

Owen Joyce (DFIN)

From: Paul Cotter (DFIN)
Sent: Tuesday 13 December 2022 15:55
To: Maeve O'Brien (Housing); Feargal Ó Coigligh (Housing)
Cc: Colm O'Reardon (DFIN); Housing Buildingstandards; Sarah Neary (Housing)
Subject: RE: Urgent - Report of the Inter-Departmental and Agency Group - Defects in Housing
Attachments: Final Report of the Inter-Departmental and Agency Group_DFIN_obs.docx

Maeve, Feargal

I was on annual leave yesterday, so missed the same day deadline. Please see attached observations from the Department of Finance.

The most important one is in relation to 3. Remediation Work Already Commenced or Undertaken, page 10.

As it stands we can't agree the report if it contains the final line in that section. The Government is free to make any decision it wants in respect of this, but the consensus in the group was clear that this is not a compensation scheme. The line therefore only serves to introduce ambiguity where there was none.

Thanks for the time and effort you and your colleagues put into this report. I'd appreciate if you could send on the Memo for Government when its ready.

Kind Regards,
Pau

From: Maeve O'Brien (Housing) <[REDACTED]>
Sent: Monday 12 December 2022 11:02
To: Jim Baneham <[REDACTED]>; Brophy, David <[REDACTED]>; Clare Costello (PER) <[REDACTED]>; Paul Cotter (DFIN) <[REDACTED]>; [REDACTED]; [REDACTED]; Derek Rafferty (Housing) <[REDACTED]>; [REDACTED]
Cc: Feargal Ó Coigligh (Housing) <[REDACTED]>; JohnR Wickham (Housing) <[REDACTED]>; Sarah Neary (Housing) <[REDACTED]>; Paul McDermott (Housing) <[REDACTED]>; Claire Manifold (Housing) <[REDACTED]>; Gerard McGuinness (DFIN) <[REDACTED]>
Subject: Urgent - Report of the Inter-Departmental and Agency Group - Defects in Housing

I attach a revised draft final report of the Inter-Departmental and Agency Group considering defects in housing. We are aiming to submit a Memo to Government next week and it is intended that this report will be attached to the Memo. With apologies for the short notice, I would be very grateful if you could submit any comments you may have on this report by close of business today. We will circulate a revised draft tomorrow morning with a view to finalising it by lunchtime tomorrow.

Regards,
Maeve

Maeve O'Brien
Building Standards

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Inter-Departmental and Agency Group

Implementation of Report of Working Group to Examine Defects in Housing

Final Report – 12th December 2022

1 Background

The Inter-Departmental and Agency Group held 3 meetings between 18 October and 6 December 2022. Its terms of reference were to:

- a) Consider the recommendations contained in the report of the Working Group to Examine Defects in Housing.
- b) Elaborate on the options for the potential sources of financial support and the potential channels for deployment contained in the report of the Working Group to Examine Defects in Housing.
- c) Propose delivery mechanisms for the deployment of funding and develop an options paper with a view to providing support to homeowners who find themselves in a difficult financial situation through no fault of their own.

Membership of the Group comprised officials from the Department of Housing, Local Government and Heritage, the Department of Public Expenditure and Reform, the Department of Finance, the Department of Justice, the Housing Agency, the Office of the Attorney General and the Local Authority Fire Services.

2 Principles for designing support mechanisms

The Inter-Departmental and Agency Group is of the view that the following principles should apply to a remediation scheme:

2.1 General

- (a) The primary policy objectives of any State support mechanism should be twofold:
 - to protect people's safety and welfare when living in apartment or duplex homes, and
 - in the context of the housing situation, to protect the integrity and the capacity of existing housing stock.
- (b) The report of the Working Group to Examine Defects in Housing is clear that a whole building approach is necessary to comprehensively address defects.

