



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Local Government and Communities Committee

**Wednesday 11 November 2020**

**Session 5**



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Pàrlamaid na h-Alba

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**LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE**

**28<sup>th</sup> Meeting 2020, Session 5**

**CONVENER**

\*James Dornan (Glasgow Cathcart) (SNP)

**DEPUTY CONVENER**

Sarah Boyack (Lothian) (Lab)

**COMMITTEE MEMBERS**

\*Keith Brown (Clackmannanshire and Dunblane) (SNP)

\*Gail Ross (Caithness, Sutherland and Ross) (SNP)

\*Alexander Stewart (Mid Scotland and Fife) (Con)

Annie Wells (Glasgow) (Con)

\*Andy Wightman (Lothian) (Green)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Professor John Cole CBE (Building Standards (Compliance and Enforcement) Review Panel)

Christina Gaiger (Royal Incorporation of Architects in Scotland)

Malcolm MacLeod (National House Building Council)

Pauline McNeill (Glasgow) (Lab) (Committee Substitute)

**CLERK TO THE COMMITTEE**

Peter McGrath

**LOCATION**

Virtual Meeting



# Scottish Parliament

## Local Government and Communities Committee

Wednesday 11 November 2020

*[The Convener opened the meeting at 09:15]*

### Decision on Taking Business in Private

**The Convener (James Dornan):** Good morning, and welcome to the 28th meeting in 2020 of the Local Government and Communities Committee. I ask everyone to ensure that mobile phones are set to silent. I remind members that broadcasting staff will operate the cameras and microphones. Please allow a short pause when you are called to speak so that they can do so. We have received apologies from Sarah Boyack, and Pauline McNeill is here as her committee substitute.

Our main item of business is to hear oral evidence on building regulations and fire safety in Scotland in relation to zero-valued homes, but first we will consider whether to take agenda items 5 to 8 in private. Item 5 is consideration of the evidence received on building regulations and fire safety, item 6 is consideration of a revised draft letter to the Scottish Government on pre-budget scrutiny, item 7 is consideration of the analysis of responses and agreeing witnesses for future meetings on post-legislative scrutiny of the Community Empowerment (Scotland) Act 2015, and item 8 is consideration of a letter from the Finance and Constitution Committee on the impact of Brexit on devolution.

As we are meeting virtually, rather than asking whether everyone agrees I will ask whether anyone objects. If there is silence, I will assume that everyone is content. Does anyone object?

I take your silence as acceptance. We have agreed to take items 5 to 8 in private.

## Building Regulations (Fire Safety) (Zero-valued Homes)

09:17

**The Convener:** Item 2 is evidence on building regulations and fire safety in Scotland in relation to zero-valued homes. This session forms part of the committee's on-going work to monitor the Scottish Government's response to the tragic events that occurred at Grenfell tower in 2017 and related issues. Today's focus is mainly on issues with cladding and other external wall systems on apartment buildings.

I welcome Malcolm MacLeod, director of the National House Building Council in Scotland; Christina Gaiger, president of the Royal Incorporation of Architects in Scotland; and Professor John Cole CBE, chair of the review panel on building standards compliance and enforcement.

I am grateful to you all for taking time to answer our questions. We have allocated up to an hour and a half for this session.

We will soon move to questions, after I give some technical information on the handling of questions. For the benefit of broadcasting staff, there is a pre-arranged order. I will call each committee member in turn to ask questions for a block of up to nine minutes. It would be helpful to broadcasting staff if members indicate which panel member their questions are addressed to. There might be a short amount of time for supplementary questions at the end.

Panel members should indicate clearly when they wish to answer a question. You can do so by raising your hand, which I will see on my monitor. You should not feel the need to answer every question if your views are in line with points that have already been made. Please give broadcasting a few seconds to operate your microphone before you speak.

I will ask the first question. How have we reached a situation in which the fire safety of flats in some brand-new buildings is in such doubt that lenders will not provide mortgages for buyers without extensive investigations being carried out?

**Malcolm MacLeod (National House Building Council):** I thank the committee for inviting me to provide evidence. Although I am the director of the NHBC in Scotland, I was asked to contribute today in my previous capacity as chair of the Chartered Institute of Building and I am happy to do so.

As you stated, I was told that today's meeting would look into high-rise buildings and their cladding issues and, yesterday—albeit late in the

day—I submitted a short paper to the committee clerk; I do not know whether that has been circulated.

In summary, the paper sets out the deficiencies—in my view—in how materials and components are determined to be fit for purpose, as well as in the competence and experience of all participants in the design, procurement, approval and construction processes that are associated with these types of projects. The paper goes into a little more detail, but those are the principal areas that, in my view, contribute to the problems that have emerged and have resulted in the EWS1 form being used and circulated.

**The Convener:** This has been going on for some time. You would have thought that all new builders would have been up to date with what they were meant to be doing. Why do you think that we have got to the stage that lenders will not, in many cases, accept what is in front of them?

**Malcolm MacLeod:** Unfortunately, I cannot speak on behalf of lenders, although I am aware of the problem. The committee has had evidence from them before.

The building industry and the construction process are very fragmented, with many players involved from the design through to the handover. Part of the problem is that, generally speaking these days, there is no one individual who takes control of the process from conception through to completion. When there is a fragmented process with many companies, organisations and individuals involved, things unfortunately do not often go to plan.

My report starts off by looking at the design, be that in the design or construction process. It focuses on the competence of the person who procures the design—generally the owner of the building—and whether they have the experience, knowledge, competence or proper professional assistance to properly design and procure what they are seeking. I then consider whether the designer has the competence and experience for the specific project that they have been asked to look at, whether the control or approval people have the competence to check that what is being put forward complies with the regulations, and whether the materials, components and systems that are being proposed are fit for purpose when the project is designed. I also consider how those components interface with each other and whether the junctions where they interface have been properly designed and are fit for purpose.

