

# **TRANSPORT AND THE ENVIRONMENT COMMITTEE**

Wednesday 30 October 2002  
*(Morning)*

Session 1

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## TRANSPORT AND THE ENVIRONMENT COMMITTEE

29<sup>th</sup> Meeting 2002, Session 1

### CONVENER

\*Bristow Muldoon (Livingston) (Lab)

### DEPUTY CONVENER

\*Nora Radcliffe (Gordon) (LD)

### COMMITTEE MEMBERS

\*Robin Harper (Lothians) (Green)

Mr Adam Ingram (South of Scotland) (SNP)

\*Angus MacKay (Edinburgh South) (Lab)

\*Fiona McLeod (West of Scotland) (SNP)

\*Maureen Macmillan (Highlands and Islands) (Lab)

\*Des McNulty (Clydebank and Milngavie) (Lab)

\*John Scott (Ayr) (Con)

### COMMITTEE SUBSTITUTES

Bruce Crawford (Mid Scotland and Fife) (SNP)

Helen Eadie (Dunfermline East) (Lab)

David Mundell (South of Scotland) (Con)

Iain Smith (North-East Fife) (LD)

\*attended

### WITNESSES

Neil Cooper (National House Building Council)

Richard Gibb (Royal Institution of Chartered Surveyors in Scotland)

Malcolm MacLeod (National House Building Council)

Sidney Patten (Scottish Building)

Sebastian Tombs (Royal Incorporation of Architects in Scotland)

Douglas Walker (Institution of Civil Engineers)

### CLERK TO THE COMMITTEE

Callum Thomson

### ACTING SENIOR ASSISTANT CLERK

Alastair Macfie

### ACTING ASSISTANT CLERK

Rosalind Wheeler

### LOCATION

The Hub



# Scottish Parliament

## Transport and the Environment Committee

Wednesday 30 October 2002

(Morning)

[THE CONVENER opened the meeting in private at 09:52]

10:02

*Meeting continued in public.*

### Building (Scotland) Bill: Stage 1

**The Convener (Bristow Muldoon):** I welcome members of the press and public and our witnesses to the 29<sup>th</sup> meeting of the Transport and the Environment Committee in 2002.

Our main agenda item today is evidence taking as part of our stage 1 consideration of the Building (Scotland) Bill. The first panel of witnesses is Douglas Walker from the Institution of Civil Engineers, Sebastian Tombs of the Royal Incorporation of Architects in Scotland and Richard Gibb of the Royal Institution of Chartered Surveyors.

All three witnesses have made written submissions in advance of the meeting, but I understand that each witness wants to make a brief opening statement. I will take them in the order in which I introduced them and start off with Douglas Walker.

**Douglas Walker (Institution of Civil Engineers):** Good morning. The Institution of Civil Engineers welcomes the introduction of the bill, which will replace the existing legislation in Scotland. The Building (Scotland) Act 1959 has delivered safe and secure buildings for many years, but changes in technology and the mechanisms of building procurement in recent years have shown the system to be insufficiently flexible and to be in need of change.

We welcome much about the new proposals. We are particularly supportive of the adjudication role that is envisaged for the central body. That has been needed for some time. We believe that the proposals for performance audit for verifiers are innovative and prudent.

However, we are disappointed that the bill has not taken the opportunity to seek greater harmonisation with the system in England for approved inspectors. Local authorities in Scotland

have for many years administered a successful system of building control with a high degree of impartiality and integrity and we see no reason why they should not continue to do so for the majority of warrant applications for the foreseeable future. However, a small but significant number of large and technically complex buildings are being constructed each year for which the present system struggles to deliver an adequate service, particularly in terms of flexibility and speed of response.

The approved inspector system in England has offered the opportunity to provide tailored services on a commercial basis. Competition has delivered service improvements in both the public and the private sector in line with best-value policies. We are concerned that in order to achieve similar improvements to service provision in Scotland the bill proposes to rely too heavily on self-certification. Although self-certification has a role to play in the process, the recent report by the Standing Committee on Structural Safety, which considers issues of concern on structural safety throughout the UK, has highlighted a number of safety problems that could arise from the inappropriate use of self-certification.

Structural design self-certification has been a feature of Scottish building control for 10 years. The bill seems wanting in a number of regards when we measure it against the concerns that SCOSS has raised. The appropriate use of self-certification requires value judgments to be made by experienced professionals following some form of risk assessment. Crucially, in the case of the large and complex buildings to which I referred, self-certification fragments the design process and hinders the application of an holistic approach to verifying safe design.

We remain unconvinced that legislation can be framed in such a way as to ensure that proper risk assessment is undertaken. We believe that a more appropriate model would be an approved code of practice, similar in format to that which the Health and Safety Executive introduced for use with the construction, design and management regulations. Although we accept that the existing arrangements for approved inspectors in England and Wales might not be perfect, we believe that the basic principle of independent design audit that is similar in approach to what local authorities do provides for better safety standards.

The proposals that the bill contains for the introduction of private sector verifiers could be strengthened to provide a system that is similar to and possibly better than that of the approved inspector system elsewhere in the UK. We urge the committee to ensure that the bill provides for the creation of a standing list of approved private sector verifiers, whose competency and

professional ethics would be guaranteed by the professional institutions and whose actions would be governed by an approved code of practice.

The professional institutions in Scotland collaborate through the professional bodies college of the Scottish Construction Industry Group. The college has forged links with the Construction Industry Council, which is responsible for the licensing of approved inspectors in England and Wales. Therefore, the necessary organisation is already in place in Scotland to support the construction of an approved verifiers register. It is able to harness the expertise that is available from the professional institutions. Thank you for listening to our concerns.

**Sebastian Tombs (Royal Incorporation of Architects in Scotland):** I thank the committee for the opportunity to give evidence. Generally speaking, representing architects, we believe that the building control system in Scotland has been, as Douglas Walker said, robust and well managed. However, architects have drawn to our attention inconsistencies in local authorities' interpretation and performance and questions of innovation, to which the bill refers.

There are some areas in which clients are reluctant to challenge building control interpretation because that requires a referral to a sheriff and there is no quicker adjudication mechanism. Like Douglas Walker, we support the bill's proposals for dealing with that problem.

There have been some issues concerning liability in relation to completion certificates. We are not sure that the bill entirely addresses the matter, but we could come back to the committee on that.

Generally speaking, we are in favour of the proposed verification and certification arrangements. We support the distinction that the bill makes between functional and performance requirements and we support the proposed establishment of a national central body to oversee the new system; to deal with cases of doubt, as we discussed earlier; and to manage the approved certifiers of design and construction.

I shall touch briefly on professional indemnity insurance, which is a topical issue across all the professions. There have been massive hikes in premium rates just for undertaking ordinary business. We are pursuing with our advisers in the insurance market the question of the availability of appropriate insurance cover for self-certification. That could be quite an important aspect of making the system work, and I draw the committee's attention to a potential issue in that context. Premium rates are at their highest level for about 20 years, and the market prediction is that those rates are likely to rise over the coming year.

Despite that, we believe that a self-certification system has some strengths. Although we note the points that the ICE has just made, we believe that there is an issue of consumer protection. We have been concerned that inappropriately qualified persons are submitting applications for building warrants and that departments are having to spend too long in helping to sort out difficulties that that may cause. There is a consumer protection aspect to that.

Applications for self-certification could be made at the small end of the market, where it is possible to get a more holistic, all-inclusive view of a building warrant and self-certification arrangements. However, we foresee problems at the larger end of the scale, as it is possible to self-certify certain aspects of buildings without anyone seeing the holistic end result on which the verification body normally takes a view. Therefore, the way in which the new system is implemented is critical, but we are very much in favour of the principles on which it is based and we support the proposed registers of approved certifiers of design and construction.

We also support the proposed duty on local authorities to provide building standards assessment, subject to resources being available to allow them to undertake that appropriately. We regularly receive calls from solicitors who are having difficulties with certifications of buildings and their adequacy, and we spend a lot of time explaining the different sorts of certificates that exist in the market, who signs them, the liability consequences of them, and so on. The bill could move the market a good way along in that direction, through giving the duty to local authorities to provide standards assessment.

We also support the bill's proposal to give local authorities powers to inspect buildings. That has become a topical issue, with failures in building maintenance leading, unfortunately, to injury and death. It is very important that we encourage owners to take serious responsibility for their buildings, and we should strengthen local authorities' powers regarding the inspection of buildings. We have had a general concern about the issue for several years and helped to publish a handbook on how to look after tenements. Later in November, there will be a public debate concerning building maintenance, to which the City of Edinburgh Council, the National Trust for Scotland and the Society for the Protection of Ancient Buildings will contribute. This is, therefore, a good time to raise public awareness of the issue, and the bill could help to do that.

All in all, we are in favour of the general principles of the bill and, in particular, we welcome the way in which the drafting has been undertaken following extensive consultation over more than

two years. We think that the bill is a good example of how legislation can be drafted in Scotland.

10:15

**Richard Gibb (Royal Institution of Chartered Surveyors in Scotland):** The Royal Institution of Chartered Surveyors is governed by its royal charter, whose prime objective is the promotion of the public interest. RICS Scotland represents some 9,000 members, who are employed in both the private and the public sectors. Our members practise in all aspects of land, property and construction and are involved in all stages of a property's life.

The members are represented via 16 faculties within RICS Scotland and the organisation's comments were formulated by a specific working party consisting of members from the faculties of construction, residential property and building surveying, the last of which includes the Scottish building control forum. The working party has considered the bill's proposals in depth throughout the consultation. I am a member of the management committee of the Scottish building control forum and chairman of the RICS international building control forum, which has a worldwide remit.

Generally, the RICS supports the bill's proposals, which we believe meet the policy objectives of the bill as contained in the policy memorandum. As with any proposals, the devil is in the detail and the RICS has highlighted remaining points of concern. Those are the possible legislation overlaps in relation to continuing requirements; the implications of applying standards retrospectively; the implications, particularly for conveyancing, of the building standards assessment; the restriction of the verifiers' role to the public sector; the lack of flexibility in the fact that the owner is the only person who can apply for a building warrant and the knock-on effects for completion certificates; the ability of local authorities to remove people to allow repair works to be carried out on defective as opposed to dangerous buildings; and the recovery of expenses incurred by local authorities.

Full details of all those points have been submitted with our written evidence. It is encouraging to note that several of the RICS's ideas and comments have been taken on board in the drafting of the bill. We feel that the consultation process has been carried out in a positive manner.

**The Convener:** Thank you. We will now move to questions. The first section will be questions addressed generally to all three witnesses. Please indicate if you have a particular response to make with regard to the first section of questions. Later, we will focus on specific questions for each of your organisations.

**Angus MacKay (Edinburgh South) (Lab):** I have three questions, which I will go through in order. If the witnesses want to respond, they are free to do so, but they are similarly free not to do so.

You perhaps touched on this question in your opening statements. However, do you think that the bill can be improved and could you briefly outline what specific changes your organisations would like? Perhaps you could also give us the reasoning behind your views.

