



Regulation of housing quality in Ireland: What can be learned from food safety?

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Abstract

This paper contrasts, and critically evaluates, the Irish regulatory regimes for building control and food safety. It concludes that the systems are similar in design, but vary greatly in implementation, drawing on analysis of enforcement statistics published by the Food Safety Authority of Ireland and obtained from building control authorities. It is argued that regulatory systems require enforcement and oversight in order to verify consistency of decision-making, compliance with their own rules and standards, and overall effectiveness, and that this lack of emphasis on enforcement and oversight is a significant failing in the Irish building control system.

Keywords: Regulation, building control, food, enforcement

Introduction

There is a striking difference between enforcement policy for construction and enforcement of food safety legislation. The enforcement tools are similar, but the decisions on whether to use those tools vary significantly between building control authorities and

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the Food Safety Authority of Ireland ('the Authority'), its authorised officers and official agencies.

This paper considers the legal frameworks for building control and food safety, examining inspection and enforcement powers under the Building Control Act, 1990 ('the 1990 Act'), and the Food Safety Authority of Ireland Act, 1998 ('the 1998 Act'), and related legislation. The regulatory regime for the two models is then compared, highlighting enforcement powers and introducing a theoretical model for the analysis based on contemporary regulatory theory, together with international perspectives. The paper draws on empirical research and enforcement information published by both local authorities and the Authority in order to highlight the significant difference between food safety regulation and building control regulation. The paper concludes that regulation without enforcement may suggest an ineffective building control system, and that the system requires enforcement and transparency for the purpose of effectiveness and accountability.

Legal frameworks for building control and food safety

The safety and quality of residential construction are regulated by means of a number of regulatory systems and sources of law. Private law, principally contract law, governs the standard of workmanship and quality of materials that the buyer of a new home should expect, via the building agreement entered into upon the first sale of the home, and subject to terms implied by the Sale of Goods and Supply of Services Act, 1980. Public law provides a regulatory function for residential construction by means of various instruments, including the Planning and Development Acts, 2000 to 2016, and the 1990 Act, and the Building Regulations made pursuant to that Act, which are the main focus of this paper.

Building control

The 1990 Act designated each local authority as a building control authority, and empowered building control authorities to carry out compliance and enforcement activities.

The involvement of a building control authority in building works generally begins with receipt of notice of commencement of construction, the Commencement Notice, which puts the building control authority on notice of commencement of the works, and thus alerts the building control authority so that it can exercise its statutory powers of inspection of the works (O'Cofaigh, 2007, pp. 3–7).

The principal enforcement tool prescribed by the 1990 Act is the Enforcement Notice, which may be served where the construction of any building or the carrying out of any works to which the Building Regulations apply has been commenced or completed otherwise than in accordance with the regulations (Section 8). A notice may require the removal, alteration or making safe of any structure, service, fitting or equipment, or the discontinuance of any works, and may prohibit the use of a building or part thereof until specified steps have been taken. The authority may carry out the steps specified in the notice itself if the person to whom the notice was served does not do so, and may recover the costs of doing so from that person (O’Cofaigh, 2007, pp. 3–9; Sections 8(7) and 8(8), 1990 Act).

Inspection powers and enforcement

An authorised person, as defined in the legislation, may enter any land, before or after completion of works, seek information in relation to the works and take samples of materials where necessary to assess compliance with the Building Regulations (Section 11, 1990 Act). Section 16 of the 1990 Act provides that ‘Any person who contravenes (by act or omission) any requirement of this Act or of any order, regulation or notice under this Act shall be guilty of an offence.’ The author has been able to find no reported judgments by which criminal liability has been imposed on any person pursuant to the 1990 Act.

The building control regime and the approach to its administration and enforcement were called into question by two reports into widespread building failures in Ireland in the past five years, in each case commissioned by the government following discovery of significant defects in homes.

The Pyrite Panel recommended in 2012 that building control authorities should exercise their enforcement powers, and was concerned at the evidence presented to it that the cost and time of prosecutions were a deterrent for building control authorities. The panel commented that ‘Building control authorities have a responsibility under the Building Control Acts 1990–2007 to enforce Building Regulations’ (Department of Environment, Community and Local Government, 2012b, p. 21).

The 2017 report of the Expert Panel on Concrete Blocks also drew attention to enforcement of building control as a relevant factor in the prevalence of sub-standard blocks used in the construction of houses in Donegal and Mayo. The panel stated that it was ‘concerned regarding the current level of enforcement of the Building Control

Regulations and the Construction Products Regulation and recommends that these roles be strengthened significantly' (Department of Housing, Planning and Local Government, 2017a, p. 81).

Empirical research in relation to safety on Irish construction sites was carried out by Hrymak & Meekel (2012), consisting of fifty-one interviews with construction site personnel in 2010–11. A total of 83 per cent of participants stated that they believed that their sites could be selected for inspection by the Health and Safety Authority (HSA), and 69 per cent of participants believed that 'a real unannounced HSA inspection to site would change their attitudes towards safety behaviour on site' (Hrymak & Meekel, 2012). This supports the view that the likelihood of regulatory intervention by a building control authority, both in the form of unannounced inspections and subsequent use of enforcement powers, may have a significant role to play in improving compliance with Building Regulations.