Moving on to the construction process, I consider how those things are checked in situ. Some materials look identical but do not give the same performance levels, so seeing how that is checked and certified on site is an issue to make

sure there has not been any material substitution. Have the people who are installing the materials been trained properly and do they have the proper competence and knowledge to do that?

That continues all the way through to when the building is occupied and finished. How is the building then maintained? Is there a proper strategy for looking after it to make sure that the design and construction process does what it should in terms of fire protection and prevention and is not interfered with through maintenance or subsequent improvement works?

That is the message of my paper.

**The Convener:** I will ask you another question and then I will move on to the other witnesses.

Are you satisfied that the vast majority of Scotland's new homes are well designed, well built and compliant with building standards? Do you think that the issue of zero-valued homes is principally an issue for the financial services industry, or is there truly a problem with how we design, build and regulate construction in Scotland?

**Malcolm MacLeod:** There are quite a few questions in that.

**The Convener:** Basically, do you think that there is a finance industry issue or that there is an issue with how Scotland's building industry does things?

**Malcolm MacLeod:** There is a bit of both. The EWS1 form is definitely a finance industry issue. It has been driven by surveying and financial institutions for use when valuation surveyors are not confident in providing a value for a building that they are not able to survey traditionally. Access to parts of low-rise buildings is relatively easy and there is general confidence that the construction materials and components that are used are quite traditional. For low-rise buildings, including low-rise flats, it is not generally a problem.

The issues tend to be with higher-rise buildings, in which the materials and components that are used may not be traditional. Sometimes those are relatively new and the systems of build are new, and the surveyors who are trying to do the valuations may not have the confidence, knowledge or experience to properly assess and survey those buildings in order to put a valuation on them. My understanding is that they put a zero valuation on as a check. The value is not zero; it is a way of saying that they are not confident in the construction and that they need more information before they can provide a proper valuation.

**The Convener:** Thank you very much. I am abusing my position as convener in going over my time, but I ask Christina Gaiger to give her view on

the questions that I have just asked of Malcolm MacLeod.

**Christina Gaiger (Royal Incorporation of Architects in Scotland):** Thank you, convener. It is a pleasure to be here and to give evidence. Thank you for the invitation. We also submitted evidence in advance, which I hope members have had a chance to look at, as well as the evidence that we submitted on 22 September, which it builds on.

It is hard to touch on all those things in one answer, to be honest. It is a very complex situation and many players are involved. From our perspective, one of the biggest factors is that, over the past 20 years or so, the traditional role and structure of the design team has been eroded. Design and build contracts have become very prevalent in large-scale public sector work, and especially in developer-led housing schemes, for example. The consultant's role has become very limited during the site works. The contractual obligations are to the contractors as their employers, and the architect may, for example, not be aware of changes during construction. To simplify, they are not in a position competently to issue certificates such as the EWS1 form.

A lot of factors are at play in the industry as a whole and in how the traditional role of the design team has evolved—one could say—or been eroded. The reason behind that change, and the elephant in the room, is cost. There has been a narrowing down of expenditure at that stage in construction. As a consequence, the position is that no one can issue the certification that is required, which is what we are talking about today in relation to zero-value homes and mortgaging. Ultimately, it is the consumer who suffers. Cost is the main factor.

In the paper that we submitted on 6 November, we proposed two solutions, because there are two ways of looking at it: what we can put in place to mitigate the issue when it comes to new-build properties, and the problem of the existing building stock and how form EWS1 is applied to that.

You ask a loaded question when it comes to where blame may lie, or how we get to the nub of the issue. It is very tricky.

On new build, the solution is essentially threefold. We can improve site inspections by the professional design teams—almost going back down the traditional roles route. The key elements can be checked, through compliance with the building regulations as work progresses. An onerous inspection scheme can also be put in place from the outset. That is one thing relating to the EWS1 forms that can be an issue. They appear once the building is complete and they are a retrospective application of compliance. I think

that that is where the feeling that those forms are onerous lies. The certifier is being asked to certify something that they may not have had a robust process of inspection for or involvement in during the works. It is therefore asking a huge amount of them to sign that form.

The cost links back to industry and what is happening in the insurance market. The problem is that architects are not insured to sign the forms, and it is almost impossible to gain insurance to do so. That is a market failure—not an architect failure. The cost element comes back in relation to certification and inspection.

09:30

The issue is all about the involvement of the design team on site. Expectations must be outlined from the outset so that a robust inspection process is built into the procurement system and the appointment. That must guarantee design team involvement and independent scrutiny. One of the biggest issues in the design and build approach is that there is no third-party scrutiny. Schemes are in place, such as the NHBC scheme, which has been mentioned. They are backed by insurance and are of high quality. More use of third-party quality control and insurance-based schemes should definitely be considered, but that comes with a cost. All those things must be balanced.

On top of that is enhanced statutory scrutiny. The Scottish Government's building standards division is examining an expanded compliance management scheme with the involvement of a range of stakeholders, including the RIAS. That is fantastic to see. We support that proposal, especially for the future, as it is more appropriate for new builds. Such an approach would work more effectively alongside more use of third-party control and insurance schemes and continuing design responsibility from the professional design team. Those things are linked in managing the new-build situation.

A cost is always associated with such things. To return to the elephant in the room, the issue is how to manage that to get the most out of the situation, given the mortgage concerns that are linked to it, and allow owners to sell properties.

**The Convener:** There was a lot in that answer. Unfortunately, I am running out of time for my questions, so I ask Professor Cole to respond briefly. I am sure that my colleagues will ask many more questions that are along the same lines.

**Professor John Cole CBE (Building Standards (Compliance and Enforcement) Review Panel):** My two colleagues have covered most of the key points that I would like to make. I reiterate that four things need to happen to make a

building safe. First, we need a set of building standards that everybody understands. There has been confusion about the application of some materials and in particular about the class O allocation, as opposed to European standards A1 and A2, in relation to whether a material is combustible. That confusion existed throughout the industry and led to lots of buildings being built across the United Kingdom and in Scotland that contained materials that should not have been used because they are unfortunately combustible. Building control and building standards departments have taken steps to eradicate that confusion by improving the clarity of information. That is a key factor that is happening now.