**Douglas Walker:** The main issue is the one that I tried to highlight in my opening presentation. We are worried that trying to put aspects right in terms of flexibility and response, which have generally been regarded as the problems of the current system, could lead us down the road of placing too much reliance on the self-certification issue. We feel that there is a better way of addressing those problems within the general framework of what is proposed. We are certainly not saying that there is no place for approved verifiers—there is. There is also a place for approved certifiers. However, that needs to be within the constraints of a system in which professional risk management can be applied.

**Sebastian Tombs:** I regard the bill as an enabling one that allows the Executive to develop appropriate mechanisms within the enabling framework, both for verifying and for certifying. I am perhaps a little more relaxed than the civil engineers on that issue because I believe that the powers exist. The strength with which they are developed and then enforced or applied could be up to the Executive. The powers are there if the Parliament wants them to be granted.

Richard Gibb mentioned an issue that I believe merits closer consideration. That is the role of owners. There are many occasions on which those who have a leasehold or other interest in a property want to make changes to that property. If owners are the only people who can submit certain documentation to enable the process to proceed, that could inhibit the progress sought by those occupying the buildings.

I have looked at the draft definitions and they are pretty limited in respect of owners. I suggest that that be considered in greater detail.

**Richard Gibb:** In relation to Sebastian Tombs's last point, we believe that good legislation is always based on a need. We are not satisfied that there is a need for the owner to be the only person who can apply for a building warrant.

The 1959 act allows an applicant to be a number of different people, to the extent that someone who has nothing at all to do with the building, although they might have a future interest, could apply for the building warrant. To the best of our

knowledge, that system has worked for over 40 years without any problems, and we have certainly looked around for any problems.

Elsewhere in the bill the provision has been retained for someone other than the owner to apply to the Scottish Executive, for example for a relaxation. That must be for the same reason that I mentioned—that someone other than the owner might have an interest in the building. It would be useful if that flexibility was retained in the bill.

In relation to the restriction of the verifier's role to the public sector, we strongly believe that we are trying to improve the overall building control service. Although there have been some difficulties with approved inspectors in England and Wales, there is a general consensus—I serve on a working party that is considering this problem south of the border—that there have been improvements in the service provided by approved inspectors and by local authorities. In particular, clients suggest that they now view building control less as a hurdle and more as assistance to the design process. That is what we are trying to achieve. We want to ensure that we are contributing to the design process and not being a hurdle for it.

Some progress has been made in Scotland because of best value and various other factors. However, we believe that the progress that has been made south of the border has been better because there was real competition involved. The local authority building control authorities therefore felt obliged to be as helpful as possible and not to be the hurdle that they have traditionally been seen as in the past.

There is another main area about which we have concerns. Although there are good reasons for doing it, the building standards assessment might well introduce delays into the conveyancing process. As you might know, lawyers are a cautious bunch of people. If an opportunity exists for lawyers to use something else that might cover them in terms of liability, they might just use it automatically instead of selectively. More thought has to be given to that.

**Angus MacKay:** Richard Gibb's answer has pre-empted my second question. I was going to ask about the fact that the duty to apply for a building warrant, an amendment to a warrant or a completion certificate has been put on the property owner rather than on an agent. You addressed that issue directly.

However, why do you think that that move would have an inhibiting or negative effect? What would the consequences be?

**Richard Gibb:** There might be some delays in the building warrant process if, for example, the local authority believes that the person purporting

to be the owner is not really the owner. There are criminal offences in the 1959 act and if someone identifies themselves as the owner but turns out not to be the owner, there is a sanction.

Nonetheless, for the local authority properly to carry out its duties, it should be convinced that the right person has applied for the warrant. At the moment, that is not required because anyone can apply for a building warrant for anyone's property. Furthermore, we believe that there could be some difficulties in the later stages of the process. For example, a number of developers sell houses on even before they are built. Who is the owner in such circumstances? Although the legal system would probably be able to resolve some of those problems, going to court could mean delays. Instead, we should have legislation that clearly indicates who is responsible for what. When lawyers see that the legislation sets out clearly in black and white who is supposed to do what, they are unlikely to challenge matters in the courts; however, at the moment, the approach suggested in the bill might lead to ownership disputes, which will inevitably have to be resolved in court and will delay the process.

**Nora Radcliffe (Gordon) (LD):** I am interested in the business of tying builders to owners. Would it fit the bill if the person who applies for the building warrant has to state who the owner is instead of the owner doing so? I presume that the reason behind the approach is that buildings can be tied to owners for other purposes.

**Richard Gibb:** I understand that there is a very laudable reason for the approach. The Executive simply wants to ensure that the person responsible is easily accessible. Certainly, the 1959 act contains an obligation to identify the owner, no matter whether the developer or someone else does so. However, as far as the building warrant process is concerned, is it necessary for the owner to be in place? If we are required to carry out enforcement work or if a dangerous building is involved, it becomes very important to ensure that we are actually pursuing the owner. However, we do not feel that the issue is as important during the building warrant or certificate of completion stages.

**Sebastian Tombs:** In discussions with our colleagues in the construction sector about applications for the certificates of completion that are currently issued by the local authority, we have found that the question of who takes responsibility for the finished product's compliance with building standards regulations has become an issue. The bill has moved towards putting the onus on the owner because he or she has a clear responsibility to have a care about any changes that are made to the property for the benefit of public safety and future users. As a result, the bill introduces a degree of clarity that is better than the lack of



clarity that has sometimes been experienced, and also makes it clear who takes responsibility for compliance when any changes are completed. At the moment, architects are quite happy to say that building drawings on which any changes have been based comply with building standards regulations. Moreover, monitoring is usually carried out over the course of a construction project, which means that, at the end of the process, people have confidence that the building complies with the approved drawings which in turn comply with building standards.

However, the difficulty lies with whether anyone is prepared to stand up and say that, because doing so could have consequences if something is proved to be inadequate later on. That is why the bill has tried to make it clear that the owner should take responsibility. That position can then be supported by the agents who act for the owner. The problem is that the bill's clarity is fairly rigid. Relying only on that approach will mean other consequences for time and for decision making.

**Des McNulty (Clydebank and Milngavie (Lab):** I am interested not so much in the curtilage of the building but in linkages to the sewerage and drains, and in the issue of pavements and lamp-posts and so on. When a developer builds a new estate, the local authority and the builder discuss the transference of responsibility or the process of adopting the features I have just mentioned. Often the debate takes place before the owner is in place or is a full party to it. However, sometimes the debate is not completed; the builder goes away and owners are left in a situation where the local authority does not take responsibility for adopting certain features and the developer no longer has any responsibility for them. Can we cut through that kind of circle? Do we need to put responsibilities on surveyors, for example, to ensure that completion certificates and adoption certificates are finalised before owners find that they are in a position of responsibility that they did not know about?

**Sebastian Tombs:** Part of the issue relates to the number of parties that can be involved in projects. Richard Gibb mentioned the model of developers and house builders, but there are many other models in which development and transfer of ownership can take place. If more than one department or public utility is involved, the work must be co-ordinated. I am not sure that a building bill can deal with matters that lie too far outwith the curtilage of buildings, although I would be interested to hear Richard Gibb's view on that. The issue becomes complex and the legal framework within which conveyancing takes place is probably as good a mechanism as any to ensure that the appropriate documents are in place before property and responsibility for its future maintenance are handed over.

10:30

**Des McNulty:** I would like to respond before Richard Gibb comments. I know from painful experience in a number of different settings that that system does not work. We end up in situations in which completion certificates are issued, even though the locus of the building in the local community has not been completed. That happens because completion certificates focus on the buildings themselves. There is a genuine issue, which may sit between a building bill and a planning bill. I am anxious that we do not lose sight of that issue. Although I accept your argument that a transference of issues between owners should take place, developers have a lingering responsibility to ensure that what they sell has been completed in the broadest sense, rather than purely in the building sense.

**Sebastian Tombs:** Perhaps I can come back to the committee with our responses on that problem.

**The Convener:** That would be useful.

**Richard Gibb:** You are right—a typical housing development would cover several different areas of legislation. At present, building regulations cover an element of that. Drainage matters, for example, tend to be included in the building warrant plans, which are approved and vested in the local authority. It would be difficult for the Building (Scotland) Bill to take on board all such issues. The principal purposes of the bill are not necessarily the same as the purposes of acts that cover sewerage or other issues.

It is important that the people who are involved in looking after the new owner's rights—the lawyers and the surveyors—are properly educated to ensure that their checks cover all eventualities and that the person who occupies the house is confident that everything is in place. To be fair to the Law Society of Scotland and the other professional bodies, I should add that they arrange a number of continuing professional development events to ensure that the issues that you are talking about are properly covered. I understand that the situation is improving. When the bill is enacted, we must ensure not only that the changes are made known to building control surveyors up and down the country, but that events such as seminars are organised for the Law Society and for other parties that are involved in conveyancing.

**The Convener:** Have you finished your questions, Angus?

**Angus MacKay:** My third question was related to verifiers, which have been mentioned already, so I will pass on that.

**Des McNulty:** Sebastian Tombs raised concerns about the fact that appeals against

building control decisions will continue to be decided by sheriffs, even though sheriffs do not necessarily have the detailed knowledge of building regulations that might be required to adjudicate properly on such matters. Do you have anything further to say about those concerns? Do you have any ideas on how to find a better solution?

**Sebastian Tombs:** My first point relates to innovation and sustainable development, in which we should all have an interest. Different aspects of complying with regulations can be combined with a form of innovative design solution, which can help to address a number of points together. If one were to deal with those elements in isolation, it might be difficult to comply with a detailed functional requirement. A performance requirement, on the other hand, gives an overarching set of objectives that a building should achieve. The building is put together in a certain way, to ensure that it meets those overall performance objectives.

The inhibitions in relation to taking such an approach are tacit at the moment. We do not often hear about appeals, as it is very rare that a client will want to push the boat out that far. The normal mechanism is for people to apply for a relaxation and see how far they get. It is then a matter of discretion. The view among architects has been that discretion is applied in various different ways, according to individual circumstances and geographical location, and that a national approach to how one can be flexible—or not—would lead to a fairer system. Once a national set of examples is in place, they can be understood across applications, from Stornoway to Duns, that raise similar problems.

We came across the question of how historic buildings are dealt with. Every building, including the one in which we are located now, becomes an historic building once it is complete. It might not be listed, but it is there. It derives from a set of needs and from a set of building standards regulations that applied yesterday. The way in which one interprets the need for change—disability access or environmental performance, for example—has to be considered. Society has changing ideas about how buildings should address those issues. Interpretation and discretion will always be required and different interpretations and different degrees of rigidity have proved problematic for applicants and their agents. A quicker, fairer, nationwide, centrally managed adjudication system would be a good idea. In future, we might have to be a bit more sympathetic to our historic structures if we are to maintain their integrity, even if that means compromising on other aspects of environmental performance, for example. Somebody needs to make those judgments in an holistic, balanced way, while still allowing

innovation to occur and problems to be solved in different ways. We need to encourage a can-do, rather than a must-not-do, approach.

**Richard Gibb:** Historically, the sheriff has had a fairly large role under the 1959 act. There have been one or two hiccups—eyebrows were raised about one or two decisions—but, generally speaking, decisions have been sound. The sheriff has often exercised his or her right to employ someone from a professional body to give technical advice and, generally, that approach has been successful.