Food safety regulation

Laws regulating food safety have been in place internationally for many years, for reasons based on religious beliefs, protection from toxins and ensuring that food was as described (Griffith, 2006). Ireland shared the British regulatory regime during the period of the nineteenth century when there were various Acts passed in order to regulate food, including the Public Health Act, 1848, the Adulteration of Food Act, 1860, and the Sale of Food and Drugs Act, 1875 (Griffith, 2006). Towards the end of the century the European food safety regime had begun to develop (MacMaoláin, 2007). Over time this took root in Irish law, in part due to a number of significant events that brought food safety into sharp focus, including the bovine spongiform encephalopathy crisis in the 1990s, and the development of genetically modified organisms and their incorporation into the food chain (MacMaoláin, 2015, ch. 1, 5). European surveillance and monitoring systems for food were also further developed and harmonised in response to the food scares (Knowles et al., 2007).

The regulatory framework for food safety in Ireland is contained in primary and secondary legislation, principally the 1998 Act, which established an independent regulatory body for food safety, the Authority, to which various functions and powers were assigned. The key pieces of secondary legislation which form part of the regime are Regulation (EC) 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and

animal welfare rules, and Statutory Instrument 432/2009, European Communities (Food and Feed Hygiene) Regulations 2009, and Statutory Instrument 117/2010, European Communities (Official Control of Foodstuffs) Regulations 2010, by which that Regulation was implemented in Ireland; each of the two statutory instruments contain enforcement powers that complement those in the 1998 Act.

The principal function of the Authority is to take all reasonable steps to ensure that food produced, distributed or marketed in Ireland ‘meets the highest standards of food safety and hygiene reasonably available’ (Section 11 of the 1998 Act). The Authority must encourage and foster ‘the establishment and maintenance of high standards of food hygiene and safety’ (Section 12) in order to implement its mandate of achieving the highest level of protection reasonably available in the interests of public health and consumer protection.

Inspection powers and enforcement

A significant part of the Authority’s work consists of the administration of inspections; Section 12(2) of the 1998 Act provides that the Authority ‘shall carry out or arrange to have carried out such food inspections as are required to determine compliance with food legislation’. A certain level of inspections is therefore required in order to determine compliance. The inspection regime is well-developed, delivered via service contracts with thirty-three public sector official agencies nationwide, including local authorities and the Health Service Executive.

The 1998 Act requires the Authority to monitor the agencies that carry out inspections on its behalf: Section 17 of the 1998 Act provides that ‘The Authority shall consider and keep under review the efficacy of the food inspection services’. Section 48(9) of the 1998 Act similarly provides that ‘The Authority shall take such measures as it considers appropriate to determine whether an official agency is adequately carrying out its functions under a service contract.’ Therefore, the Act itself emphasises inspection, assurance and monitoring of the regulatory regime.

This monitoring is carried out by means of audit levels required pursuant to the 1998 Act and EC Regulation 882/2004, including internal audit systems that must be devised and implemented by official agencies, audits of those agencies by the Authority and audits of the Authority itself by the European Commission, which publishes the results of audits of national competent authorities. An audit carried out in 2014 resulted in a finding that the official control system

for production of Irish fishery products had not been consistently applied, which was reported by an Irish national newspaper (Healy, 2014).

Authorised officers of the Authority have broad powers to take action in respect of non-compliance with food legislation, detected during inspections. An Improvement Notice can be served by an authorised officer who is of the opinion that any activity involving the handling, preparation, processing, manufacturing, distribution, storage or selling of food, or the condition of any premises where such activities are carried out, is of such a nature that, if it persists, will, or is likely to, pose a risk to public health. The notice, served on the proprietor or person in charge of a premises, identifies the activity or defect in the premises giving rise to the risk, specifies the remedial action to be taken, together with a time limit for such action, and may include other requirements considered necessary by the authorised officer.

Section 52(4) of the 1998 Act provides that where an Improvement Notice is not complied with, an Improvement Order may be issued by the District Court, which has the effect of elevating the original Improvement Notice, to the extent that it has not been complied with, to a court order. The Improvement Order itself includes the mechanism for the Authority or an official agency operating under a service contract to serve a Closure Order if the Improvement Order is not complied with within the time period specified, without the need to return to court (1998 Act, Section 52(5)).

Food safety and building control: Regulatory models compared

A significant difference between the regulatory models for building control and food safety is that the 1998 Act established the Authority as an independent regulatory body with responsibility for monitoring and ensuring the safety of food.

The 1990 Act and the 1998 Act define a class of persons ('authorised persons' under the 1990 Act, and 'authorised officers' under the 1998 Act) empowered to exercise certain enforcement powers, although authorised persons may not themselves issue Enforcement Notices under the 1990 Act – which assigns this power to the building control authority (Section 8) – while authorised officers may themselves issue Improvement Notices under the 1998 Act (Section 52).

Connery & Hodnett observe in this respect that regulatory statutes derived from EU directives would not fall foul of the Article 38.1 right to a trial in due course of law. Where an EU directive requires the imposition of financial penalties, indictable offences may be created by statutory instrument, and many regulatory offences are in fact prosecuted in the District Court (Connery & Hodnett, 2009, pp. 429–31). The mandatory requirements of European law therefore exercise a significant regulatory discipline on the Irish food safety regime. By contrast, the fact that an authorised person under the 1990 Act may not issue an Enforcement Notice, and that recourse to the District Court may be required in order to enforce such a notice (Section 9), may inhibit its effectiveness as a regulatory tool.

