throughout the systems. In order to make good use of scarce resources there needs to be information sharing and effective use of the people with the necessary skills and specialisations. Information, guidance and supports are needed for local authorities, for designers, for builders and for owners.

#### **3.2 COSTS AND INCONSISTENCY**

BCAR was applied to all of the industry (residential, commercial and institutional) in response to problems in the residential sector. The cost/benefit has not been assessed as there was no Regulatory Impact Assessment undertaken in relation to the costs of BCAR.

In the housing sector, there is much discussion about the cost of BCAR. Taking the administrative costs<sup>13</sup> for one house, the CIF have said that "it is not €15,000, the cost of compliance is €2,000 to €2,500 per Assigned Certifier". The Department of Housing have estimated this as €3,800. The RIAI<sup>14</sup> say closer to €8,000. In the market there are Assigned Certifiers providing the service for as low as €500 (a similar cost to the old 'Opinions'). These are the quoted costs for the Assigned Certifier role, which is only one part of BCAR. SCSi/ DKM research says that 5% has been added to costs across in the construction industry<sup>15</sup>. Others say that this is closer to 10% when sub-certification, specification and contractual costs are added.

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<sup>13</sup> BCAR did not change the technical standards, the additional costs discussed here are for additional administrative requirements only.

<sup>14</sup> Royal Institute of the Architects of Ireland

<sup>15</sup> Irish Construction Prospects to 2016, DKM/ SCSi

[https://www.scsi.ie/documents/get\\_lob?id=538&field=file](https://www.scsi.ie/documents/get_lob?id=538&field=file)

The BCAR system was designed to be forensic, to document and record every process and component and this is expensive. However, the market cannot bear this level of cost and the administrative drain on expertise. As a result there are very wide variations in interpretation of the regulatory requirements. There is no consistent standard for BCAR, at one end commercial owners are paying high costs for a quality control system and at the other the market has reverted to business as usual. (In Australia an unregulated privatized system resulted in a race to the bottom on fees and diligent professionals were priced out of the market).

### **3.3 REGISTRATION / LICENSING OF PROFESSIONALS & BUILDERS**

The engagement of 'competent persons' is an important aspect of the BCAR regulations. At present there are two statutory registers (architects and surveyors), a non-statutory register for engineers and promised legislation for two more registers for builders and architectural technologists. Under current proposals in excess of 100,000 people and businesses may be included.

Some other trades are also regulated (gas installers, electricians, locksmiths etc.). Other trade organisations manage standards of their membership (Guild of Master Craftsmen, plasterers etc.).

In terms of consumer protections, it is important to be clear about what these associations mean. In some organisations, there may be a mechanism for complaint and sanctions, but this is not a route to financial redress. There is an inconsistency of approach and a lack of transparency for consumers.

In the context of the EU Services Directive<sup>16</sup> there cannot be legal and administrative barriers to trade. This means that any statutory system must be open to all member states. This has implications for resources and for areas of skill not based on recognized Europe-wide qualifications.

The costs and inefficiencies of supporting multiple registers administered by private organisations needs to be considered in the context of both consumers and the administrative burden to industry. There are critical trades and professions that need to be regulated (as examples, fire-stoppers, fire alarm installers, radon barrier installers, structural engineers etc.). In other cases the benefits are questionable (plasterers, decorators, etc.).

CORU<sup>17</sup> the shared register for health sector professionals (physiotherapists, dieticians etc.) may be a suitable model for the construction industry.

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<sup>16</sup> EU Services Directive [http://ec.europa.eu/growth/single-market/services/services-directive\\_en](http://ec.europa.eu/growth/single-market/services/services-directive_en)

<sup>17</sup> CORU <https://www.coru.ie/>

It is also important that self- build and other flexible methods of procurement can operate in any regulatory regime, subject to the necessary safeguards of State controlled inspections. It is not appropriate for a Building Control regulatory system to impose narrow commercial contractual arrangements on consumers. One size does not fit all.

In order to reduce cost in construction, competition should be encouraged and all procurement models facilitated (be it spec build, contract build, management contracting, PPP, self build etc.) The Building Control system needs to respond to market conditions rather than to limit them.

### **3.4 INSURANCES AND REDRESS**

Insurance arrangements in the construction industry are fragmented and there are issues of regulation of the sector, particular as much insurance is held off shore and regulated in other jurisdictions.

BCAR places primary responsibility on the professional certifiers with an assumption that Professional Liability Insurance (PII) is appropriate and adequate for building defects. This is a critical error- PII is a business insurance for professionals not a construction insurance for owners. It has limitations outside the control of the professional. It operates on a 'claims made' basis which means that it may not be in place at the time of a future claim. It is not a readily available or reliable means of redress for consumers.

'Home Warranty' policies are available for most speculative housing developments. Similarly they have limits and exclusions (notably pyrite) and in many of the past failures these policies were inadequate or the funds were not sufficient for the defect.