In respect of the bill, as with any legislation, there is a line to draw between the appeals that should go to political bodies and the appeals that should go to the law of the land. The Scottish Executive has taken the opportunity to move some appeals from the sheriff's domain to that of the Scottish Executive. I think that the Executive has got it just about right. There are enough checks and balances in the bill, and the sheriff has the right to approach a professional body or some other adviser for advice on technical or professional issues.

**Douglas Walker:** The question highlights what we believe to be one of the biggest problems with the current system: the inability to seek some sort of adjudication. The time pressures on development are so huge that, in most cases, it is not a realistic option to go to a sheriff. We are firmly behind the adjudication role that the bill describes.

There is also a case for issuing better guidance on the procedure for building matters across the country. We have anecdotal evidence, largely from our clients, that difficulties are still being encountered as different procedural mechanisms operate in different parts of the country. We believe that that could be overcome if a code of practice were issued, which would cover both the private and public sectors. That would be a useful addition.

**Nora Radcliffe:** Will you clarify whether you think that the people who are responsible for the procedures are not being consistent across Scotland or that people who have to operate within the procedures do not understand them?

**Douglas Walker:** I think that both problems exist and that different authorities approach the procedures in different ways. In addition, developers that make applications, for example, want more guidance.

**Nora Radcliffe:** So it is a bit of both.

**Des McNulty:** The nature of the building industry is changing fairly substantially, particularly in regard to larger and more complex buildings. Many builders are now, in a sense, managing

agents and the building is done by sub-contractors. That has changed relationships on the construction side and on the professional services side. Does the bill adequately take account of the changes that are taking place in the industry? Sebastian Tombs raised one or two issues about larger buildings, but I think that there is an issue about the industry and the different responsibilities that people have for building control.

**Douglas Walker:** That is part of the concern that we have been expressing this morning. The process is extremely fragmented—even the design of a structure can be handled by a number of different specialist engineers. Matters such as fire engineering and energy conservation involve a wide range of professionals, some of whom are employed by the developer, while others are employed by contractors or sub-contractors. That is at the root of our concern on self-certification. Some organisation or person will have to see the whole process holistically and ensure that things do not fall down the gaps.

**Sebastian Tombs:** As Des McNulty suggested, we are seeing the professionalisation of construction and management, and new forms of procurement are causing people to switch responsibility. Different forms of procurement work so long as all parties share the same objectives, are well trained, well organised and act in a much more professional way. The construction industry is moving in that direction and such approaches apply as much to the small scale as they do to the large scale.

I agree with Douglas Walker that, as both of us have said, there is a problem of compliance and certification and verification of compliance in the holistic sense. Somebody needs to verify that all the issues are being addressed adequately. I think that self-certification has a distinctive and important role to play, but my hunch is that, certainly in the early days of a new scheme such as the one that we are envisaging, it will be more holistic at the lower end of the scale.

**Des McNulty:** Are you implying that you would favour a particular element of the construction management process being responsible for certification, so that there is a single system rather than responsibility being fragmented within the management arrangements?

**Sebastian Tombs:** The existing system is very fragmented. The larger the scale of the project, the more complex it tends to become and the more diverse the range of services becomes, as a proportion of construction investment. Self-certification in technical areas is more likely in the larger framework, so there will still need to be an overall verification of compliance over and above that to ensure that the gaps are plugged. Alternatively, there might be comprehensive self-

certification for small projects. An engineer and an architect—assuming that they are appropriately competent and are approved certifiers—could certify a smallish project within their own competence, and such certification could be verified in the usual way.

**Des McNulty:** Forgive me for pursuing this point, but there seem to be two models. One is what might be called professional self-certification, where each specialist is responsible for self-certifying their bit of the project. The other is what might be called managerial self-certification, where somebody takes responsibility, as part of a contractual relationship with another stream of professionals, whom they are employing, for ensuring that the certification is properly done. The second seems to be more appropriate for big projects, but I am not clear that that is necessarily what is envisaged by the way in which the bill is constructed. What are your views?

10:45

**Sebastian Tombs:** My understanding of the bill is very much as you have stated. The overarching role of verification of compliance remains the ultimate test and security for the common good, and, as I understand it, that will rest in the interim with those who have been verifying at local authority level. Within that system, there will be possibilities for self-certification for various parts of a project or for the whole project, and one can see various models emerging out of that. That is why I said that I see the bill as enabling legislation. I also understand that certification, either of design or of construction, would come about only if there was sufficient interest among parties who wanted to develop that competence and be approved to certify. It depends on the market wanting to do those things.

**Douglas Walker:** Our concern with self-certification is that, although it has a place in smaller jobs, where the whole design can be understood by one individual, one does not have to move very far beyond that for fragmentation to occur. When self-certification is set down firmly in legislation, as is the case with structural design in Scotland, in effect that removes any further consideration of the matter once the certificate has been signed by a professional engineer.

Lots of things can go wrong. The person who signs the certificate could make a mistake or be incompetent, or he could have missed something. SCOSS highlighted all the things that could go wrong in the report that it published last May, and I have reproduced those issues in our written submission. We believe that the correct way forward is to set down firmly the possibility of that happening in legislation. We lay the responsibility for assessing whether the certificate is appropriate

in the hands of the verifier. The verifier is then able to take into consideration the competency of the person who submits the certificate, the complexity of the design and whether there are any safety-critical elements that should not be certified but should subsequently be checked. The change to the bill is not fundamental; it is a shift in emphasis.

**Fiona McLeod (West of Scotland) (SNP):** I know that we do not envisage private verifiers, but they are a possibility under the legislation. To allow the process that you have described to take place, should private verifiers have enforcement abilities, which local authorities obviously have?

**Douglas Walker:** It is possible to separate enforcement from verification for the simple reason that if the private sector verifier does not issue a certificate to say that he is comfortable with the design, the building cannot be built. The enforcement action would then be taken by the local authority, which is best placed to do it.

**Des McNulty:** One thing that bothers me is the fact that private sector verifiers or local authority building control inspectors are in a relatively weak position because, on a large or complex project, they have to chase round the different individual self-certificators. Is there an argument, particularly where a management system is leading the building of a project, for bringing in the verifiers as legal partners, so that they have responsibility for ensuring that the self-certification process is properly managed? Would that provide the holistic framework that Douglas Walker was talking about?

**Richard Gibb:** I support the view that, in the case of large, complex contracts, it is difficult for verifiers, of whatever shape or form, to handle all the difficulties that arise. It is one of those jobs in which the more that you do it, the more competent you become at it. I do not have any difficulty with that, as a number of perfectly competent building control surveyors in the big cities undertake that role—indeed, building control surveyors in Glasgow and Edinburgh are doing it all the time.

Given the learning curve that is involved when a surveyor undertakes the first such job, I am concerned about the difficulties that could arise in rural or other areas where large, complex projects are not built all the time. A surveyor could learn how to do it once and not have another such project for 15 years; they would have to go through the learning curve again. In those circumstances, a valid case could be made for having an approved verifier, who specialises in large, complex projects, to do that sort of work up and down the country, in or out of the cities.

**Douglas Walker:** The construction, design and management regulations offer an interesting model for a system that places the responsibilities

on the contractor. When contracts are being put together, it is routine for developers to require all parties to the contract to fulfil their obligations and present such information for compilation into health and safety files and plans. People do not get paid unless they do that. We could learn from that model.

**John Scott (Ayr) (Con):** Douglas Walker spoke about verification being backed up by membership of an institute. How does that work in respect of indemnity insurance? Does the institute carry insurance on behalf of its members or do members pay for it?

**Douglas Walker:** At the moment, the certification system means that the position is extremely unclear. I expect that the responsibility lies with the person who signs the design certificate and that their professional indemnity insurance would have to back up that responsibility. That has not been challenged. The issue becomes problematical when an individual signs a design certificate for a design that they have undertaken for their company. In that case, the company covers the individual's professional indemnity insurance. However, if the person leaves the company and goes to work for someone else, they are no longer covered for the work that they have done. A number of issues in the field of insurance are extremely unclear.

We believe that the solution lies in the verifier—whether local authority or private sector—taking responsibility for ensuring that the system is managed properly. The verifier's professional indemnity insurance should cover the system in an overarching way. In the private world, I would expect companies to cover that with back-to-back indemnities on those submitting certificates, as is the case at present.

**Sebastian Tombs:** One point of fact about the way in which professional indemnity insurance works is that the system is based on claims made. An insurer can deal with a claim if the insurance is in place when the claim arrives. Professional indemnity insurance is different from other forms of insurance. The claim for an act of negligence can be dealt with if the people who were responsible for designing the engineering or constructing the building five years earlier—or whatever—are still covered by the appropriate insurance when the claim arrives. Part of the problem is that that is the way in which the insurance market works. If there is to be new thinking about how to cover the liabilities that inevitably follow on from engineering or architectural design work, that point of fact requires to be understood.

**Richard Gibb:** Members of the RICS, along with the other professional bodies, have many obligations. Two of the principal ones are that one

can only practice in an area in which one is competent to practice, and one must have appropriate PI insurance. Guidelines are given on turnover and on the level of insurance that people must have. The RICS does not issue the PII. Applications are received from various insurers who identify the coverage, and the RICS says whether the coverage is adequate. It is then up to the private sector insurance provider and the professional to arrive at the payment that must be made. That normally includes run-off cover and various other conditions. That is the general arrangement for most professional bodies.

**The Convener:** I ask Robin Harper to be brief.

**Robin Harper (Lothians) (Green):** Yes. I seek clarification from Sebastian Tombs. Are you saying that there could be occasions when, five years down the line, insurance cover might not be in place?

**Sebastian Tombs:** That does happen. If a sole practitioner dies and the estate vanishes, no insurance is in place. Obligations are placed on most professionals by their professional bodies. In the case of architects, that is done by the Architects Registration Board, under the Architects Act 1997, which places an obligation on architects to carry appropriate insurance if they provide services to third parties. One issue is run-off insurance. What happens to liability when someone ceases to trade, retires or, having been a sole practitioner, becomes an employee of another business, and calamity strikes? The insurance industry is still grappling with such issues.

We are talking about people who have chosen to play a specific role in terms of competence and certification. It is more likely that they will undertake such activity within a business framework than as individuals. Under the Building (Scotland) Act 1959, liability accrues to the person who signs the certificate, so the liability attaches to an individual. However, as Douglas Walker said, the way in which the market usually works is that insurance is provided to a business, which covers the work of the individuals within that business. There are occasions when PI insurance or another form of insurance might not have been taken out. That is possible.

**The Convener:** We need to make progress, because we have been on this issue for a while. We will go back to Des McNulty's questions.

**Des McNulty:** It has been said that people would like a duty to be placed on owners to inspect their buildings regularly. Is that practicable? Would you support that? How could that be made to work?

**Sebastian Tombs:** I will kick off. That is a difficult question. I started work in Edinburgh

tenements in the late 1970s. I was not long out of university and I branched into working in housing associations and on tenement refurbishment. It was quickly evident that there was a lack of maintenance, and that that was particularly difficult in multi-ownership properties. I hope that the Scottish Parliament will make efforts soon to address some of the issues of tenement law. I know that the RICS has made its presence felt in trying to address those issues. Indeed, the RIAS has also been positive in trying to help owners to address regular maintenance.