Each of the 1990 and 1998 Acts creates offences of failure to comply with enforcement tools, with accompanying powers of seizure, detention and prosecution. One important difference between the regulatory regimes is that the 1990 Act does not provide for less prescriptive enforcement tools for activities that, if not corrected or addressed, are likely to result in a breach of the Building Regulations, in contrast to the Improvement Notice procedure of the 1998 Act, which allows activities to be targeted if ‘likely to pose a risk to public health’ if they persist (Section 52(1)).

Devaney conducted empirical research among a number of Irish focus groups, selected to represent the views of consumers with regard to food risk governance. The results highlighted confusion among consumers about the public bodies responsible for food risk governance, with a particular lack of awareness of the work of the Authority. Devaney commented that this aspect of the participant responses ‘signals a distinct lack of consumer awareness regarding the responsibilities of the Authority, raising questions that if consumers do not know about the institution, they will not hold it accountable for its actions, question its conduct or impose any external disciplinary effects’ (Devaney, 2016, p. 5). This is notwithstanding the Authority’s efforts at maintaining a substantial public profile for its activities via press releases, newsletters and events (for which there is further information at www.fsai.ie), and detailed annual reports.

This suggests that similar empirical research on consumer awareness of building control authorities would be likely to demonstrate a much lower level of awareness of their functions; information freely available from the Authority’s website in relation to Enforcement Notices and prosecutions, for example, is not published by building control authorities. In response to enquiries by the author

pursuant to the Freedom of Information Act, 2014, a number of local authorities refused to provide a copy of the register of Enforcement Notices and District Court orders, on the basis that the register was available at the offices of the local authority.² As each Irish local authority maintains a website, however, there appears to be no reason why this register would not be available online.

Regulatory theory building control, and food safety

In highly influential research, Ayres & Braithwaite advocated a ‘responsive’ form of regulation, arguing that a combination of regulatory activities, from persuasion to sanction, is liable to generate better outcomes than either a strict ‘command and control’ approach or an approach based on negotiation and persuasion by the regulatory body. A regulator, in this model, should be responsive to the regulated industry, so that ‘The very behaviour of an industry or the firms therein should channel the regulatory strategy to greater or lesser degrees of intervention’ (Ayres & Braithwaite, 1992, p. 4).

Following on from that work, a model of ‘risk-based’ regulation emerged that proposed allocating regulatory resources based on risk assessment rather than one premised on comprehensive surveillance and monitoring. Beaussier et al., writing in relation to healthcare regulation in the UK, describe the model as follows:

The central conceit of risk-based regulation is that regulators cannot, and indeed should not even try, to prevent all possible harms. Instead, regulatory interventions should focus on controlling the greatest potential threats to achieving regulatory objectives. (Beaussier et al., 2016, p. 206)

Beaussier et al. pointed to a number of significant ‘high-profile breakdowns in care quality’ (p. 206) that occurred notwithstanding the evidence and risk-based intervention strategy implemented in the UK by the Care Quality Commission, and concluded that, for risk-based regulation to be appropriate as a regulatory strategy, there needs to be ‘political tolerance for adverse outcomes’ (p. 205). They also highlighted problems with defining the meaning of quality for different regulatory contexts (p. 207).

² Telephone call to author, Kildare County Council, 20 July 2017; pers. comm. to author, Dún Laoghaire–Rathdown County Council, 25 July 2017.

The risk-based model is attributed by a number of commentators to the Hampton review of 2005 (Hampton, 2005) and the UK Government's 'Better Regulation' initiative that followed. It is described in general terms by Black as an approach by which a regulatory agency decides how it will use its resources in carrying out its regulatory function, and, crucially, 'what types of failures an organisation is willing to tolerate, and which it is not' (Black, 2005, pp. 510–11). Black criticises this approach in part as an institutional response to the state's ideological withdrawal from regulation:

Through risk-based frameworks, regulators are attempting to define what, to their minds, are the acceptable limits of their responsibility and hence accountability. (Black, 2005, p. 512)

Black & Baldwin subsequently sought to reconcile the 'responsive' model with the 'risk-based' model, suggesting that the 'risk-based' approach warranted re-examination in light of the failure of risk-based regulation 'to protect consumers and the public from the catastrophic failure of the banking system' (Black & Baldwin, 2010, p. 182).

Tombs & Whyte provided a critique of the responsive regulation model, and of the research of Ayres & Braithwaite that produced it, in 2012, claiming that the responsive regulation model had been used to justify 'risk-based' targeting of limited regulatory resources, thereby perpetuating and legitimising the limited allocation of resources for regulatory activities.

The relevance of this critique to building control is that the Irish model of building control is firmly rooted in a risk-based allocation of resources for monitoring and enforcement.

Tombs & Whyte suggest that 'responsive regulation – because it opens the door to risk-based targeting and cedes ground to those who would argue for deregulation – contains the seeds of its own perennial degradation' (2012, p. 2.) They argue that one of the assumptions in the literature with regard to responsive regulation is that the state is in retreat from regulation, and that 'state resources are not and never will be sufficient for the task of overseeing compliance with regulation' (p. 2.). Tombs subsequently characterised risk-based and responsive models as part of a generalised academic orthodoxy of regulation that, by reason of its underlying premise of an acceptable level of regulatory failure, gave legitimacy to private actors in externalising the costs and damage caused by regulated activities (Tombs, 2015).