The design needs to be done properly. The designer relies on the understanding of the standards, which need to be properly translated into the design that is to be built. The construction industry's ability to translate the design into the building and to follow exactly what has been prescribed has changed to a degree, because the design of detailed components is increasingly done by subcontractors, whose design ability is not always checked or scrutinised. Often, the original designer does not design detailed elements. The Grenfell inquiry showed that the detailed design and the fabrication of the system were done by the subcontractor and not by the architect. The original designer does not give such designs enough detailed scrutiny.

The construction team needs to be competent to build. As expressed in some of my earlier reports, we have concerns about the quality of the construction industry tradesmen and their training to build systems. Often, they are self-employed subcontractors who come on board for a scheme and have not necessarily had training. In the Grenfell project, the subcontractors employed labourers who were being trained on the day to install the cladding and who were doing that for the first time. That is crazy when you think about the importance of those components.

The final issue is the role of building standards. Many people have assumed that building standards inspections have been sufficient to confirm that buildings are safe. They are not. Those inspections are not frequent or detailed enough.

I know that significant steps are now being taken by building standards to look at compliance plans. Some of you will know that I was involved in the review of the compliance and enforcement of building standards in Scotland. I made a range of recommendations, which I think are being taken forward by the futures board that the Government has set up to review and consider the implementation of those recommendations. That

will take some time, because we need to change the whole culture of the industry.

Grenfell has given us a real scare. It is terrible that it has taken such a tragedy to allow us to see the problem. The industry has been sloppy. The fragmented situation in which things are not carried through from design to construction has become a key issue. That break in responsibility, with architects unfortunately stepping back from inspecting construction due to the appointment situation, has been a major failing. It means not only that we do not get independent scrutiny being carried out on behalf of the client but that the whole architecture profession has become de-skilled. Architects are not seeing their designs being built; they are seeing them only on the drawing board. That is a terrible situation. Architecture happens on site. It does not happen on a drawing board. What matters is how the design is implemented. That is how people learn to reflect on their designs and to make changes and improvements as they go back to design their next project.

There have been failures across the system. We are taking steps, but it will take time to change the culture so that we can be sure that the work will be correct.

**The Convener:** Annie Wells is not well. I thank her for giving me her nine minutes so that I could get all of those questions in.

**Alexander Stewart (Mid Scotland and Fife) (Con):** In 2017, the committee expressed concerns that few clerks of works were being employed across the construction sector. We published a report asking for greater use of clerks of works.

What has happened since then? Have we seen any increase in employment of clerks of works? If that has not happened, how might it be encouraged, so that we have those professionals on site examining and scrutinising the work that is being done? That has been a major issue and it would be good to get an update.

**Professor Cole:** I could not agree more. The failure in recent projects and over recent decades to employ clerks of works has made a major contribution to the reduction in construction quality. It is difficult to say whether there have been significant changes. People in Scotland will know more. In the original Edinburgh schools report and subsequent reports, recommendations were made about clerks of works being a critical part of the inspection regime. I am not sure how that has changed in Scotland, but that change is necessary.

I know that the Scottish Government issued guidance saying that all buildings should have appropriate inspection and independent scrutiny



on site. I know that some local authorities have recruited more clerks of works, but I do not know how big that improvement has been. One major problem has been that, because of the reduction in the use of clerks of works, fewer skilled and experienced clerks are available. It will be difficult to find clerks of works to do the job properly.

Secondly, clerks of works are quite often appointed on only a very temporary basis. For example, the clerk of works for the Grenfell project, who worked as an independent inspector, was at the site for only half a day per week. It is no use a clerk of works being there after things are closed in. The failures in such buildings are in areas that are out of sight once the finish has been applied, particularly in cladding areas. People need to be on site regularly, and the people who carry out the work need to know that they are under regular scrutiny.

I am not sure that the position can have moved forward that much, because there is a scarcity of people with the right experience and a lack of courses and training for clerks of works. There has certainly been a revival in the awareness of the need for clerks of works across the United Kingdom, which is a good sign, but how much time will it take to build up a cadre of people with the competence to meet all the needs?

As the president of the RIAS said, there is an issue about whether plans are prepared to pay appropriately for that quality of inspection. It is unquestionable that cuts were made regularly in initial capital investment that have been paid for in the longer term. Society as a whole is paying big time for the lack of quality investment originally. Local government and the public sector ought to be leaders in that regard and ensure that clerks of works are being used. I am not in a position to say precisely what has changed, but Alexander Stewart is absolutely correct that it is one of the key issues that needs to change.

**Malcolm MacLeod:** I echo what John Cole has said. I do not see many projects these days that employ an independent clerk of works. To go back to Christina Gaiger's comments, I am old enough to have had roles in project managing large projects that were procured by what is called the single stage selective tendering route, which was how projects used to be procured traditionally. A team of consultants would be employed, including an architect, a surveyor, a mechanical engineer and so on. A clerk of works would be part of that team. As has been stated, all that comes with costs. Such decisions were driven and pushed by the owner of the building, who would be advised to seek and procure such services for the long-term benefit of the project.

Unfortunately, over time, procurement routes have changed. As Christina Gaiger said, we now

focus more on design and build procurement routes, which take away the traditional role of the consultants and professionals who were used previously. The only organisations that now commonly use a clerk of works are social housing providers, such as housing associations. They seem to have in-house and directly employed clerks of works for their projects, so they obviously value the contribution and input of those individuals in ensuring that things are done correctly on site. Clerks of works have a valuable role, but there are not many of them about.

The problems were well put by John Cole, in relation to the need to build up skills and the time that that will take. Unfortunately, at the moment, clerks of works are a bit thin on the ground.

**Alexander Stewart:** Does Christina Gaiger believe that that has had a detrimental effect on her role with the RIAS in supporting contracts and projects?

**Christina Gaiger:** It is hard to comment on whether that has had a detrimental effect. I do not have enough evidence to hand to comment on that aspect.