Mortgage lenders, for example, do not enforce the obligations that they place on mortgagees to look after their buildings. Nobody ever comes round to see whether grass is growing out of the gutter.

In the late 1970s, the conditions for repair grants for tenement properties, in which I was particularly interested, imposed an obligation on owners to continue to maintain their property well. However, local authorities gave no resources for that, apart from playing their normal building control role, which examines dangerous buildings, although there was a regime in Edinburgh for the regular inspection of tenements.

11:00

The mechanisms are not in place. We need a mixture of things. As well as increased public awareness, we need solicitors to make it clear to owners what their obligations are when they take on a new property. Also, those who lend money to owners need to make it clear what they expect. Much could be achieved if—just as we have for a car—it became common practice for a building to have a logbook attached to it in which owners were encouraged to keep a record of how regularly the roof was inspected and when the windows were replaced or renewed. That sort of logbook should become common practice, but we do not have the mechanisms in place to make it obligatory. The solicitors profession could help a lot by helping to introducing that sort of thinking at the time of conveyancing of new properties.

That is a big question, to which, unfortunately, there is no easy answer.

**Douglas Walker:** I echo that. The problem is a difficult one, which most of the professions are grappling with in the aftermath of recent events. The Health and Safety Executive has been considering the interesting idea of introducing building inspection as a duty under the Health and Safety at Work Act 1974. Such a duty would require premises that are places of employment to have regular structural assessment. Of course, that would not deal with tenement properties that are not places of employment. Those matters are

currently under consideration by the professional institutions.

**Richard Gibb:** The question is a difficult one. The issue is about resources as much as anything else. In an ideal world, local authorities would have loads of resources and would be able to send people round to do more than just visual checks. Visual checks on their own will not do. One cannot know whether the stones of a tenement roof are properly fixed simply by standing on the street outside and looking up. Any check that is carried out must be a proper check, but I doubt that the resources exist for that to happen.

Such checks will happen only if legislation is introduced to require the owners or occupiers of a building to have the fabric of the building checked out by surveyors or by someone else. That would be a far-reaching move, which would have big implications for all concerned. The RICS is considering the issue at the moment. Obviously, from our point of view, we would be delighted if people were required to have checks and so on carried out frequently, but we are trying to consider the issue from the point of view of what is justifiable.

We are fortunate in that incidents are—touch wood—relatively few and far between, but it is acknowledged that people do not maintain their buildings at anything like the right level. There also tends to be a cumulative effect, as the small things that were initially ignored subsequently become bigger issues. The trick is to be able to identify such things in the early stages to stop them developing.

**Des McNulty:** I have some questions for Sebastian Tombs. In his opening remarks, Sebastian Tombs mentioned inconsistencies in decision making among the building control departments of local authorities as well as the poor performance of some of those departments. Does the bill address those issues? Could more be done to deal with them?

**Sebastian Tombs:** Yes, I think that the bill offers the possibility of improvement in relation to the inconsistencies of interpretation. As Richard Gibb mentioned, the bill could also improve things by lifting local authorities' aspirations for their building control officers. Building control officers have a professional, public and responsible task, which we would like local authorities to view in a positive light. That is the case in the majority of instances, but there are resource problems in some areas, which can lead to extensive delays.

I am aware that the Executive, under its earlier guise of the Scottish Office, introduced self-certification for engineering aspects of warrant approvals, because some authorities were

struggling to deal with that issue. Taking the matter into a national framework could assist if that unlocked inconsistency problems.

The performance of regulation seems to vary over time. That is partly a consequence of reorganisation in some local authorities in recent years, which upset the normal modes of management. Burdens become too heavy when a lot of staff leave, and there are difficulties in getting the job done adequately. I am not sure whether the bill will be able to address all such issues unless an alternative verifier is put in place, to whom one can go in case of need. Especially from the commercial side, there is demand for an alternative route whereby problems can be solved more quickly.

In Australia, where new ways of regulating the construction sector have been tried, the introduction of private verification did not lead to the total demise of public sector verification. However, for those who wanted to use it, it proved quick and effective at more or less the same cost. The difference was in the time that private verification took, rather than in its quality.

Both the issues that you raise could be addressed in the bill. However, one might be addressed slightly quicker than the other.

**Fiona McLeod:** I am interested in what you have said. Do you think that self-certification and private verification are valid in themselves, or are we seeking to patch up a system that is failing to achieve the objectives that are being set for it?

**Sebastian Tombs:** I do not know. There is a role for both in addressing some of the difficulties that exist in the system. In today's world, where people's ideas and needs are changing rapidly, time is becoming the commodity that people value most. If someone borrows money to make changes to buildings—such projects are usually expensive—time becomes a critical factor, especially in commercial development. Anything that helps to introduce a quicker turnaround time for decision making is of advantage to society.

**Des McNulty:** That is putting a positive gloss on the matter. Can I tempt you to consider a negative gloss? What is to prevent a contractor or owner who recognises that they have to face a particularly assiduous building control department from approaching a private verifier as an easier way of getting approval? If they were a large enough operator, what would prevent them from retaining a squad of private verifiers to assist them through the process? In speeding up the process, how can we prevent its being short-circuited?

**Sebastian Tombs:** Being an architect, I am always positive and constructive. Clearly, there are potential conflicts of interest. However, the evidence from Australia showed that what you

suggest did not happen, despite the fact that the temptations must have been evident. My understanding is that private verifiers would be subject to audit by the national body, meaning that no one would be able to be a private verifier unless they satisfied certain pretty stringent conditions that were set out in the bill. It would be for the Executive's national body to govern that process, which would be subject to regular review and audit. Someone would be taking a big risk if they tried to get round the system. I certainly cannot imagine a verifier being tempted to start cutting corners. I cannot envisage that happening, but other witnesses might.

The big advantage would be time. I know of no evidence—others in building control departments may—of people trying to get round the building standards regulations. I have not come across that. The big opportunity is to save time. That is what would drive private verification rather more than people trying to avoid basic compliance.

**John Scott:** To return to insurance, am I correct in understanding you to have said that, notwithstanding the need for private verifiers, a private verifier may at some point not carry insurance, whereas a local authority verifier would almost certainly continue to have indemnity insurance *ad infinitum*, as a local authority employee?

**Richard Gibb:** Some local authorities carry insurance—they go out and buy policies to insure themselves—and some authorities are self-insuring in so far as they believe that they have sufficient funds to allow them to cover any claims that they may have. The local authority will be around for the foreseeable future. For that reason, there is a continuing safeguard.

Most of the professional bodies will be vociferous about ensuring that run-off periods are adequate. The question is how long we make the run-off period. It cannot be 100 years; it should not be one year. Just now, the level tends to be around 10 years, although it varies slightly. The idea is that, if something is going to go wrong with the building, it should have manifested itself by that time.

The PI situation in that regard is in many ways the same as it has been for the architects and engineers. I would not want anyone to think that because the local authority exists just now and can be sued, it is the only body that might be sued if something went wrong with a building. There are obligations on the designer of the building, the engineer, the contractor and anybody else who has liabilities in that respect. From that point of view, if there were private verifiers who were required to get PI insurance to cover them in the same way in which it covers architects and engineers, the situation would not be much different from the present situation.

We were coming to another point on verifiers, which I will come back to, but I will make some notes on that point and come back to you.

**Des McNulty:** The responses make me feel that I would want a mechanism to ensure the independence of private verifiers and the robustness of the auditing mechanism for them. I may be a little less charitable than Sebastian Tombs about how building controls are maintained in many practical areas.

I will ask about approved certifiers of design. That is one of the measures that you support explicitly. What are the benefits of such a system? How would the training, operation and monitoring for that system work in practice?

**Sebastian Tombs:** I will deal with the second question first. I cannot imagine that anyone would become competent to certify unless they had been through an approved training course, which would require them to demonstrate satisfactory knowledge of the areas in which they wished to be able to self-certify. A competence test would have to be undertaken.

My understanding is that discussions would be embarked upon. If a group of architects wanted to self-certify, there would be a discussion between the professional body for that discipline in Scotland and the Scottish Executive about the process of competence testing and management of the list. As the overarching body for architecture and architects in Scotland, the RIAS would be happy to have a role in that if that was deemed appropriate. However, the first point is that, as one does with other qualifications, one would have to get oneself on a list by demonstrating competence.

The advantages were touched on earlier, and they include both speed and innovation. I have hinted that creative people may well be able to solve several different problems within one design solution, which they would not be encouraged to attempt if they had to comply with fairly specific sets of regulations. The bill is moving much more towards performance—we want our buildings to behave in a certain way—and self-certification will help to encourage people to think of innovative ways in which buildings can address that, particularly environmentally.

**Des McNulty:** I think that you and I share a strong interest in innovative design. Do you think that local authority building control departments have enough suitably qualified staff and the resources that are required to deal with innovative approaches, as opposed to more standard designs?

11.15

**Sebastian Tombs:** Such resources are variable; my answer will be a bit of a curate's egg. As Richard Gibb said, larger authorities tend inevitably to have more resources over a wider range of building types. I suspect that there is a richer answer to that question in the larger authorities. I would not want to make too detailed a comment on the individual capabilities of different authorities' building control departments. However, one positive objective is to raise the professionalism of building control as a discipline; the bill offers an opportunity to strengthen both the role of building control officers and their professionalism. I would like to see that encouraged.

**Richard Gibb:** I want to come back on a couple of issues that we were talking about earlier. On the verifiers and how confident we can be that short cuts will not be taken, I would be the last person to stand up and say that no professional has ever done anything wrong. However, instead of discussing the consequences of a fraud or of someone making off with an agent's money, we are speaking about people's lives, which would be a big factor in discouraging people from cutting corners. We are all professionals and have a stringent code of conduct to which we are supposed to adhere. As we heard earlier, the matter is all about competencies. There are in the RICS chartered building control surveyors who use an assessment of professional competence that relates specifically to building control. That assessment is made up of several modules in which professionalism must be proved.

We were also talking about the certification of design. Des McNulty was right to suggest that self-certification came about because there were delays in the process, but those delays will never go away. Pressure will always be put on to try to ensure that applications are dealt with quickly. However, even with the best will in the world and with local authorities having good training, not all authorities can justify having enough fire officers and mechanical engineers to carry out all the checks. They would probably have to bring in people from the private sector to do checks if the facility for self-certification of design did not exist. However, as Des McNulty said, it is important that the matter is viewed in the round and that one person is responsible for verifying that all the certification is in place and can be properly accounted for and interrogated later.

**Des McNulty:** Thank you very much. I have a final question for Sebastian Tombs. You said that some architects have expressed concerns about signing applications for completion certificates because of worries about future liability. Is there anything in the bill that would give people

reassurance on that matter? Could anything be included in the bill to do that?

**Sebastian Tombs:** Subject to earlier remarks about the role of owners, which justifies a closer look, the bill as drafted places a duty on the owner to certify, which resolves the problem. There are some preceding problems to sort out—for example on whether the role of owners needs to be examined more closely—but if that clarity is detailed, we need only ensure that there is a system for those who are responsible for the design and end result of a building.