Writing in 2016, Tombs highlighted the progressive decreases in regulatory inspections by UK health and safety executive inspectors and environmental health officers in the preceding decade. These decreases were accompanied by very low levels of prosecutions, indicating, in Tombs' view, 'an institutionalisation of regulation without enforcement as a sustained political initiative' (Tombs, 2016, p. 334).

May & Burby have identified two enforcement philosophies and three enforcement strategies apparent from their research into building code enforcement in the US, noting that 'There are notable challenges in bringing about compliance because of the complexity and variety of building codes, severe limitations on resources in most agencies, and political environments that tend to favor passive enforcement' (May & Burby, 1998, p. 162). They go on to distinguish between systematic and facilitative enforcement strategies, drawing on their empirical research of building code inspectors and agencies in the US, from which they concluded that 'in practice agencies act in accordance with philosophies that embody mixes of systematic and facilitative elements with systematic elements dominating' (p. 166).

The authors also observed that agency capacity and the establishment of goals tended to contribute to 'increased emphasis on the systematic dimension' (p. 169), which in turn suggests that strategy-setting at building control authority or national level for Irish building control enforcement could contribute to a shift from facilitative to systematic enforcement. The evidence gathered by this author in relation to building control enforcement, discussed below, suggests a greater focus, to date, amongst building control authorities on the facilitative enforcement style.

Really responsive regulation of building control and food safety

There is a significant emphasis in the work of Black & Baldwin (2010) on the audit and monitoring of the performance of the regulatory model in practice. It is notable that, in addition to record-keeping and audit applicable to food business operators and agencies carrying out inspections, the Authority itself is subject to monitoring and audit by the EU Directorate General for Health and Food Safety. An audit carried out in 2013 by the European Commission found that the 'Food Safety Authority has put in place a number of mechanisms intended to verify that controls are delivered as required, have the desired effect, and are adapted when necessary' (European Commission, 2014, p. 7). Therefore, viewed in this context, the failure of the Irish building

control model to include the means of assessment of its own effectiveness in practice is arguably a significant failing.

There are criteria for a risk-based approach to inspections specified in the County and City Management Association's *Framework for Building Control Authorities*, including the authority's prior experience of the builder and project team, the use of the building, and the 'relative independence' of the persons who adopt the statutory roles under the Building Control (Amendment) Regulations, 2014 (County and City Management Association, 2016, pp. 12–13). There is, however, no provision for review or audit of the effectiveness of building control authority inspection and enforcement activities, nor to any system for gathering, aggregating and analysing building control information over time and between building control authorities. There is also no evidence from building control authorities through annual reports of local authorities to suggest that such an approach is occurring in practice.

It is difficult to see how this assessment could be carried out without assembling building control enforcement data across building control authorities, possibly in conjunction with data gathered from the national online platform for building control, the Building Control Management System (for example, where an assigned certifier has resigned from a project), to analyse that data on a nationwide basis so as to identify trends and emerging issues.

Law Reform Commission issues paper on regulatory enforcement, 2016

The Law Reform Commission published an Issues Paper, *Regulatory Enforcement and Corporate Offences*, in 2016, which considered the failures of regulatory enforcement that led to the near-collapse of the Irish banking system in 2008, and suggested alternative approaches to regulation that could be applied in other sectors.

The paper invited views on twelve issues, including the possible standardisation of regulatory powers across different regulated sectors. The discussion in the paper on this issue refers to the 'Enforcement Pyramid' categorisation of enforcement approaches, which describes an escalating sequence of enforcement activities from negotiation and compliance, at the base of the pyramid, to prosecution and revocation of authorisation for the relevant activity, at the top. The logic of representing enforcement activities as a pyramid is that most activities should occur towards the base of the pyramid, with formal enforcement tools, as well as civil and criminal sanctions, occurring only where less coercive measures have failed.

The paper describes the regulatory approaches as moving from ‘soft’ to ‘hard’ powers from the bottom of the diagram upwards, observing that ‘the credible threat of ‘hard’ action should help to make the ‘soft’ powers at lower levels more effective. Conversely, the more effective the ‘soft’ powers are, the less frequently it will be necessary to deploy the ‘hard’ ones’ (Law Reform Commission, 2016, p. 14).

Applying this analysis to construction and food safety regulation is instructive. Food regulation appears to operate effectively at all levels of the spectrum of approaches from ‘soft’ to ‘hard’ powers. The evidence for this effectiveness is readily available on the Authority’s website, which includes a considerable amount of information and guidance, representing ‘soft’ powers, giving details of enforcement proceedings that are ongoing, representing the ‘hard’ powers, and demonstrating the credible threat of enforcement.³

Building control enforcement, by contrast, appears to occur virtually exclusively in the lower half of the enforcement pyramid, concentrated on negotiated compliance, with formal enforcement tools under the 1990 Act seldom used (see discussion below).