Throughout the construction sector (residential, commercial and institutional) the opportunities for 'project insurance' should be considered. This would improve the current fractured and inadequate insurance arrangements in the sector and is an area where State capital projects could take a lead and bring about change. Other options for the housing sector include a bonding arrangement for house-builders and a state fund or 'war chest' for future defects, material failures, standards failures etc. (perhaps on a 1% contribution at completion from all construction).

### **3.5 ENFORCEMENT**

It is widely considered that the enforcement mechanisms under the Building Control Act are unworkable. For this reason the Fire Services Act, 1981<sup>18</sup> is often used for enforcement in urgent cases. There is no published data on enforcement activity.

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<sup>18</sup> Fire Services Act, 1981

<http://www.irishstatutebook.ie/eli/1981/act/30/enacted/en/html>

### **3.6 “CLARITY AND CERTAINTY”**

Although BCAR has been promised as a ‘chain of responsibility’ for consumers, there is little clarity and certainty for any of the stakeholders in the process. For consumers BCAR has been presented as a robust solution for a range of issue far beyond the scope of the regulations. The Building Control system is not an appropriate mechanism for an “asset” guarantee of 100% compliance and quality. Consumers have an expectation that the system has been fixed but they have no new legal rights under BCAR.

This ‘stretching’ of Building Control has also given rise to increased insurance and overhead costs throughout the sector. Professionals have very serious concerns about the future affordability of PII insurance, the risk of insurance flight from Ireland (if BCAR claims rise), and the potential loss of livelihood due the negligence of others over which they have no control. Because of this expectation this has also has given rise to very justifiable fears in local authorities about potential future liability for their own work. Local authority staff and independent inspectors can prevent problems and administer enforcement, they cannot issue a warranty on the work of a builder or be held liable for the mistakes of others.

Since 2014, there is increased awareness and an improved culture of compliance. However, this is in the context of moderate levels of construction activity in the commercial sector and low levels in mass housing, the area of highest risk. Will the BCAR system be fit for purpose if there is a doubling of output, a substantial change in construction methods (Near Zero Energy Buildings<sup>19</sup> by 2020) and an influx of 80,000 workers?

## **4. SOLUTIONS**

### **4.1 “PREVENTION IS BETTER THAN CURE”**

There will always be some defects in construction, buildings are unique, they are designed, constructed and coordinated by many people, over time, with multiple requirements, made with natural materials and put together in the rain.

In this context, there must be unambiguous national technical requirements. This must be supported by appropriate, timely, independent interventions that are cost-effective. Industry needs the system to be responsive and well resourced to retain competitiveness.

Appropriate supports and information can improve standards, many breeches are through a lack of information. Designers and builders must have certainty about the extent of their own responsibilities and be accountable. Consumers need robust protections that are available immediately without arbitration or litigation.

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<sup>19</sup> NZEB, Near Zero Energy Building Standard is required for all buildings by 2020 and for public buildings by 2018.

## **SUMMARY SOLUTIONS:**

The following is a range of improvements for an effective system:

- Inspection of design and construction that are independent of the owner and builder, under State control and paid for by the owner, appropriate to the risk;
- standard national checklists for substantial compliance, common to all and centrally recorded;
- a repository of standard national 'Approved Construction Details' digitally available to all designers and builders and subject to ongoing review;
- active market surveillance of construction products (such as UK Trading Standards) independent of the supply chain as intended under the EU Construction Products Regulations, to include Rapex<sup>20</sup> alerts for dangerous, defective and fraudulent products.
- a standard system of licensing or registration for key professions and trades;
- a system of licensing or registration for speculative housing developers (who may or may not be builders), with additional consumer protection requirements and bonded for consumer redress;
- a system of 'warranty' or a national fund for latent defects, defective materials, errors in standards;
- a national strategy for insurances in the construction sector and a review of the regulatory controls in insurance;
- re-establishment of BRAB (Building Regulations Advisory Board) with a technical support function to advise designers and builders;
- consumer information, similar to that available to owners from the HSA<sup>21</sup>;

**/END**

## **APPENDIX**

"One Stop Shop" Streamlined approval and inspection system for the accelerated conversion of existing vacant buildings for housing

Proposal under Rebuilding Ireland Pillar 4 and Pillar 5 (23 March 2017)

<https://drive.google.com/file/d/0BxfQwMKnCyNoNExKeDIObndXN0E/view?usp=sharing>

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<sup>20</sup> Rapex, EU Rapid Alert System

[http://ec.europa.eu/consumers/consumers\\_safety/safety\\_products/rapex/alerts/repository/content/pages/rapex/index\\_en.htm](http://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/repository/content/pages/rapex/index_en.htm)

<sup>21</sup> HSA, Construction- What are the duties of a Client?

[http://www.hsa.ie/eng/Your\\_Industry/Construction/Construction\\_Duty\\_Holders/Client/](http://www.hsa.ie/eng/Your_Industry/Construction/Construction_Duty_Holders/Client/)