Sometimes there are differences between what is designed and meets link control requirements, and what ends up on site. All sorts of things happen. We may discover that there is an underground sewer on a site and that it is necessary to relocate some parts of a passageway. A formal amendment to the design might be needed, but sometimes changes are simply made to the way in which a structure is built. Someone must be secure in the knowledge that what is built complies with requirements. Between them, those who design a building and those who construct it should be able to find a mechanism for satisfying the owner, so that they can sign certification that the building complies with requirements.

The bill offers us the hope of solving the problem that currently exists. I would like to see more of the details of that solution, but there is time for that. The bill is framework legislation and we do not have all the regulations and documents that will be associated with it.

**Nora Radcliffe:** My questions are addressed primarily to the representatives of the RICS. The institution has expressed concerns about the introduction of continuing requirements. Can you expand on that and say how you think the difficulties might be resolved?

**Richard Gibb:** Our main concern is that in certain circumstances buildings that were built a number of years ago may be assessed using standards that exist now. When examining an existing building and trying to give an impression of whether that building is satisfactory or suitable, it is difficult to decide what yardsticks to use. It is being suggested that we should use present-day standards or standards that will be introduced by regulations under the bill, but we believe that those standards might be too onerous. I understand that there will be an attempt to base the system on the functionality of the regulations. Phrases such as "the sound insulation shall be adequate" and "the structure shall be adequate" will be used. The people who carry out surveys will be required to make subjective decisions and we are concerned that people will interpret the regulations in different ways.



We have been led to believe that extensive guidance will be given, which might include a list of checks that should be carried out. If the guidance is properly introduced, that should ensure that there is consistency and that minor issues do not require updating. We accept that there are circumstances in which upgrading of existing buildings might be useful for society as a whole—that applies to energy conservation, in particular. We have signed up to the Kyoto agreement, but even if we make all our new buildings comply with thermal insulation requirements, it is likely that at some stage existing buildings will have to be upgraded to reduce CO<sub>2</sub> emissions. We recognise that there are benefits in applying legislation retrospectively. However, we are concerned about the extent to which that can be done to existing buildings and about the inevitable costs that such changes will entail for owners.

**Sebastian Tombs:** We share those concerns. However, we also have an opportunity to address the issue of buildings that fail, especially in energy performance. I am concerned about housing, in particular. We refer to the example of Denmark, where there are mechanisms for carrying out an energy assessment and audit when a property changes hands. The state can make money available through grants to allow uplift of a building's energy performance.

How that was done would depend entirely on how the building is built. Buildings in common ownership pose particular problems, but we should, through appropriate enabling legislation, try to unlock mechanisms through which the market can deliver. An energy audit could be carried out when ownership of a property is transferred, because that is the point at which capital becomes available in the market. A property's value could be depressed slightly to take account of the fact that work needs to be done on the property. If a surveyor identifies defects in a building, that can be reflected in the valuation and capital can be made available for investment. The same principle could apply to energy performance upgrading.

We should allow for upgrading, without introducing measures that are excessively draconian. If upgrading requirements were tied to assistance through cheap loans and—occasionally—state intervention, the energy performance of housing stock would be improved, which would be desirable for everyone.

**Nora Radcliffe:** As ever, a nice balance has to be struck and we have to decide where to draw the line in the sand.

**Sebastian Tombs:** Sure.

**Nora Radcliffe:** In written evidence to the

committee, you proposed a revised system of letters of comfort, which you think would be preferable to the building standards assessment that the bill outlines. Why would such a system be preferable and how might it work?

**Richard Gibb:** As Nora Radcliffe just said, it is a question of degree. There has been a tendency for letters of comfort to be developed. Essentially, lawyers were a bit nervous that their clients might sue them at some stage if they did not ensure that all the relevant permissions were in place and so on. The option was to go back and apply retrospectively for a building warrant and to try to apply the present-day standards, which is the difficulty that I mentioned earlier.

Lawyers persuaded local authorities to give them letters saying that they would not take action later. That is what lawyers attempted to achieve through letters of comfort. The letters do not have a legal basis, but they provide a defence for the lawyers if they are sued subsequently. We would like to have a system in which that aspect of the process was covered so that the people who are involved in conveyancing can be assured that local authorities will not take action against them later.

We do not, however, know whether the bill has to go quite as far as what was suggested for the building standards assessment. Some clients might like to have a building standards assessment; that is fine, but most clients would be scared if they saw one because the vast majority of buildings would not comply. Buildings that have stood for many years would not comply with present-day codes of practice for engineering. We are a bit nervous that clients or even lawyers might be scared when they see a building standards assessment that identifies all the areas that fail to comply. We think that such assessments should be available, but only in respect of what is useful to the client and to society in terms of improving the building stock.

We do not want people to be scared off. The conveyancing process would take much longer as a consequence of people being nervous about the assessments. The issue might be educational; we might have to explain to lawyers the circumstances in which we expect building standards assessments to be useful rather than counterproductive. By the same token, there should be a mechanism in the bill that would provide a letter like a letter of comfort with some kind of validation.

**Nora Radcliffe:** Would that be fulfilled by some sort of annotation on the building standards assessment, such as, "We have found this, this and this, but we are not going to do anything about that, that or that"?

**Richard Gibb:** I understand that what is proposed is simply a checklist that would identify whether a building failed or complied. The assessment must include much more than that, because many people would be nervous or upset if they were told that a building was not structurally adequate, which is the sort of wording that the functional standards would tend to come up with. We want to be able to say that although a building does not comply with present-day standards, it has been standing for 120 years and does not show any signs of distress. That is the kind of thing that we hope could come out of the bill.

**Nora Radcliffe:** So the bill should provide for fuller explanatory notes?

**Richard Gibb:** Yes.

**Douglas Walker:** I just want to reinforce Richard Gibb's comments. I remember quite vividly when letters of comfort started to appear. We were suddenly almost plunged into a situation in which nobody could sell a house; it was really quite desperate. I remember going round lawyers' groups and explaining the situation to them. They told me that they were concerned that their clients would be liable to prosecution under section 9 of the Building (Scotland) Act 1959 and they wanted to relieve themselves of that burden. With letters of comfort, building control surveyors take a view on what needs to be done to the house. They will not bring it up to current standards, because that is impractical in the vast majority of cases and we must maintain that situation. The process has been valuable in many respects in getting rid of dangerous loft spaces in which people were sleeping, windows that would not open and so on. The exercise has been useful, but it would be a mistake to take it too far and make it as mandatory as Richard Gibb suggests.

**Nora Radcliffe:** Do you see the value of objective assessment?

**Douglas Walker:** Yes. When that system first arrived, I did not necessarily take that view, but over the years, I have seen instances in which it has been of benefit.

**Robin Harper:** Although environmental concerns are not addressed directly by the bill, I should declare an interest as a member of the Scottish Ecological Design Association.

The RICS has raised concerns about the monitoring of private sector verifiers. We have had some discussion of that already. Should the bill set out a monitoring system and, if so, what form should it take?

**Richard Gibb:** We believe that if private verifiers are allowed, there should be a monitoring system. Our suggestion is that the proposed building standards agency should have a list and

that it should monitor whether the private sector verifiers do their job properly. That would be fairly straightforward and would provide enough checks and balances in the system.

11:30

**Robin Harper:** Thank you for that clear answer. My next question follows Nora Radcliffe's questions. The bill does not define defective building, but should it do so and, if so, what should the definition be?

**Richard Gibb:** Defective building should be defined, but I would not like to be the person to define it. Three areas must be considered: first, what is immediately dangerous—for example, what is going to fall on the street; secondly, what is dangerous; and thirdly, what is defective. It is difficult to draw those lines. Perhaps the easiest line to draw is that between what is immediately dangerous and what is dangerous. If a building is about to fall on the street, it is immediately dangerous. If it has fairly extensive dry rot, it is dangerous, but not immediately. However, it is difficult to draw the line between dangerous and defective. If I were asked to give a definition, I would suggest that defective relates to a building's fabric, whereas dangerous relates to disrepair that is likely to endanger people's lives. That is the definition that I have used for 27 years.

**Robin Harper:** So you think that the bill should provide a definition.

**Richard Gibb:** Yes, the bill should try to do that.

**John Scott:** My questions are largely for Douglas Walker. The Institution of Civil Engineers supports strongly the introduction in Scotland of the system of approved inspectors that is used in England and Wales. What benefits would that have over the system that is proposed in the bill?

**Douglas Walker:** We want a system that is similar to the system in England and Wales. There is an opportunity for private sector organisations to offer a commercial verifying service. That would be useful, given the delays and problems that arise in major developments such as those that I described earlier. Many major development organisations are concerned that the time that it takes to get a building warrant through the process adds significantly to costs. Those organisations will continue to press for improvements in procedures, time scales and flexibility. If we rely entirely on the process of self-certification for a solution to that problem, or if we consider self-certification simply as a means of speeding up the process, mistakes will occur, difficulties will creep in and matters will fall between stools. We have listed a range of problems in our submission; for example, the problem of deciding who will make decisions about whether a certificate is appropriate.

A private sector verification system similar to that in England would achieve two things. First, it would retain the overall ability to ensure that nothing falls into the cracks. Secondly, bringing competition into the marketplace would allow for service improvements in the public and private sectors. Going down that road would put us in a win-win situation.

**John Scott:** Is there in the bill anything else relating to the self-certification process that you regard as flawed? Can such flaws be removed?

**Douglas Walker:** We should ensure that self-certification is used sensibly and appropriately. We believe that it is not possible to set down a mechanism in legislation, but it is possible in a code of practice to give good guidance to people. Take, for example, concerns about whether a building is so complex that it needs a secondary check. Are there elements of the structure that, if they were to fail, would fail so catastrophically that they would cause a general collapse of the building? Good practice would dictate that such safety-critical elements have an independent or secondary structural design check. Such checks can be explained in a code of practice. One can explain to an engineer what he ought to think about when he is making a decision, but such an explanation cannot be written into a piece of legislation.

The problems are similar to those that we have just discussed relating to what a dangerous or defective building is. A code of practice can explain what ought to be in an engineer's mind when he makes a decision, but it is virtually impossible to write a legal definition of that. It should be remembered that lawyers question the exact meaning of legal definitions. The approach would take us down the wrong road in respect of ensuring that we have safe buildings. The profession ought to work with the industry and with the grain of how the industry is developing to ensure that things are done properly.

I have been associated with the business for many years and, like Sebastian Tombs, I am not aware of anybody who sets out to evade technical standards requirements. People get extremely frustrated about the time that is taken to get through a process if they do not understand what they should do or the purpose of the process—that is when they try to find a way past it.

**John Scott:** The Institution of Civil Engineers has expressed concern that the use of approved certifiers of design and approved certifiers of construction might compromise the safety of new buildings. We have just discussed that matter. Do you have any evidence that that has happened elsewhere and what could be done to prevent it from happening?

**Douglas Walker:** There is evidence that self-certification can compromise safety. There are a number of examples from around the world in which that has been the case.

**John Scott:** Will you cite one or two examples?

**Douglas Walker:** One that springs to mind was reported in 1999, I think, by the Health and Safety Executive. I cannot remember the address of the building, but it was in Kent. It collapsed while alteration works were being carried out on it and four workmen were killed. In the investigation, the cause was traced to extremely poor workmanship that was carried out in the mid-1960s, when the original building was constructed. The Health and Safety Executive's report did not lay blame on particular individuals because too much time had passed, but it pointed out that the work had been certified by the engineer at the time and that he stated, in effect, that he would personally supervise the work. I have no means of knowing whether that had an effect on the final result, but one can imagine situations in which the local building control authority, having gained such certification, may take a different view on how it supervises works on site. We do not know the effects, but that is an example of the use of certification.