The paper refers to discussion in both reports of the Irish Financial Regulator’s approach to regulation in the five years preceding the giving of a guarantee in respect of Irish banks by the Irish Government in September 2008, which it characterises as ‘light-touch’ and principally reliant on ‘enforcement through moral suasion’ – whereby non-compliance was addressed with negotiation, rather than enforcement. The paper suggests that ‘negotiations were not backed up by credible threats of more serious enforcement action when non-compliance continued or re-occurred’ (Law Reform Commission, 2016, p. 7).

The ‘credible threat of enforcement’ is a key distinction between the Irish construction and food regulatory models. It is instructive to reflect on what inferences may be drawn from the enforcement activity statistics in the Authority’s 2016 annual report.

The effect of the Improvement Order procedure under the 1998 Act, as described above, is to convert an Improvement Notice issued by an authorised officer into a court order, at least to the extent that it has not been fully implemented by the person to whom the notice was addressed. There were only three cases in 2016 where it was necessary to apply for an Improvement Order as a result of failure to comply with an Improvement Notice; 263 Improvement Notices were issued,

³ See https://www.fsai.ie/enforcement_audit.html [20 March 2018].

and only 3 Improvement Orders were served (Food Safety Authority of Ireland, 2017b). This suggests that if an Enforcement Notice issued under the 1990 Act did not have an immediate sanction for non-compliance, building control authorities might issue Enforcement Notices more readily rather than regarding them as a last resort when negotiated compliance has failed.

There is further support for this view in the fact that Dublin City Council reported having issued two Enforcement Notices in 2016, along with twenty warning letters, despite the fact that the 1990 Act makes no mention of warning letters as a regulatory tool that can be used prior to issue of an Enforcement Notice (Dublin City Council, 2017). This suggests a need for the warning letter to be recognised as a regulatory tool. The use of informal enforcement mechanisms outside the procedures of the 1990 Act poses problems of accountability, as such letters are not subject to the appeal procedure against issue of an Enforcement Notice (Section 9), nor to the remedy of judicial review. The question of whether a warning letter issued by a regulatory body was susceptible to judicial review was considered by the US Supreme Court in *Holistic Candles and Consumers Association v Food and Drug Administration* [2012, Case No. 11–1,454], which held that a warning letter did not constitute ‘final agency action’ for the purposes of the relevant legislation.

The use of warning letters also presents problems of transparency, as there is no legal requirement to record the issue of a warning letter on the register of Enforcement Notices and District Court orders, required to be maintained by a building control authority (Regulation 21, Building Control Regulations, 1997).

The statistics available for building control enforcement in the annual reports of local authorities, and from data collected by the author from building control authorities directly, suggest that enforcement for non-compliance will be initiated only as a last resort, which keeps both the public and the courts excluded from the process of construction regulation.

Part of the research for this paper involved a review of annual reports for recent years of each local authority, as well as requests for information pursuant to the Freedom of Information Acts querying the number of Enforcement Notices and District Court prosecutions brought by building control authorities in the period 2012–17.

Fifteen building control authorities, out of a total of thirty-one nationwide, confirmed in writing that no Enforcement Notices had been issued under the Building Control Act between January 2012 and

July 2017, or (in the case of Louth and South Dublin) that no records existed of any such notices.⁴

International perspective: Europe and Australia

Ireland is not alone in grappling with issues of building control enforcement. Meijer & Visscher have carried out extensive comparative research into construction regulation in the EU. In a recent article the authors examined the position in seven EU countries, updating their earlier research and seeking to identify regulatory trends. The role of private parties in construction regulation was highlighted by the authors, and was attributed to what they describe as ‘the persistent wish of governments to diminish the regulatory pressure of the building regulations on the building industry’ (Meijer & Visscher, 2017, p. 144.)

Meijer & Visscher note that Eisenberg ‘argues that the regulatory role should not be limited to guarding minimum arbitrary boundaries between what is legal and not’ (Meijer & Visscher, 2017, p. 159; Eisenberg, 2016). They go on to refer to the broader range of tools that could be used in order to promote housing quality, such as quality levels in insurance and warranty policies, before concluding that ‘a coherent and evaluative approach to look at the effectiveness and efficiency of the requirements could still be developed further’ (Meijer & Visscher, 2017, p. 159). Meijer & Visscher also emphasise the importance of training of enforcement officers dealing with potential non-compliance with building codes:

The quality controllers should be up for their tasks. They must have sufficient training and the right qualifications and they must have the right powers to act in cases of non-compliance. There should be serious penalties and consequences where regulations are not met. (Meijer & Visscher, 2017, p. 160)

There is a significant amount of legislation in the various Australian states governing safety and quality in residential construction.

⁴ Pers. comm. to author from Carlow County Council, 30 August 2017; Cork City Council, 27 July 2017; Cork County Council, 27 July 2017; Donegal County Council, 15 August 2017; Galway City Council, 25 July 2017; Galway County Council, 1 August 2017; Kerry County Council, 18 August 2017; Kilkenny County Council, 25 July 2017; Limerick City and County Council, 15 August 2017; Louth County Council, 30 August 2017; Monaghan County Council, 27 July 2017; Roscommon County Council, 16 August 2017; South Dublin County Council, 18 August 2017; Waterford County Council, 9 August 2017; Wicklow County Council, 11 August 2017.