In relation to traditional forms of procurement, the design team—the architect, the engineer, the surveyor and the clerk of works—have a significant level of involvement on site. For example, the architect would visit regularly—often weekly—for inspections and to look at structural issues, which might include fire-safety measures, and they would see the key elements that we have already spoken about.

On more complex projects, there is likely to be a clerk of works, who will provide an additional level of scrutiny. The key point is having independent scrutiny from a third party that can review, scrutinise and notice things as they happen. As everyone has said, the difficulty is that such decisions are client or developer driven. Having third-party independent scrutiny is really important.

When you have a design team, you have that third-party scrutiny, but because there is more than one person in a team, things are discussed and problems are shared. It is a team, essentially. Having a design team involved does not dilute the process; it just adds expertise throughout the construction phase, which is critical. A clerk of works is key, especially, as I said, on more complex projects. Again, it comes back to cost, and not making the process so onerous that it is completely unaffordable. There needs to be a balance there. The role of the clerk of works is key, alongside the traditional role of architect on site. It is that combination. That is not to harp on about a traditional role or protection of architects; it is actually to do with the delivery of quality.

09:45

I completely agree with Professor John Cole. The difficulty that the industry is facing is that the changes that have happened over the past 20 years or so have resulted in a knock-on effect on skills, and the involvement of site and construction professionals across the board, and not just architects. It is time to reinvest in that: to deliver quality first, involve the design team and have the oversight that is required that is relatable to the scale and complexity of the project. Yes, there is a cost involved, but essentially it is justified by the quality that is coming out. That applies more to new build—we are getting away a little bit from existing building stock.

On how we move forward, it is about getting processes in place to ensure design team involvement and a procurement route that delivers quality, which is key. The level of roles in the design team should be equated to the complexity of the project. It is difficult to say how that would be measured at this point, but more scrutiny, especially if it is independent or third party, results in higher quality of delivery.

**Pauline McNeill (Glasgow) (Lab):** Christina Gaiger said that, in some cases, consumers have paid quite a high price. Many buildings in Glasgow are in effect zero valued, and horrendous defects in a building are very hard for the consumer to come back on.

Malcolm, your written submission to the committee is quite damning on the system. You talk about the competencies of key players and no single person taking control, and you say that the system is “fragmented and confusing”. Why do you think that that has been allowed to go on for so long? Given that position, is the only way to provide protection for consumers to make sure that no one falls through the gap again and to move to mandatory independent on-going inspection? What is wrong with going back to the old scheme? If we do not have a foolproof system, buildings will face the problem again.

**Malcolm MacLeod:** Personally, I do not think that there is anything wrong with going back to the old system. It worked in its day and there is no reason why, with some refinements, it could not work again.

Over time, some of the issues that have been mentioned have led to where we are today. A lack of skills, confidence and experience has gradually led to the contractor or builder being brought in more often to assist with the design. That has always been the case. On site, under the traditional system, if the architect or surveyor had not taken account of everything, input was required from the builder to resolve the problem. As Christina Gaiger said, people tended to work

as a team. It might have attracted more cost, but problems were resolved on site and everyone was involved in the way in which they were resolved.

Over time, the involvement of the builder and contractor has grown and it has outstripped the involvement of the design team, to an extent. In my view—I might be wrong—that is down to a combination of things including a lack of experience and confidence in the design team. I am not being critical of design teams; it is just that, as John Cole alluded to, the less time people spend on site and in the contracting environment, the less knowledge they will have of the build process. The design process is a separate issue here. The building and contracting side has grown, going down the procurement route and taking control of part of the design on site.

**Pauline McNeill:** My question was about why, given what you say in your submission, that has been allowed to go on for so long. I could find building after building in Glasgow where the failure to have a clerk of works’ scrutiny from beginning to end, as Alexander Stewart put it, has resulted in issues. The Glasgow harbour development, which you might be familiar with, is one example of that. It was built about 15 years ago. Why do you think it has taken so long?

**Malcolm MacLeod:** It boils down to cost and the client’s decisions. A project starts with someone who owns land or buildings wanting to do something with them and deciding to progress with that. Historically, there would be a design team with a clerk of works, but over time the costs have been eroded and development costs have been honed. The term “value engineering” is often used, and I often hear developers talking about not needing an architect, a surveyor or a clerk of works because they seem not to value the benefits that come from the costs of those.

The original decisions about how a job is procured and designed lie with the owner or developer—they make the decisions. As Christina Gaiger said, cost has unfortunately pushed them down a particular path and problems are beginning to emerge with construction quality—we are beginning to see those. It takes a lot of time for those things to come to light.

Most of the issues tend to be with the construction side. Generally speaking, the design is okay. During that stage, a plan is drawn on a computer-aided design system, which is then approved by the local authority’s building control department. That process tends to be relatively straightforward. Where it goes wrong is on site when the plan is being put together, because the people on site are trying to assemble a building and there might be some flaws in that, or issues with materials meeting other materials. That is generally resolved on site by the builder working

with the subcontractor. As Christina Gaiger said, the design team is often not involved in that part.

The issues have developed over time and, unfortunately, cost is part of the issue. There needs to be a shift in culture and appreciation by whoever is investing in a development of the impact of not having enough control over the length of the project.

**Pauline McNeill:** How should remedial work on blocks that were clad with potentially combustible cladding be taken forward? Do you have views on how work should be prioritised, certified, undertaken and—importantly—paid for? Many consumers have been left in a position where their building was compliant at the time when it was built. A good example is the Glasgow harbour development. It was compliant when it was built, but consumers have now potentially been left with the bill for remedial work, or have been left in a position where remedial work needs to be done or they cannot sell their properties.

**Professor Cole:** It is hard to say how it should be paid for. Inevitably, in some situations, there will have to be some Government intervention and support. We already have that across the UK.

The buildings that are at the highest risk should be prioritised. We need to develop a standardised system that is used by all the people who carry out investigations of existing properties so that it is done as part of a systematic risk-based process. That means that they would move from the initial assessment to further more in-depth intrusive assessments until they discover the full extent of the issue, and consider whether there are problems or further investigations are needed.