Elsewhere in the world, my company is engaged in advising the Gujarat Government in India on how it might improve the seismic resistance of buildings. There was a major earthquake there two years ago, in which many thousands of people were killed or injured. We have identified that the system of structural certification in that state relies entirely on self-certification by engineers, which has widely failed to ensure that buildings are seismically properly designed.

About the time that self-certification was introduced in Scotland—in 1992—the Singapore Government was introducing a system of secondary checks on its buildings because inadequate structural design had caused the collapse of the Hotel New World. Many people were killed or injured in that collapse. A building in Kansas City became another famous case of structural collapse after a walkway collapsed during a tea dance. There is still in that case an argument between the engineer and the fabricator—who changed the engineer's design after his drawings were stamped—about who was responsible for ensuring that the building was adequately designed.

There are many instances of such situations unravelling. Although I am not aware of any incidents of collapse in Scotland, where we have had self-certification for 10 years, I do not want to wait to get that sort of proof.

**Fiona McLeod:** You have given us examples of self-certifications being seriously flawed and causing safety problems. You have talked about approved inspectors, rather than the verifiers that the bill proposes and the private verifiers that we could have. How can the approved inspectors—as opposed to the private verifiers and the local authority building control departments—ensure that designs that have serious flaws do not get through the system?

**Douglas Walker:** I do not want the approved inspector to be the model that we follow, although it has the advantage of providing an independent view of the process. Someone who sees the whole design would be able to take a view on whether a design certificate was all the evidence that was needed to ensure the safety of the building; whether they could go beyond the needs of that design certificate and institute secondary checks; or whether that design certificate covered all the necessary issues.

Under the current system in Scotland, someone self-certifies for the regulations on structural design that deal with loading of dead load, live load and wind load, but not for the condition on whether the building will collapse in a fire, which relates to a separate regulation. Nowadays, as technology moves on, many engineers will design structures to withstand a fire loading. For other buildings, the architects will specify whether there is adequate structural fire resistance. We need somebody who can sit back from the process and say exactly what a certificate covers and what further evidence will be needed to cover the other design situations that are involved.

I do not want to overstate the safety case; the bill will not result in the widespread collapse of buildings around the country, but it does not present the best way of ensuring that we get a safe and holistic check of a complex building design.

**Fiona McLeod:** In your written evidence, you talk about the English approved inspector system being the answer. However, you are now saying that it might not be the answer. If you believe that the bill does not propose the right system, what should we have?

**Douglas Walker:** As we say in our written evidence, we need a system that is similar to the approved inspector system in that there would be an independent private sector verification route. The approved verifier that is proposed in the bill is quite close to that, but we would like a commitment in the bill to the establishment of a register of approved private sector verifiers. Such a register would be a potential way forward.

**Fiona McLeod:** I have one tiny wee—

**The Convener:** I want to draw this part of the meeting to a close because we are running well over time and have covered all the areas on which we intended to question the three witnesses.

I thank the witnesses for today's evidence, which has been very useful. The professional expertise that you bring to your evidence will add to our ability to consider the bill.

11:45

*Meeting suspended.*

11:52

*On resuming—*

**The Convener:** We proceed with the second panel that is giving evidence on the Building (Scotland) Bill. I welcome Malcolm MacLeod and Neil Cooper, who represent the National House Building Council and Sidney Patten, who represents Scottish Building. Both organisations intend to make introductory comments. I invite Malcolm MacLeod to make introductory remarks on behalf of the NHBC.

**Malcolm MacLeod (National House Building Council):** Good morning, ladies and gentlemen. I put on the record the fact that the NHBC welcomes the changes that are proposed in the bill, in particular the ability of ministers to appoint private sector bodies as verifiers.

We are delighted to be here today to provide evidence to the committee. With me today is my colleague, Neil Cooper, who is our building control manager in England and Wales. As we do not provide building control services in Scotland, Neil will highlight to the committee the strengths and weaknesses that we have encountered in the system. His presence will enable the committee to ask detailed questions about how the system in England operates and how we deliver our independent building control services.

The NHBC is the largest provider of building control services in the United Kingdom. We provide more than half the building control service to consumers in England and Wales. I will not repeat the contents of our submission, which I hope that members have all received. The NHBC is committed to improving quality in housing. I will say a few words about the organisation and set our building control role in that context.

The NHBC is an organisation that sets standards for construction. We are the leading warranty provider for new homes in the United Kingdom. We are a non-profit-distributing company and operate independently of both the Government and the housebuilding industry. We have no shareholders to answer to. All the income

that we raise is reinvested to ensure that housebuilding standards are raised, that our insurance reserves are sufficient to meet the liabilities that we carry and that our customers and consumers are protected.

We are a stakeholder organisation and are governed by a council with 71 members. Membership of the council is wide ranging. It includes representation from local government, the Council of Mortgage Lenders, solicitors, professional bodies and builders. We work together to promote quality in and to raise the standard of housebuilding.

We raise housebuilding standards by setting and publishing technical building standards. We inspect during construction of houses. In England and Wales, we provide building control. We offer consumer protection through our warranty and insurance products. We provide a wide range of value-added services to the housebuilding and construction industry. Those include training, health and safety, engineering and energy rating.

Our key role of interest today is in building control. The NHBC has built up a wealth of experience in building control, as it has been an approved inspector in England and Wales since 1985. Nationally we employ about 1,000 members of staff. Across the country we have 400 inspectors who inspect on site and use the most current technology—hand-held computers—to record the defects that they find and breaches in building standards. We report those breaches back to the industry on a regular basis.

Our track record and experience show that, by providing a national service using the latest technology, and by working in partnership with local authorities, the quality building control that is provided to consumers in England and Wales has improved. Some of the witnesses who gave evidence earlier made a similar point. We are proud to have played a role in bringing about the improvement to which I have referred. We hope that today we will be able to assist the committee in its consideration of the bill. We hope that we will be able to offer our resources, expertise and experience in order to raise the standards of building control in Scotland.

Neil Cooper would like to make a few remarks.

**Neil Cooper (National House Building Council):** Good morning, ladies and gentlemen. Thank you for giving me an opportunity to address the committee.

We broadly welcome the bill. I would not claim to be an expert in Scottish building control, but I am an expert in building control south of the border. I would like to make a slight clarification of Malcolm MacLeod's opening statement. Last year, we provided building control for half the new homes in

England and Wales. We provided building control for 78,000 units, ranging from single houses to mixed-use developments of 20 to 30 storeys in the provincial centres.

Since 1985, as an approved inspector we have provided building control for 1 million new homes in England and Wales. We have built up a significant body of experience as an approved inspector. For insurance reasons, and for reasons that members have cited—to ensure public confidence and to cover on-going liabilities—we were the sole improved inspector. We may want to touch on that issue later, as some of the previous witnesses mentioned it.

We believe that we have brought about improvements in building control. What do those look like? The witnesses from the RICS, the RIAS and ICE have said it all for me, so I will not labour the point. We have brought forward system approvals—national consistency in the approval and inspection service—through the use of information technology systems, in particular.

We have brought added-value products, which local authorities have introduced—that is a testament to their response to the competitive situation. Those products include latent defects insurance for commercial buildings. We act as facilitators for such essential protection.

We have raised service levels, which have several facets. An obvious aspect is response speed. I am convinced that we have also raised service quality. We have been instrumental in assisting the building control performance standards advisory group—I am sorry for the long name, for which BCPSAG is the abbreviation—to set building control performance standards for England and Wales.

I am a member of the working group that is devising the monitoring arrangements, which will deal with the qualitative side of building control. The systems have some inherent weaknesses, one of the most noticeable of which is that no one measures the finished product's quality. I am delighted that the Building (Scotland) Bill provides the enabling power to go deeper than an organisation's responsiveness and to consider the effectiveness of building control.

12:00

**Sidney Patten (Scottish Building):** Good afternoon, ladies and gentlemen. Through Scottish Building, I represent about 1,200 companies large and small. Those companies are involved in the planning, development and, more important, the hands-on element of constructing buildings. I am pleased to have the opportunity to give the committee our views of some of the practical difficulties that we foresee.

We have appreciated and been impressed by the amount of consultation that has been undertaken. We feel that the bill is fairly non-contentious now. I am not sure whether the clerk has distributed my paper, but I have taken the opportunity of summarising some of our concerns.

We understand the flexibility that has been required in the bill because of the flue ducts directive and the acknowledgement of the industry's complexity. We have concerns about the clarity and the understanding that might be required of the functional standards and the performance requirements.

We welcome the philosophy of a more user-friendly and client-friendly system. The committee might be surprised to hear that we are content with and support the idea that local authorities should retain the verifier role, at least for the time being. More integration of the consent process is needed in local authorities, but we are not persuaded that private verifiers per se are the way forward. However, we commend the use of industry initiatives to assist the public sector in verifying standards.

I commend the new Construction Licensing Executive Ltd, which was formed in the past six months. It would be nice for each body that is represented today and the other trade and professional bodies to be given some authority over verification and to increase their standing. However, that would not provide independent verification. Therefore, the Construction Licensing Executive Ltd, which includes consumer bodies, trading standards, the Scottish Executive and the Health and Safety Executive, is the way forward and may provide an appropriate approach on certifiers of installations. I might have the opportunity to speak about that later.

We have had concerns—we hope that we will not have them again—about the composition of the Building Standards Advisory Committee and the new standards agency that is to be formed, which we support. More industry practitioners—those who are involved at the coalface—should be involved. We have made our concerns known about that. We would like the industry to be better represented. Given the intention behind the bill, it is imperative that those bodies are properly represented by people who work at the coalface.

**The Convener:** Thank you very much. We will now move into questions. We intend to start with general questions aimed at the whole panel, so if anyone wants to contribute, please indicate and I will allow you to come in. We will then focus on specific questions to each organisation.

**Robin Harper:** Obviously there will be opportunities to be more detailed, but the first question is simply whether you think that the Building (Scotland) Bill could be improved. If so,

would you briefly outline what changes your organisation would like and explain the reasoning behind them? This is an opportunity to give a brief introduction to any changes that you would like to see.

**Sidney Patten:** The main problem that we have found with the current building control system is the time that applications take, which has been mentioned several times. We made the point in our report that construction should be able to begin before a warrant is issued. If that is a problem, the bill should implement a system of phased warrants. We feel strongly that the inconsistencies and time problems in local authorities need to be addressed, although we are not ignorant of the fact that there are resource problems in local authorities with building standards and control. We have made the point that the issue should be critically reviewed and we would be happy to help and work with any review. We want anything that helps to improve the speed of the system while not diluting the standards or quality of the end product. Of course, as has been said several times, there should not be a net cost to the constructor.

**Neil Cooper:** The first thing to do is welcome the plain English—I cannot think of a better phrase—content of the bill. It is simple to understand and, because of that, it strikes my organisation that the sections are broad enough to allow a wide range of regulations. Although we have picked up on some detail, most of the points will be satisfied by regulations. Whatever the bill's aims—by and large, they are conservation of fuel and power, health and safety, welfare and sustainability—they will be met by regulations. That is good and I do not see any improvement that can be made on that.