Regulation of safety and quality in residential construction in the State of Victoria, for example, involves the supervision of builders and construction professionals, the operation of a system of permits for building work, and inspection and certification of work. Builders may not carry out residential construction work unless they are registered with the Victorian Building Authority.

The authority carries out inspection and enforcement activities pursuant to powers under the Building Act, 1993. Building permits are required for most building work and can be issued by municipal (public) or private surveyors. In certain circumstances, a building permit may be issued on condition that a bond for the 'complete and satisfactory carrying out of the work authorised by the building permit' will be lodged with the local council or the authority (Section 22, Building Act, 1993). There is a similar regime in the state of Queensland, where the Queensland Building and Construction Commission prescribes minimum financial requirements which must be met by builders undertaking residential construction work.

The Building Act, 1993, of the state of Victoria also imposes obligations on owner-builders, who may not carry out domestic building work as a builder on their land or buildings unless they have been issued with a certificate of consent for the work, or unless they engage a builder authorised to carry out such work pursuant to its registration category (Section 25(b)). Van der Heijden has conducted research into private sector involvement in building control in Australia, following the introduction of private actors into state building control regimes in the early 1990s (Van der Heijden, 2010). He notes that, since the 1993 Building Act, private building surveyors have been entitled to carry out reviews of construction plans, to issue permits for building, to inspect buildings and to issue certificates of occupancy. The structure of the system, therefore, is quite similar to that which applies in Ireland pursuant to the Building Control (Amendment) Regulations, 2014.

A key distinction that Van der Heijden highlights, however, is that the private certifiers must register with the Victorian Building Commission (now the Victorian Building Authority), which may audit certifiers and instigate disciplinary procedures where necessary (Van der Heijden, 2010, p. 4.). This is in contrast to Ireland, where building control authorities have no authority over assigned certifiers who are appointed to discharge private building control duties pursuant to the Building Control (Amendment) Regulations, 2014, and who are answerable only to their own professional bodies in respect of any

breach of their registration requirements or other professional misconduct.

In its annual report for 2016–17, the Victorian Building Authority noted that it had held 137 practitioner disciplinary hearings, had carried out 1,187 investigations into building and plumbing work, and had instigated 60 building and plumbing prosecutions. The authority also reported that it continued to refine and develop its Monitoring and Evaluation Framework, allowing it to ‘monitor its efficiency and effectiveness in delivering our Corporate Plan, our core regulatory objectives, and our statutory and strategic objectives’, including whether the authority’s work contributed to the desired regulatory outcomes (Victorian Building Authority, 2017, p. 19). The system therefore includes procedures for monitoring its own effectiveness, in common with the Irish regulatory regime for food safety, but in contrast to that for building control.

Enforcement – Construction and food safety contrasted

Enquiries to building control authorities by the author indicates that very few Enforcement Notices were issued in the period 2012–17 by building control authorities; in many cases, no notices were issued during that period. This indicates that most enforcement activity in fact takes place on an informal basis without use of any formal enforcement tools. In the case of one building control authority, Dublin City, a review of the register of Enforcement Notices by the author showed that formal enforcement was invariably preceded by numerous regulatory interventions, such as verbal cautions and warning letters, that are not part of the formal enforcement mechanisms in the Building Control Acts, 1990–2007, and are not required to be included on the register. Dublin City is an outlier in terms of enforcement generally by its use of the Enforcement Notice procedure on twenty-three occasions, as most building control authorities never progress past the first stage of regulatory intervention depicted in the enforcement pyramid, referred to in the *Framework for Building Control Authorities* as ‘persuasion/advisory letter/verbal’ (County and City Management Association, 2016, p. 5).⁵ This suggests that a national enforcement policy, together with a procedure to deal with less serious breaches and potential breaches,

⁵ Details of the review of this register available from author; the register is not available online and copies were not permitted to be made.

such as an Improvement Notice procedure, is needed for building control.

Enforcement policy – Building control

Before the introduction of the 1990 Act, a circular letter was sent by the Minister for the Environment to all building control authorities (Department of Environment, 1992). The letter includes guidance in relation to the policy to be applied in operating the Enforcement Notice procedure, noting that, where a building control authority becomes aware that a contravention of the Building Regulations has occurred, ‘it would seem appropriate, in normal circumstances, *to raise the matter informally with the person concerned before availing of the formal enforcement procedures set out in the Act* [emphasis added]’.

The letter suggests that a breach of the Building Regulations should be ‘reasonably substantive’ before an Enforcement Notice is served, and that ‘it is to be hoped that the need to serve an enforcement notice should arise only infrequently and that informal contact with the person concerned will usually obviate the need for it’.

A number of consequences follow from the adoption of the type of enforcement policy described in the 1992 circular letter. The letter was clearly intended to shape and direct enforcement policy on a national basis from the commencement date of the Act. The central message of the letter appears to be that enforcement policy is best conducted on an informal basis outside the enforcement procedures established by the Act, effectively creating an informal preliminary procedure applicable before the Act’s enforcement procedure. In doing so, the circular may have had the effect of largely shielding the Act and building control enforcement activities from judicial oversight.