The higher a building is, the more vulnerable the group of people in it will be. Problems of access, buildings that have compromised means of escape and other provision in buildings such as fire suppression systems—all those considerations have an impact on which buildings we should look at first and whether they should get remedial treatment.

With regard to a standardised approach, as Christina Gaiger said, it is difficult because architects are finding it impossible to get insurance to carry out tests. I am also anxious about the effectiveness of the tests, particularly on very tall buildings, and how people examine the outside of the upper floors of inaccessible buildings in high winds. The problems have lain in the use of combustible insulation—which, unfortunately, tends to be widely used—and missing or inappropriately fitted cavity barriers, which rely on the quality of the tradesmen who install them and supervision of those teams.

When we have examined sufficiently to give us an assurance that the quality of the workmanship

is good, we need to look at the top and bottom of the building, because the applications might be different. We need a prioritised, risk-based assessment, which should be standardised across the industry so that different people do not come up with different assessments.

**The Convener:** Christina, do you want to comment on that?

**Christina Gaiger:** Yes—that would be helpful. I completely agree with Professor Cole that the cost is a difficult side of things. There are two sides to the issue. In properties where there is equity, there is value in spending money because, although it is hard on the owners, they might be able to recoup the money, but the cost of the work will push some properties into negative equity.

It is hard to look at it across the board but, in relation to existing buildings, the difficulty lies in the level of investigation that is required. As Professor Cole said, investigation has to be carried out at the top, the bottom and the middle, because there should be a cavity barrier wherever there could be a fire. The difficulty also lies in the level of investigation that would be required on an existing building. The EWS1 form looks like something that can be signed but, with a thorough investigation, it is quite an undertaking for the person who signs it to say that they are competently satisfied that the primary materials and external envelope are of limited combustibility. That is a big task and, again, it comes down to cost.

It is very hard for house owners, and particularly those in the zero-rated category. However, those problems have been exposed by the industry. There is a light on them, and it is about finding a way to move forward. In the evidence that we submitted to the committee previously, we looked at what we can do with what we have and how we can move forward.

At industry-wide level, we are looking at an approved code of practice on how the form should be used and how inspections should be carried out. Without that, as Professor Cole said, there will be variation in how the forms are treated and how the industry moves forward. There needs to be a code of practice on how the matter is looked at across the board, in order to ground the process. That will allow discussions on prioritisation and funding to move forward, because the work that is required for the types of buildings will be more quantifiable.

**Gail Ross (Caithness, Sutherland and Ross) (SNP):** I thank the witnesses for joining us. A lot of the evidence that we have heard this morning has been really concerning. We have heard about lack of on-going monitoring, cost cutting, the need for

different regulations, skill shortages—*[Inaudible.]*—and the need for a code of practice.

As we take evidence, more and more is coming out about worrying aspects of the matter. Do we have any idea how many buildings in Scotland might be affected? We have moved on from talking about cladding on high-rise buildings to talking about insulation and all the other things. An untold number of buildings could be affected and, as was mentioned, there will be a huge cost to finding that out. How much importance should be put on finding out where these buildings are?

10:00

**Malcolm MacLeod:** It is obviously very important to find out where the buildings are and how many there are. I might be wrong, but I thought that local authorities had carried out an audit through their building control departments to identify where in Scotland these buildings are, how many there are and the type of construction. If that was done, that information will already be in place. It then comes down to prioritising the buildings along the lines that Christina Gaiger and John Cole suggested, and deciding how best to approach them.

Some of the buildings will be in private ownership and some will be in public ownership through social housing providers, housing associations and local authorities. However, I believe that the information might already be in the Government's possession.

**Gail Ross:** We have spoken about the problems that home owners face—you have just mentioned that some of the buildings are in private ownership—and the costs of any remedial work that is necessary. How will local authorities go about this? We have just scrutinised the budget for local authorities and we are all aware of the budgetary constraints on them. How could that be alleviated or, indeed, the work funded? I put that question to you first, Malcolm, because you are still on my screen.

**Malcolm MacLeod:** That is a good question. I am afraid that I am not able to give you any direction or guidance on that. You would need to speak to the Cabinet Secretary for Finance. There is no simple answer.

With regard to the private sector, as has been stated, the buildings were constructed in good faith and in compliance with all the regulations and statutory requirements that were in place at the time. There is the odd builder that has taken action. We have examples of Taylor Wimpey and Cala Homes undertaking works on some of their projects in Glasgow to resolve the issues, but other builders say that it is nothing to do with them because they did everything that they ought to

have done at the time. Unfortunately, I do not have a resolution for that.

Housing associations might have to look at their reserves or try to factor the work into future maintenance programmes. In the meantime, there are people who are rightly concerned that their homes might not be safe in the event of a fire, which is quite worrying. Practices can be put in place, such as the use of fire wardens and so on, but that is quite a costly exercise and it does not fully alleviate the concerns. However, I am sorry, but I do not have an answer to the problem of where the money is going to come from.

**Christina Gaiger:** I do not have any answers on the finance, unfortunately. It is a difficult area of the conversation.

You are right to say that many issues are being raised today. The Scottish building regulations have been quite responsive over the years. For example, they were changed in 2005 in response to the lessons that were learned at Garnock Court. In high-rise domestic buildings, either the cladding and insulation are required to be made of non-combustible materials or the whole cladding system must be subject to a stringent fire test.

In Scotland we have quite a robust system—it is different from the system in England—which is to be looked on positively at the moment. It is not perfect by any means, but the underlying science is sound and there are on-going investigations and conversations about how the system can be improved. It is not perfect, but it is positive. The issue is how we work with that to ensure that we design and manage the work robustly in relation to new build and the existing buildings problem.