I share concerns with others who have given evidence this morning about the owner being responsible for applying for the warrant. In our experience, the funder of the building work, who may be the owner, is not necessarily the person who carries out the work and puts the plans into action. That could be an offshore company, a multichain development company or a high street outlet that puts out the work to project managers. In the same way, a leaseholder in an office development may want to make some internal alterations. Under the terms of the lease, they would have to get permission from the owner to undertake those works, but the leaseholder is effectively the owner or person carrying out the works. Alternatively, the builder carrying out the works could be in that position. I think that the provision has to be broadened to deal with those situations, particularly as development is going in that direction. Owners are divesting their responsibilities in procurement and the carrying out of work to others.

We share concerns about design certification. Our experience in England and Wales is that the regulations provide for design certification of some description by competent or approved persons. It is interesting to see in the policy memorandum that the Executive is not intending to take the issue too far.

We fully support that approach for all the reasons that the other witnesses have mentioned. In our experience, there is enormous pressure on building owners and developers to get as much usable space out of their buildings as possible. However, by doing so, they run the risk of under-designing certain non-structural elements, such as spatial requirements for disabled access. Such risks of non-compliance are taken under pressure from the building owner, who is obviously keen to maximise the building's economic aspects. As a result, we would advocate a fallback position of limited design or construction self-certification for boilers, controlled services and fittings and other specialist areas of installation, including thermal insulation.

I agree with the gentleman from ICE on the question of structural robustness. From our experience, people need to be satisfied that someone else has—for want of a better word—okayed a construction. Structural robustness includes issues such as disproportionate collapse, which takes into account cases such as Ronan Point, where simple mistakes happen. Who oversaw that construction? In the third-party checking process that we carry out north and south of the border—the question of who carries out such a process is a different kettle of fish—we find that mistakes happen; that is a risk that we run. As a result, we support limited self-certification. That could be made more explicit in the bill.

**John Scott:** You mentioned the Ronan Point disaster. What level of certification or checks and balances was provided in that case?

**Neil Cooper:** The Ronan Point collapse involved a basic systemic failure. The failure of one element of the building led to the failure of support to other elements, and the whole thing went down like a deck of cards. It is funny how regulations change. For example, the Summerland fire, which happened at a holiday camp, involved plastic linings. Because there were no regulations to control the spread of the fire and the way in which the coverings reacted to flames, plastic dripped on to people and killed a lot of them. Although, mercifully, not many people were killed in the Ronan Point collapse, it demonstrated graphically what can happen.

The regulations changed in a knee-jerk fashion in reaction to both events. Since then, it is fair to say that disproportionate collapse is a thing of the

past, even though many cases come across my desk where we have to arbitrate between the engineer and the client, who might not want to put in all the necessary mechanisms that will restrain a building fully or make it robust. As we are the third-party certifier, we are judge and jury; that is why the design professions rely largely on third-party certification. That is also part of the risk to which previous witnesses alluded.

**Robin Harper:** Several commentators have raised concerns about inconsistencies in decision making among local authority building control departments and poor performance by some of those departments. Will the bill's proposals remedy those concerns?

**Sidney Patten:** To be honest, I am not sure that they will. We need a fairly extensive review of how resources within those departments are trained and of the funding that is made available to ensure that there are enough people to do the job. Although the change to functional standards and performance requirements might assist the situation, proper training needs to be done in local authorities.

That said, we should not get things completely out of perspective. We are well aware that many local authorities do a very good job. Throughout the year, we conduct a programme of visits to all 32 local authorities to discuss a range of issues. Our members, on occasions, compliment the authorities on the way in which they go about their business but, as a whole, there needs to be a review of the resources that are applied and the training and qualifications that those human resources receive.

**Robin Harper:** Could that be addressed by the bill, or is it a case for improved regulation?

**Sidney Patten:** The bill might well try to stipulate some sort of competence or standard levels for the particular roles.

**Malcolm MacLeod:** Evidence was presented earlier today that suggested that there is inconsistency in interpretation across the country. That is fair comment. Evidence was also provided that time is becoming a crucial element in the building process. There is an opportunity to address those matters and to deliver a more efficient system. In England and Wales, our building control system enabled us to issue type approvals across England and Wales. I ask Neil Cooper to expand upon that and to provide the committee with evidence on how that consistency and speed of service has contributed to the efficiency of delivering building control in England and Wales.

12:15

**Neil Cooper:** I will dissect the question into two issues, if I may. First, I will wax lyrical about how wonderful our service is, but there is a national type approval service, and local authorities provide that type approval service as well, which was a direct response to the NHBC setting up a service 15 years ago. That service gives a class warrant, if you like, for a building type. Subject to certain site-specific conditions, it can then be used anywhere round the country.

On the control of resources and the way in which we operate, we have a comprehensive electronic system for monitoring the level of responsiveness to our plans-checking service. We can place anyone anywhere in the country, because they are all able to work from home, and we know exactly what each individual's output is in terms of responsiveness. We undertake quality audits to look at the professional decision making of the inspectorate and the plans-checking staff, and we report that at a national level through a performance review so that we can provide a nationally consistent service.

That is our answer to the 270-odd local authorities. By and large, they provide a good service, but obviously it is variable. The builders that we deal with look for a nationally consistent level of service, so if we tell them that on average we will check plans within 2.3 weeks, that is what we will do. Obviously, we are in a position to bring forward certain plans if necessary. If we claim to undertake at least seven meaningful inspections on a building control site or on a house nationally, that is what we do. We have the facility to manage and monitor that resource.

A national building control provider—in the public or private sector—can provide national consistency and can meet the needs of major developers in particular, but you have to go beyond the skills and competencies to the monitoring and approval process, which the bill enables. That is another piece of good news in the bill—Scottish ministers will be able to direct how verifiers and certifiers operate.

It strikes me that there is huge potential to lay down levels of inspection, responsiveness, competence and resources. That is exactly what is laid down for us in the approval process that we have to go through every five years as an approved inspector south of the border. Every five years, we have to resubmit to the body designated by the secretary of state our processes and procedures, and convince that body that we are up to doing the job. Local authorities do not have to do that south of the border, because under the Building Act 1984 those bodies have to exist in perpetuity. They have a general duty to enforce, but they have no specific requirements with regard to competence and everything else.

The system has developed over time and there is a perceived wisdom about what needs to be applied in terms of resources, but that is not defined in law. The weakness in the English and Welsh system is that there is no requirement for competence to report resources to be applied to both public and private sector verifiers. That requirement applies only to the private sector, but we would like it to apply across the board. The Scottish Parliament has the opportunity to do that. You could deal with the professional and financial interests and with the levels of service by specifying what the public and private sector verifiers should be doing. That would allay any fears about differing levels of service. You could even attach minimum levels of fees if you wanted to. It is within your gift to do all that and to have a competitive marketplace that competes on levels of service and not on price or technical standards.

**Robin Harper:** Thank you. That leads on neatly to my final question, which concerns the monitoring of verifiers. The bill gives Scottish ministers the power to appoint private sector verifiers, but there is no mention of a system for monitoring private sector or local authority verifiers. Should a monitoring system be set out in the bill? I think that you have already partly answered that question. If a system were to be set out, what form do you think it should take? Who should be in charge of the monitoring?

**Sidney Patten:** A monitoring system should certainly be set up if there is going to be some sort of fragmentation of verification. However, as I said in my introduction, we do not feel that that is an appropriate way forward at this stage. With all due respect to my colleagues, the evidence that we have seen from the English situation shows that it has proved just as cumbersome and costly, as all sorts of verifiers have been set up for different trades and different parts of the construction process. Any system must be policed and the necessary resources to police the system must be in place.

The Scottish Executive must examine carefully what the industry itself is doing and must establish whether the rigorous inspections that are being carried out by bodies such as the construction licensing executive satisfy to a large extent what would be required of the certified installer. I am not talking about the design, but purely about the installations. There must be some way to monitor the process, and the new standards agency is undoubtedly the right approach to ensure that standards are maintained and retained in years to come.

**Neil Cooper:** I agree that verifiers need to be monitored—I hesitate to say “controlled”, because that smacks of the suggestion that they are incompetent, which is the last thing that we should



be saying. To ensure public confidence, there must be an overarching body, which could be a cross-industry group that considers such matters as the level of service that is being provided by verifiers. Such a group could also consider a degree of compliance, which might suggest a monitoring or spot-audit arrangement. It could review complaints about performance and conduct an annual review of resourcing to see whether the verifiers are up to the job, employing the right people and deploying them in the right way.

A cross-industry group could monitor whether the right resources are being applied to complex work. For example, on a large job in a rural area, are the right people available to discharge the function? That could be monitored in a variety of ways—by audit, by annual returns or by people submitting their business or work plans to the monitoring body. It should be a cross-industry group, comprising consumers, building owners, building control practitioners, Government officials and design professionals. The building control performance standards advisory group does not have any locus in law in England and Wales, but something like that with teeth would really work.

**Fiona McLeod:** I think that we have heard answers to the questions on verifiers, but I would like to put another question to Sidney Patten. Neil Cooper answered one of the questions that I was going to ask about flexibility on the definition of an owner. What are Sidney Patten's comments on that?

**Sidney Patten:** What Neil Cooper said is absolutely right. The issue of who the owner is of completed buildings and those that are being constructed causes problems in the industry. It is important that the concept of owner is retained, whether it is the developer, the builder or someone else. We must also consider the contractual arrangements in the process. It is important to retain the concept because, as I made clear in my paper, the owner should remain the duty holder in relation to the completion of the building. I am pleased that the concept of the owner is included in the bill.

To avoid having an extremely fragmented system, we should concentrate on trying to identify and define ownership at the earliest stage and keep to that throughout the process. The concept of owner should be as restricted as possible, because there should not be too many people who are responsible for making applications and signing off completions.

**Nora Radcliffe:** Earlier witnesses mentioned insurance and run-off, which I think refers to continuing responsibility. Is there room for consideration of continuing responsibility after ownership has been transferred, even for a limited period, to pick up the loose ends that Des McNulty

mentioned? When a property is handed over, part and parcel of that is that the ownership changes, but there might be things that should be referred to the previous owner. Is that a feasible concept?

**Sidney Patten:** Yes. The concept applies in construction through the contractual process, which, for example, allows for the identification and rectification of latent defects. As members know, the NHBC buildmark scheme carries that kind of guarantee for 10 years. I do not know whether the idea is feasible for individual developers. Sebastian Tombs mentioned the difficulties of identifying who is responsible for defects and of making those people responsible. That is a difficult issue to solve.

The ultimate user of the property can always fall back on the contractual process. The guarantees or warranties that might be applied are being considered. I am sorry to harp back to the Construction Licensing Executive Ltd, which has been formed by the construction industry, but one of its requirements is that a guarantee must be in place for any work that is done on behalf of a customer, whether large or small. That is a step forward in the process of providing protection for the end consumer. That idea might be examined and extended, but it would be difficult to ask constructors to carry 10 or 20-year insurance in case something goes slightly wrong.