The circular is also difficult to reconcile with the statement of the then Minister for the Environment, Padraig Flynn, TD, to the Dáil during the debate on the Building Control Bill, to the effect that ‘If they find that the building does not comply with the regulations they can serve the enforcement notice and if that notice is not complied with they will have recourse to the courts. They will have the full power of the legislation to demand that the building complies with the standards and the regulations as set down’ (Dáil Eireann, 1989). There is little jurisprudence readily available on the interpretation of the enforcement powers under the 1990 Act; an unreported judgment of the High Court⁶ granted orders of certiorari in respect of a number of

⁶ *McGarrell Reilly Developments Limited v Fingal County Council* [2012, No. 1040JR], 18 March 2014.

Enforcement Notices, confirming that such notices may be judicially reviewed in addition to being appealed in accordance with the procedure set out at Section 9 of the 1990 Act.

Enforcement policy in building control is apparently informed by a ‘risk-based approach’, set out in the code of practice accompanying the 2014 regulations (Department of Housing, Planning, Community and Local Government, 2016) and in the *Framework for Building Control Authorities* (County and City Management Association, 2016). The framework states that the aim of risk assessment in the context of building control is to identify buildings and works that should be targeted for inspections, in order to identify the appropriate points at which to inspect construction works and to determine the number of visits ‘that might reasonably be anticipated for inspecting the building work given the risk posed by non-compliance’ (p. 8).

In the absence of an evidence-based and comprehensive review of building control, drawing on international experience, it is difficult to say whether an enhanced role for building control would in fact improve quality. Beaussier et al., describing the UK regulatory regime for healthcare, suggest that the inspection-based model of regulation is necessarily very limited, in part because it is unlikely that an inspection visit would be sufficient to discover problems, and also because resistance from regulated entities and their agents could inhibit the effectiveness of any such inspection (Beaussier et al., 2016, p. 213).

These observations suggest that a regulatory model for the relatively complex activity of residential construction should be multifaceted, with regulatory responses and interventions appropriate to each stage of construction, which could include design reviews and approvals, inspections during construction and further inspection following completion, based on approved designs, updated during construction.

It might be argued that this would replicate the role of the assigned certifier appointed in accordance with the 2014 Building Control (Amendment) Regulations, but the crucial distinction between the assigned certifier and the authorised person is that the assigned certifier has no enforcement powers, nor even an obligation to notify the building control authority of breaches of the Building Regulations. It is notable in this respect that an inspection and regulation regime which is led by building control authorities is contemplated by the recommendations of the 2017 *Safe as Houses?* report of the Oireachtas Joint Committee on Housing, Planning and Local Government, which recommended that:

To completely break the self-certification element that remains with S.I. 9 [the Building Control (Amendment) Regulations], Design Certifiers and Assigned Certifiers should be employed directly by local authorities, either on a contract basis or as full time local authority employees. (Joint Committee on Housing, Planning and Local Government, 2017, p. 12)

The closest equivalent to regulatory oversight of the building control system is provided by the County and City Managers' Association, which has been active in developing the Building Control Management System, which it hosts, and in developing building control policy and guidance for building control authorities (County and City Management Association, 2016). It can therefore be regarded as highly influential in the identification of national building control policy and trends.

In its submission to the Pyrite Panel, the Association describes the Irish building control system as 'In essence... a system of self regulation' (County and City Managers' Association, 2012, p. 5), and refers to a target of 12–15 per cent for inspections of buildings (p. 6).

With regard to enforcement policy, the association referred to the enforcement powers of building control authorities, including prosecutions for breach of Building Regulations, but suggested that the 'cost, time, etc. of initiating court proceedings and getting a conviction, or a minimum fine to mitigating circumstances' would not be warranted where there 'is a genuine commitment given to make good the defect', and advocating a 'common sense approach' having regard to 'available resources and the need to secure the most beneficial, effective and efficient use of its resources' (p. 8).

This suggests an enforcement philosophy reflective of the guidance in the aforementioned circular, and borne out by evidence of the very low levels of actual enforcement activity undertaken by building control authorities.

Building control – Inspections

A precursor to formal enforcement activity would usually be an inspection carried out by an authorised person pursuant to their powers under Section 11 of the 1990 Act. An audit of local authority performance carried out in 2015 by the National Oversight and Audit Commission, however, selected the carrying out of inspections of new dwellings as one of the performance indicators for the audit (National Oversight and Audit Commission, 2016). The audit noted that one building control authority, Waterford City and County Council, had

carried out no inspections of 161 new buildings for which Commencement Notices were lodged in 2015, which it stated was ‘due to resourcing problems’ (p. 15). The report also included statistics for the numbers of new homes inspected on behalf of building control authorities during 2015, which showed a wide variation, from 0 per cent in Waterford to less than 20 per cent in Cork City, Dún Laoghaire–Rathdown, Fingal, Galway City, Kildare, Kilkenny, Laois, Longford, Mayo, Tipperary and Westmeath. The report does not provide any further information in relation to enforcement activities conducted on foot of inspections; therefore, the data cannot be analysed to determine how many inspections resulted in formal or informal enforcement. This omission suggests a view that building control effectiveness can be audited and assessed by statistics for inspections in isolation, without any further consideration or assessment of measures taken on foot of those inspections.

Enforcement policy – Food safety

The enforcement policy for building control is in contrast to the guidance issued by the Authority to the Health Service Executive (who carry out inspections for the Authority), which includes detailed guidance on the methods of determining the risk profile of food business operators, risk categorisation, frequency of inspections and actions to be taken in the case of non-compliance (Food Safety Authority of Ireland, 2016a).