It is quite daunting to have all of this exposed and it brings up a number of conversations around materials and what sort of materials we should be using. It is also difficult because it has shone a light on cladding, which can actually offer reduced build times, reduced cost and better performance in relation to sustainability. We are looking at it as almost a villain in the circumstances, but it is difficult, because it can be used in many forms across many sectors in many different ways.

For example, in relation to the existing building stock and sustainability, we are looking for cladding systems to improve the performance of housing and help to tackle fuel poverty. When we are discussing this, it is really important to separate out the problems with our existing buildings fabric and how we support home owners from how we move forward as a building industry with the systems that we have in place, which we can work with to ensure robust delivery for home owners but also for public buildings.

The question of risk and what is a high-risk building has come up a lot in the discussion today.

We often talk about high-rise housing, and the forms that have come in now look at lower-level developments as well. However, public buildings also need to be looked at. A wider conversation needs to happen. There is now a positive awareness of the issue, but the mechanism by which something has to happen is important.

The building control system in Scotland allows us a framework to work with. England is looking at how to improve its systems through a building safety bill that introduces new and more onerous roles. Why do we not develop our existing successful Scottish system of pre-emptive warrants—which the building control system already allows for—in conjunction with the proposed enhanced compliance regime that is being talked about and, potentially, design team involvement, with the procurement system becoming more robust?

It is about learning from what we have got and from the mistakes and moving forward positively. Although the subject at hand is very concerning, I am trying to tease out that it is about learning from where we are and what we can work with, rather than adding in tiers of complexity that would dilute the process. I hope that that is helpful.

**Gail Ross:** You have certainly put a much more positive angle on it. Thank you very much.

**Andy Wightman (Lothian) (Green):** I thank the panel for coming along. This is a very useful session.

At our previous session with the minister in, I think, September, I highlighted the fact that I have been working with surveyors and lawyers on this problem for more than a year. I know, from speaking to a few surveyors, that they have identified 20 to 30 buildings in Scotland that are fundamentally not compliant with the building standards that were in place in Scotland at the time of construction. They have found EWS1 forms signed with option A1 for buildings that were—as they described them—fundamentally dangerous, and they have discovered a lot of fraudulent EWS1 forms in circulation. We therefore have a problem with buildings that were not built in compliance with standards and that are now fundamentally dangerous.

In this session, we are trying to look more deeply at what lies behind that, rather than at the immediate problem. The one question that I have is maybe for Christina Gaiger. One or two of the witnesses have talked about working on behalf of clients. With a social housing provider, the social housing association is, of course, the client; it is the builder, and a clerk of works will look after its interests. However, we have a lot of speculative build in Scotland whereby the owner is the developer, and it is only later that they will sell it to

somebody. That gives us the problem that we have today whereby the owners own defective cladding but they have no idea what is in their house, because nobody has told them. If you buy a car today, you will get a 100-page PDF document containing all the declarations of conformity with various regulations; if you buy a house, you have no idea what is in it. Is part of the problem about there being a role for much more transparency for the consumer, so that they get told and warranted that what they are buying is, in fact, what was meant to be built?

**Christina Gaiger:** That is an interesting point. I often use that analogy, so it is good to hear it from someone else. You are correct about the information about construction. The analogy with the information that is available about cars is an apt one.

We are moving forward with things like the construction (design and management) regulations or with the handing over of operations manuals. The system is becoming more stringent, but more can always be done. Being able to guarantee that and to pass on that information comes from the system that is in place. For new build, that means the level of inspection and certification that applies to the building once it is handed over. For existing buildings, it means having an approved code of practice to be able to open up a building, certify it and pass on a level of confidence to the owner.

I agree that it is hard when the client is the developer and the building is passed on at a later date. Cost comes to the fore more than ever in that situation. That is where the difficulty lies. It comes down to third-party or independent scrutiny that may not have existed in some of those instances because of the delivery mechanism. That is difficult. The benchmark is life safety. When we are talking about cost or about opening up buildings to see if they are compliant we are looking at life safety.

Retrospective certification is tricky, but it is the key to creating confidence that what you are looking at is compliant.

**Andy Wightman:** I will ask Professor Cole that question. You looked at Edinburgh schools. There was a client—City of Edinburgh Council wanted to procure schools. It may have let defective contracts, but it was responsible for ensuring that the buildings that it was paying for would meet an adequate standard.

Is there something that we can do? Christina Gaiger talked about third parties, whereas a clerk of works traditionally works for the client. Their duty of care is to the client. Clerks of works are inappropriate when the client is a speculative developer that wants to build fast, get off site and

sell the building to people who have no knowledge of what they are buying.

Do we need to fundamentally change the procurement method so that consumers are up front and their interests are guaranteed throughout the building process?

**Professor Cole:** I already mentioned the report that I did on the review of compliance with, and enforcement of, building standards in Scotland. One of my proposals was that there should be an independent inspector to act on behalf of the client. To be independent would mean also having a responsibility to Government.

In the Republic of Ireland, we have a system called the independent certifier. An independent certifier must be appointed to every project. That person is separate from the Irish building standards division and must certify full compliance with the building regulations.

A new act is being brought in in England to require the principal designer to certify—with the contractor—that a building complies fully and in every regard with the building regulations. All of that relates to the checking of building controls and building standards.

You mentioned documentation. The industry is poor at producing accurate as-built documentation of what is within a building. I proposed quite onerous requirements for video, photographic and documentary certification of what goes into buildings. Those systems should be standardised so that—as with the car that we have just bought—we can rely on what is in the walls and the roof and on how safe the structure is.

We have a long way to go yet in giving us a degree of assurance. As you said, something can be on a design or be given a warrant, but there is no point in having that pre-emptive process unless there is follow-up that ensures that what is designed is actually built.

10:15

That is where the failure has been. As I have said to the committee before, most of the failings are not necessarily in the design, although there have been design failures in the specification—[Inaudible.]—quite a lot. Most of the problems happen on site. Therefore, there is no use in having an excellent design and a warrant approved if we will not be standing there to ensure that that is what is built. We need a degree of independent certification from the contractor or even the developer. I believe that developers have to appoint an independent certifier who is acting under the law to confirm that what they have seen and certified is in accordance with the rules and therefore has compliance that can be relied on.