**Nora Radcliffe:** It sounds as if many of the issues are covered by other mechanisms.

**Sidney Patten:** Yes. There are standard forms of building contracts in Scotland, many of which cover the eventuality that we are discussing.

**Nora Radcliffe:** Thank you. That was a side issue from my main question, which you have already covered, but I offer you the opportunity to expand on the issue. Why would the removal of the need to obtain a building warrant prior to the start of building work be an improvement on the system that is proposed in the bill?

**Sidney Patten:** The problem is again the time-delay element, although we fully understand why a warrant should be issued prior to construction starting. One way to solve the problem might be to ensure that there are targets and guarantees that warrants will be issued within a prescribed time scale. I do not know how feasible that is, to be honest. The other way to look at it is that the person who is constructing or altering the building is surely in a position to make some sort of evaluation of the risk involved. They should then be able to get on with their programming of work so that the customer can get what they want.

That takes us back to enforcement and is one of the reasons why we believe that local authorities are currently best placed in terms of verification. Enforcement in such situations is very important.

As long as enforcement and independence are there, the warrant arrangements in the bill could be made more flexible than they are at the moment.

12:30

**Nora Radcliffe:** Is that because the inspection regime comes with the warrant and building cannot be started without a warrant?

**Sidney Patten:** That is right. We are talking about getting the whole process moving and not having the construction process halted because of the bureaucracy that is involved in the issue of a building warrant.

**Nora Radcliffe:** Would your concerns be alleviated if there were a requirement to deliver the warrant within a set time frame?

**Sidney Patten:** That would be very helpful. It would certainly give constructors some comfort if such targets were met, so that they would know how to programme their work.

**Nora Radcliffe:** That would remove the danger of not having inspection regimes.

**Sidney Patten:** Correct.

**Nora Radcliffe:** What system of regulation would Scottish Building like to see introduced for approved certifiers of construction? Should that system be defined in the bill?

**Sidney Patten:** I refer to my earlier comments about the committee and the Parliament considering the initiatives that have been set up by the industry.

We have consulted widely with the Executive on the construction licensing executive, which requires a high standard of competence and regulation for those companies that can be registered and licensed to operate in construction. One of the construction industry's greatest problems is its image, which results from the fact that there are far too many rogue traders who are not regulated in any way. We are looking for a way to be able to license companies without restricting trade. We want to be able to license companies that are competent to operate in a dangerous and complex industry.

We therefore see the hierarchy from the building standards agency considering a body such as the licensing executive and taking comfort from the fact that that body exists and is independent of the construction industry, as I demonstrated earlier. Representatives of the Scottish Consumer Council and the trading standards services take the chair and the vice-chair of the licensing executive. The building standards agency is thus gaining comfort and confidence that the licensing executive, or any body that might evolve from it, is determining

regulations properly within the industry. It is also ensuring that licensed companies are working correctly and competently within the industry.

Local authorities might be given a little bit of flexibility of comfort, in that they will know that standards will be applied, not just by trade bodies such as my own, but by means of rigorous inspection. By rigorous inspection, I mean regular technical inspection of every company that wants to be licensed. That requires inspectors going to sites and ensuring that standards, whatever they might be, are applied. That has to be considered.

**Nora Radcliffe:** You previously highlighted potential problems with the absence of a penalty for late applications for a building warrant. Could you expand a little on what the problems are and suggest what might be an appropriate penalty?

**Sidney Patten:** I cannot remember setting that out in our submission.

**Nora Radcliffe:** No? I am sorry, but I was provided with the question—I do not understand it myself.

**Sidney Patten:** Perhaps the question leans towards asking whether some form of penalty should be placed on the authorities if a warrant is not issued within a specific period.

**Nora Radcliffe:** Is there a problem with people not applying for a warrant timeously?

**Sidney Patten:** No, not in my experience.

**Nora Radcliffe:** Right. Do local authorities have sufficient numbers of staff and adequate resources to consider innovative designs? Does that expertise exist in local authorities?

**Sidney Patten:** Local authorities can have that expertise, but I go back to the points that were made earlier about training and standards of competence. The industry is changing—that was also remarked on earlier—and two aspects of that change are important. The first is the greater amount of innovation that is going into building construction, whether in the house building sector or in the commercial and industrial building sector. The second is that a tremendous amount of standardisation is being applied. Building control officers need to take the view that a deem-to-satisfy approach can be taken on certain design elements—my colleague Neil Cooper mentioned that approach, which applies down south.

It must be recognised that the industry is changing and that existing building control resources should take into account the innovations that have taken place in design and structure. There also needs to be a recognition that standardisation, prefabrication and off-site manufacture of buildings are very much things of the future.

**Malcolm MacLeod:** I want to build on that and to reinforce comments that were made earlier. The larger authorities in the central belt would be able to accommodate innovations and changes in construction practice much more easily than could the smaller, rural authorities. In that context, there is a role for private verifiers to provide assistance to those authorities in their consideration of complex, innovative projects. Private verifiers could provide the expertise that is not available in-house in those smaller, rural authorities.

**Fiona McLeod:** I understood that, in Scotland, developers rather than local authorities would use the system of private verifiers to verify designs and construction methods. You said, however, that you envisage local authorities using the system.

**Malcolm MacLeod:** I might be incorrect, but in earlier discussions it was mooted that there could be a role for private verifiers to assist local authorities, if that was felt to be needed.

**Fiona McLeod:** At present, a local authority could ask someone for assistance on a consultancy basis, but I understand that developers will use the private verifiers. We are talking about who is to bear the private verifier's costs. I understand that they are to be borne by the developer and that the local authority would accept the verifier's report as a valid verification of the developer's design and installation. The local authority would not bear the cost.

**Malcolm MacLeod:** Yes. You are correct.

**Neil Cooper:** Obviously, the requisite fees would have to be paid. The developer would make a choice, which is how the approved inspector system works south of the border.

Sidney Patten made a point about the responsiveness of local authorities, which has been sharpened up by competition. In England and Wales, local authorities provide a cutting-edge service in the main. Competition has brought a real benefit that has not required legislation.

In our submission, we suggested that it would be possible to have a substitute warrant for minor works that would be similar to a building notice, which would allow the commencement of work before a building warrant was in place. We were thinking of the case in which someone wanted to remove a middle wall in their house and install a beam. If such work was verified by the local authority or an independent verifier, it could be substantiated by inspection. In other words, a meeting could be held before the work began at which the person would set out their intention to install—let us say—a 225cm x 75cm steel beam in the room. They would also detail the bearings and the fact that the beam would be wrapped in plasterboard for fire protection.

Such an approach, with reasonable note keeping, is part and parcel of the quick way in which minor works in England and Wales are dealt with, so that a person can proceed and do the work within 48 hours. That approach has also reduced the amount of unauthorised work that is undertaken. If an architect or someone else has to be engaged to do relatively simple work that can be supervised quite easily and efficiently by a building control officer, why should a load of plans be drawn up? People tend to be pushed towards unauthorised work, but there should be letters of comfort and everything that goes with them. A positive improvement to the bill, perhaps through supporting regulations, would be something like a notice procedure for simple domestic work. However, there must be other checks and safeguards in the commercial sector—most notably, consultation with the fire authorities and environmental health and other statutory agencies—which make plans almost essential. However, I see no reason why such a procedure should not be introduced for simple works.

**John Scott:** How is the NHBC's building control performance audited in England and Wales? Should the bill establish a similar system in Scotland?

**Neil Cooper:** We have touched on that issue. The answer is that we must reapply for approval. We are in the process of doing so, and our licence resubmission must be in by May next year. If we do not satisfy the designated body, we will cease trading—it is as simple as that.

There is a five-year review and the BCPSAG is developing a rolling programme. Performance standards are in place, and although monitoring arrangements and key performance indicators have yet to be agreed, work is being done on them. Basic inputs and outputs will define quality and, with the quality management system in the organisation, we can demonstrate that the right resources are being applied, that responsiveness meets requirements and standards, that control development is being correctly tracked and that procedures and processes are in place to manage things. There should also be annual reports. That is the intention of the key performance indicators that the designated body will consider. Although a formal system is not in place at the moment, one will be within six months.

A similar system should be set up to quantify the level of resources according to the type, nature, cost and extent of work within a district, if a local authority is involved, or of a private sector verifier's work load throughout Scotland. The same should be done in respect of reporting and monitoring arrangements. We could go further and undertake independent audits to check the veracity of statements. With Sidney Patten's licensing

scheme or the Council for Registered Gas Installers' registration scheme, people can go in and test the water to see whether things are as they should be. Why should it be left to the electorate to be the arbiters? The central body that is proposed in the bill could do such work.

**John Scott:** Your evidence raises concerns about how private sector verifiers would pass on cases for enforcement action to local authorities. How should that system work?

**Neil Cooper:** That is a good point. The conundrum is whether private verifiers should be allowed to exercise enforcement powers. Our organisation is fairly ambivalent about that. In the interest of public confidence, such powers are best left with local authorities. We find that the refusal to issue a completion certificate and to hand it back to the local authority is an enormously powerful tool to get builders to comply with the requirements of the building regulations. That might entail opening up works or delaying the opening of commercial buildings. The stick is quite large.

12:45

**John Scott:** It is the delay.

**Neil Cooper:** Absolutely, and the uncertainty.

**Fiona McLeod:** How does the system of enforcement with approved inspectors work in England and Wales?

**Neil Cooper:** That is how it operates.

**Fiona McLeod:** So it operates in the way in which you have described.

**Neil Cooper:** If there is a contravention or breach of standards and regulations that cannot be resolved, there is a process by which the notice is served and ultimately handed back to the local authority for enforcement.

**Fiona McLeod:** So the approved inspectors can put out a notice.

**Neil Cooper:** Yes, we serve a notice of contravention, which says exactly what is wrong and needs to be put right.

**Fiona McLeod:** But you cannot enforce it.

**Neil Cooper:** No. We have an obligation to hand the notice to the local authority for enforcement within three months, because only the local authority can enforce it.

**John Scott:** In written evidence, the NHBC states that it would like to see a simplified regulatory system for small-scale development. What do you consider to be a small-scale development and how might such a regulatory system work?

**Neil Cooper:** I think that I answered that question by virtue of what I said about the building notice system for small-scale domestic or commercial work, such as replacement of windows or drainage, or the creation of small structural openings. Those small areas of construction work do not necessarily need detailed plans or specifications and the most effective control of that work is done through inspections on site, where it really matters.

**Nora Radcliffe:** I just want to clarify the procedure. Do you eventually get a building warrant, or is that not required because there is a piece of paper that says that the work has been inspected properly?

**Neil Cooper:** There is a completion certificate.

**Nora Radcliffe:** So you do not need a building warrant. You simply do the work—

**Neil Cooper:** We submit a notice to the local authority, or we could have an informal agreement with the approved inspector, because those rules do not apply for inspectors, although the same principles apply. Ultimately, the final certificate is issued—

**Nora Radcliffe:** The completion certificate is issued.

**Neil Cooper:** If you like, that is the letter of comfort.

**The Convener:** That brings us to the end of questions for our second panel. I thank all three participants, because the session has been useful and the evidence will help our consideration of the bill. I thank the members of the press and public for their attendance.

*Meeting closed at 12:47.*

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