The system for reporting of compliance and organisational data is a key distinguishing factor between building control and food safety in Ireland. The official agencies carrying out inspection functions for the Authority include the Health Service Executive; the Department of Agriculture, Food and the Marine; the Sea-Fisheries Protection Authority; twenty-eight local authorities; the National Standards Authority of Ireland; and the Marine Institute. The Authority takes an active role in managing its service contracts; in its 2015 annual report, the Authority states: ‘Regular meetings were held with senior management in each agency and with the line managers responsible for the delivery of inspection and analysis’ (Food Safety Authority of Ireland, 2016b, p. 9).

As described above, the 1998 Act and Regulation 882/2004 require a comprehensive system of recording, reporting and auditing of information by and on behalf of the Authority as the competent authority for Ireland. The Authority accordingly reported in 2017 that it had carried out an audit of official controls carried out by one of the

main official agencies appointed pursuant to the 1998 Act, the Health Service Executive (Food Safety Authority of Ireland, 2017a).

The enforcement statistics reported in the Authority's annual report for 2016 demonstrate that formal enforcement is undertaken regularly by and on behalf of the Authority: 94 Closure Orders, 263 Improvement Notices, 3 Improvement Orders, and 9 Prohibition Orders (Food Safety Authority of Ireland, 2017b, p. 23). However, the engagement by the Authority with the public and with stakeholders is also evident from its report, which notes that a helpline for stakeholders 'takes approximately 11,000 calls per year', and that the Authority had published 59 publications during 2016, including codes of practice for industry, factsheets and other materials to support compliance (pp. 9, 25).

The regulatory and enforcement philosophy is described as follows by the Authority's chief executive:

We strive to lead a regulatory culture where everyone is passionate about achieving the highest standards of food; by providing a framework for regulating food which allows for effective enforcement, whilst also ensuring a partnership approach that really engages all stakeholders. (Food Safety Authority of Ireland, 2017b, p. 5)

Conclusion

The regulatory model for Irish residential construction has a number of anomalies and fault lines. It is apparently poorly resourced; the submission to the Pyrite Panel by the County and City Managers' Association connects enforcement strategy with available resources (County and City Managers' Association, 2012, p. 8). According to figures released by the Department of Housing, Planning and Local Government in July 2017, there are 64 building control officers nationwide (Department of Housing, Planning and Local Government, 2017b), compared to 67 technical staff reported to the Dáil in 1980 as operating under the old building bye-laws system, which did not provide a nationwide building control service but was confined to Dublin, Cork, Limerick, Dún Laoghaire and Bray (Dáil Éireann, 1980).

The statistics on enforcement, both from local authority annual reports and from requests to building control authorities by the author, confirm that the formal enforcement powers under the 1990 Act are seldom used.

When viewed in comparison to other regulated activities such as food safety and safety on construction sites, there is a significant difference of visible public enforcement of the rules. This contributes to the lack of a credible threat of enforcement highlighted in the Law Reform Commission consultation paper of 2016.

A further defining characteristic of Irish building control is the hybrid public–private arrangements for building control, where private inspectors are retained to carry out inspections and to issue certificates of compliance on completion of works. The effectiveness of this system has not been formally assessed since its introduction in 2014: a review process carried out in 2015 concentrated on the scope of application of the system rather than considering whether it had led to improved safety and quality in residential construction (Department of Environment, Community and Local Government, 2015). It is clear, however, that the system relies on landowners, developers, builders and the designers and certifiers who are paid to act on their behalf, in contrast to the publicly resourced regulatory regime that applies to food safety.

There are no arrangements under the Irish building control system for audit or supervision of any of the entities involved in the system, and no means therefore of assessing the effectiveness of that system in actually delivering the regulatory objectives of the 1990 Act. This lack of oversight of the system and the entities operating within it is, it is argued, a significant and highly detrimental failure of the regulatory model. It stands in stark contrast to the food safety regulatory model, which, as noted above, has various procedures embedded within it in order to facilitate audit and oversight from authorised officers upwards through the chain of responsibility, to the Authority itself, which is audited by the European Commission.

Absence of periodic reporting in a consistent format makes it difficult to assess the effectiveness of local building control in Ireland. It is striking, for example, that local authorities are not required to provide information on their websites and in annual reports about each of their statutory roles, not only as building control authorities but also as fire authorities for the purposes of the Fire Services Act, 1981. This does little to promote transparency and customer engagement, which is one of the purposes of the *Action Programme for Effective Local Government* (Department of Environment, Community and Local Government, 2012a).

While the food safety regulation system concerns a very different set of procedures and products, a number of features of the system

have been highlighted in this paper which are a consistent feature of other successful regulatory regimes in Ireland and internationally. These include the use of formal enforcement powers, where necessary, and the reporting of compliance activities by regulatory bodies. Analysis of building control enforcement suggests an over-reliance on informal enforcement and a need for additional tools in advance of the issue of Enforcement Notices, which would require a change in the legislation. The development of a national policy for appropriate use of the powers under the Building Control Acts, 1990–2007, and the publication of the enforcement register online and in annual reports could do much to increase the transparency and effectiveness of the system, and could be achieved by a change of practice within the existing legislative regime.

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