That will also be a major assistance to building standards officers, who do not have the resources to do that level of detailed checking. It is going to cost money, but checking quality will give good value for money in terms of protecting quality, and in the long term it will work out much cheaper.

There are some things that we can do. It is important to have the degree of professional integrity that is required of an architect—in fact, architects used to sign certificates to confirm that buildings were in compliance. We need somebody to sign those certificates who is not acting on the instructions of the contractor—if the developer is a contractor, quite often there is a conflict of interests. We need to bring a professional element into the process. Doctors have to act with professional integrity, and designers of buildings should do so as well, because they can impact so much on the lives of people, as Grenfell has, unfortunately, shown.

**Andy Wightman:** I have a final question for Malcolm MacLeod. Roughly how many warrants does the National Housebuilding Council have in Scotland?

**Malcolm MacLeod:** How many warrants?

**Andy Wightman:** How many properties do you guarantee?

**Malcolm MacLeod:** How many do we cover? Across the UK, we cover about 1.3 million. Roughly 12 per cent of those are in Scotland, so I would guess that that is about 150,000 properties.

**Andy Wightman:** Are any of those properties suffering from the “zero valuation” problem?

**Malcolm MacLeod:** I would not know. I have not been made aware of any, although undoubtedly there might be some. I cannot tell you, because I do not know.

**Andy Wightman:** If there were, for example, a development in Edinburgh that had a warrant from your organisation—meaning that you had insured it—but a mortgage company declined to lend because it was unsure about what was in it, what would your role be?

**Malcolm MacLeod:** We would not have a role in that. The insurance cover that we provide is against the building’s structure failing, letting water in or not conforming.

The main problem with zero valuations is that the planning systems that were used at the time accepted that as being ok. They are still performing that function when it comes to keeping the weather out and making the building watertight, but they are not that effective in that kind of area. What has emerged since then is that there is a problem with potential vulnerability in

terms of combustibility. That is not covered in Scotland under the warranty at the moment.

**Andy Wightman:** Okay.

**Malcolm MacLeod:** I will add a few comments in relation to what John Cole said. NHBC has been trying for the past 20 years to deliver a building control service in Scotland to alleviate the problem—which has been accepted—with the resources of building control departments, but that proposal has not found favour with the Scottish Government. It is a solution that would help with resources.

On building control, I have alluded to the fact that problems that emerge in buildings tend to emerge in the construction phase. Building control departments simply cannot carry out the inspections to the level of detail that is required to ensure that buildings are constructed to meet and comply with the design. The departments do not have the resources, and, although there are construction compliance plans, the legislation does not advise departments to carry out inspections.

The last survey that I saw of the construction compliance notification plans showed that a significant number of those were not being implemented. That was not solely because of building standards; it was because building owners were not making them aware of when works were starting and when to come out and check things. There is still a problem with the system with regard to checking work on site to ensure that it meets building regulations.

**The Convener:** Keith Brown is next. Can you hear me, Keith?

**Keith Brown (Clackmannanshire and Dunblane) (SNP):** Yes. I might cut out, as my connection has been cutting out frequently. I have missed quite a bit of the evidence, so I apologise if I repeat anything that has been said.

If people cannot get certification or if the certification—[*Inaudible.*—]is insufficient because it does not take into account, for example, the flammability of the panels or the likelihood of lenders wanting to lend against the building, the system is not working. From the evidence that I have been able to hear, the common denominator seems to be cost—the cost saved by developers that are building the buildings. Despite the default position of going back to the public sector through councils and building control, should it not be the case that the costs of remedying the work and ensuring that it is done properly in the future fall on those who make money out of these things? It cannot always be the public purse that picks that up, when people have been cutting corners and not spending what they need to spend to ensure

that buildings are up to standard. Do the witnesses agree?

**Christina Gaiger:** I am thinking about that, as it is a very difficult question. I am sure that I will not answer it in full, or possibly at all.

The issue of who covers the cost and how that is delivered is almost apart from the issue that we have been looking at, which is about the mechanism by which we can ensure quality of certification and delivery going forward. I cannot really comment on the cost and who puts up the money. It is a difficult issue, and I completely understand where you are coming from. Moving forward, the system needs to be sufficiently robust to ensure that the issues do not happen again. That does not address the problem now, and I understand that with regard to what you are looking at today, but it is something that we have control over, so it should have real importance.

I am sorry, but I cannot comment on your question about who should fund the work.

**Malcolm MacLeod:** I fully understand Keith Brown's question. Like Christina Gaiger, I cannot comment on the detail of it, because we are not directly involved in the issue. It is a very difficult issue to address. All businesses work within financial years, and builders are no different in that they close their accounts at each year end and that is it—they move on to the next year. It would pose financial and accounting difficulties to try to go back to recoup costs for something that happened a few years ago.

I am not trying to justify that position; I am just saying that those are the sorts of concerns that we hear from time to time. I am sorry that I do not have an answer for that. The issue would probably have to be taken up with each individual developer concerned to see whether there would be any merit in doing that and to establish whether they would be willing to make a contribution.

**Professor Cole:** Again, that is the problem that we are all looking at. My heart goes out to families who are living in properties that they cannot sell or move out of and who are in negative equity. I am not sure how we could possibly go back in the system and get money from a range of developers whose interests change all the time—people sell companies and move on. It would be very difficult to do that.

Keith Brown is right that that is where the moral responsibility lies, although some people thought that they were acting appropriately—the situation arose because of a lack of clarity and understanding about what they were building. That was unfortunate and probably still applies to a degree.

I agree that we as an industry owe it to the public to ensure that we no longer let such things happen. The Government needs to put in place the appropriate checks and mechanisms to ensure that what is happening is appropriate. It is no use to say afterwards who should pay; we should not let such things happen in the first place.

It is too late for those who have been affected by what has happened. I feel terribly sorry for them and I would hate to be in such a position. We need to prevent that from happening again, which means investing in appropriate quality. That means not paying too much but paying the right amount for projects. The focus should be less on cost cutting and more on delivering the right quality of product with the right safety. The industry must address that, and the Government has a role in ensuring that it does so. That is why we must invest more in addressing the issue.

**The Convener:** It looks as if we have lost Keith Brown again—unfortunately, that has happened a lot this morning.

The report on building standards compliance and enforcement called for a culture change in relation to risk and compliance in the wider construction industry. Have you seen any evidence of such a change? If not, what needs to happen to facilitate it?

**Professor Cole:** I am grateful to have seen significant actions by a range of contractors in particular. I have been asked to give lots of talks to groups in the industry to make them aware of the risks that we create by the actions that we take.

Action has been taken, but it is nowhere near wide enough. It is unfortunate that the further away we move from the tragedies that we are talking about, the Edinburgh schools event or the issues with DG1 in Dumfries, the more people's memories will fade, which means that the emphasis will come off. It is important for the Government and the groups that work on its behalf, such as the Scottish Futures Trust, to maintain the emphasis.

Christina Gaiger might want to follow up on this, but I know that, in the architectural profession, there is a real resolution that we have to look at the role of architects and how we help to ensure that what we design is built, despite the procurement method. We need to say to the Government, "Can you change the procurement method, please?" The Government has largely driven the use of the design and build process, which has become almost the standard methodology for delivering Government projects. Design and build is fine but, if it is used, additional resources—almost a replication of resources—must be put in place to ensure that the building is independently scrutinised.

In the Edinburgh report, I used the two words "independent scrutiny", and that needs to happen, big time. As we said, unfortunately, it is not there yet. I am not sure that we have enough clerks of works, and changes to the procurement models have not necessarily looked at how to achieve such scrutiny in standard procurement. The culture has changed to a degree, but not nearly enough—we have a long way to go. However, there is positive movement and evidence across sectors. I have worked with contractors who are seeking to improve their quality systems. The reception seems to have been positive.

We must look at how people are selected. From the perspective of contractors, architects and design teams, we must look at how to demonstrate that our culture is focused on delivering quality and how we will take measures to ensure that. Building assurance systems need to be real rather than office based. Too many people use quality assurance systems as a tick-box exercise without checking things on site. We have the digital technology to make that real. That could be a big change factor if it was used properly, but not enough investment has been made in that yet. Good building information management could significantly help us, but it needs to be refined and made more standard across the industry.

There has been change, but it is not enough yet.

**The Convener:** Do you think that we are heading in the right direction at this stage?

**Professor Cole:** Yes. There have been positive movements by all groups involved. My worry is that that will drop off, unless we make some significant changes more quickly.

10:30

**The Convener:** Andy Wightman has a brief supplementary question for Malcolm MacLeod.

**Andy Wightman:** It is just to follow up my previous question to Malcolm. Given that, as I understand it, at least 20 to 30 buildings in Scotland are fundamentally dangerous and were not built in compliance with the standards that were in place at the time when they were built, can you clarify whether, if any of those buildings have a warranty from the NHBC, you have any liability?

**Malcolm MacLeod:** I do not know what buildings you are referring to, but I am happy to take the issue offline—if you want to drop me a note, I can look into it. My understanding is that we might have some liability if, for example, there are other claims in relation to those buildings that are not associated with the cladding. However, I cannot honestly answer your question without more detail. If you send me the addresses of the



properties concerned, I will happily look into it and get back to you.

**Andy Wightman:** If combustible cladding is now found to be on a building and that building is not in compliance with the standards at the time that it was built, do you have any liability for that?

**Malcolm MacLeod:** We are not a statutory body; in Scotland, liability for building standards and dangerous buildings lies with the building control departments. If a building control department deems that a building is dangerous, it should take action to ensure that the public are protected.

**Andy Wightman:** Would your warranty not cover a building that has been found to have been built with flammable materials and that was not in compliance with building standards at the time that it was built?

**Malcolm MacLeod:** Generally speaking, not in Scotland. I say not in Scotland because it is in the public environment. In England, where we provided building control, we have upheld some claims in relation to that problem, because when we provided building control as a service, we used to underwrite that with a separate insurance policy that clearly stated that, if the building did not comply with the building regulations, such claims would be valid. On that premise, claims relating to buildings in England where we provided building control and that were subsequently found not to comply with building regulations have been deemed to be valid in certain circumstances. In Scotland, however, we have never been able to provide building control, so that element of insurance cover was never available to consumers in Scotland.

**Andy Wightman:** That is helpful. Thank you.

**The Convener:** That brings us to the end of the evidence session. I thank the witnesses for taking part and for identifying some key issues for the committee's on-going work in this area.

## European Union (Withdrawal) Act 2018

### Town and Country Planning, Management of Extractive Waste and Electricity Works (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2020

10:33

**The Convener:** Agenda item 3 is to consider whether the regulations have been laid under the appropriate procedure. I refer members to papers 3 and 4 to assist their deliberations. Do members agree that the parliamentary procedure given to the regulations by the Scottish Government is appropriate in respect of the relevant provisions made using the power to correct deficiencies in retained EU law?

**Members** *indicated agreement.*

## Subordinate Legislation

### **Town and Country Planning, Management of Extractive Waste and Electricity Works (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2020 (SSI 2020/310)**

10:34

**The Convener:** Agenda item 4 is consideration of a negative instrument as listed on the agenda. I refer members to paper 4. The instrument is laid under the negative procedure, which means that its provisions will come into force unless the Parliament agrees to a motion to annul it. No motions to annul have been lodged. The Delegated Powers and Law Reform Committee considered the instrument on 27 October 2020 and determined that it did not need to draw the attention of Parliament to the instrument on any grounds in that committee's remit.

Does the committee agree that we do not wish to make any further recommendations in relation to the instrument?

**Members** *indicated agreement.*

**The Convener:** That concludes the public part of the meeting.

10:35

*Meeting continued in private until 11:26.*

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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