The Inter-Departmental and Agency Group agrees with the observation of the Working Group to Examine Defects in Housing, and is of the view that, in order to achieve the policy objectives stated above, a core principle of a remediation scheme is that a whole building approach is required to satisfactorily remediate

relevant fire safety, structural safety and water ingress defects and to improve the safety of all occupants in the building.

- (c) It is clear to the Inter-Departmental and Agency Group that, as with the Defective Concrete Blocks Grant Scheme, no liability for the State has been established in this matter. Therefore, any potential scheme would not be a redress scheme and any associated terms and conditions are at the discretion of Government.
- (d) Learnings from the Pyrite Remediation Scheme and the Defective Concrete Blocks Grant Scheme should be considered in the development of any remediation scheme.

However, it is noted that any scheme to support the remediation of defects in apartment/duplexes will differ from other schemes for a number of reasons, including:

- the nature of the ownership of the common areas,
- the need for a whole building approach and
- the variation of remediation works required between each unit / building / development.

In addition, the impact that any remediation scheme to address defects in apartments/duplexes may have on the scope of the existing Defective Concrete Blocks Grant Scheme/ Pyrite Remediation Scheme should be carefully considered.

- (e) The Inter-Departmental and Agency Group consider it important that Owners' Management Companies (OMCs) and occupants of apartments and duplexes are aware that at all times the responsibility for fire safety rests with those in control of the building / the OMC. See Section 2.9a below.
- (f) Any scheme will require primary legislation. It is clear that this will take time to develop and progress through the legislative process.

2.2 Proposed Scope

- (a) The report of the Working Group to Examine Defects in Housing identifies and defines three significant defects in relation to apartment buildings i.e. fire-safety, water ingress and structural safety defects.

The definitions of these defects, developed by the Working Group to Examine Defects in Housing, state that the defects must be attributable to defective design, defective or faulty workmanship, defective materials (or any combination of these) and are in contravention of Part A, Part B, Part C and Part D of the Building Regulations, as appropriate, at the time of construction.

The Inter-Departmental and Agency Group is of the opinion that the scope of any scheme should be limited to fire safety, structural safety and water ingress defects or any combination of these that arose at the time of construction, and are in contravention of the relevant part of the Building Regulations applicable at the time of construction.

- (b) The report of the Working Group to Examine Defects in Housing states that *'defects arising from inadequate maintenance or poor management of apartment/duplex buildings are outside the scope of the terms of reference of the Working Group and this report. The defects considered by the Working Group did not include the following:*
- *Defects arising from inadequate maintenance*
 - *A failure of sinking funds to adequately allow for end-of-life replacement of building and safety systems*
 - *Inadequate management of later works to the building that have inadvertently resulted in defects'*

The Inter-Departmental and Agency Group agrees with the view of the Working Group to Examine Defects in Housing that defects that originate from any of these causes, are unlikely to have occurred at the time of construction and notes the statutory responsibilities that exist under the Fire Services Acts and Multi Unit Development Act in relation to management and sinking funds etc. As such, the Group is firmly of the view that such matters should not be included within the scope of any remediation scheme.

The inclusion of such matters could potentially give rise to the State paying for the ongoing maintenance of apartments and duplexes throughout the country into the future.

- (c) Given the scale of the number of apartments potentially affected, the report of the Working Group to Examine Defects in Housing advises on the importance of planning, prioritising and adequately resourcing any programme to address defects.

The Inter-Departmental and Agency Group is of the view that any remediation scheme should incorporate a means or methodology for assessing the risk to life safety of the occupants of each building so as to prioritise the allocation and nature of support and funding, including the funding of interim measures.

The objective of the assessment of risk to life safety would be to ensure that the buildings having the highest risk to life safety are the first to be supported. The code of practice referred to in Section 2.5 below should elaborate on this risk assessment/methodology.

- (d) The Inter-Departmental and Agency Group is of the view that any remediation scheme should exclude any additional works that would increase the standards or value of the building.

However, the Group noted that given the existing Government retrofit targets, an OMC may wish to consider energy retrofitting their buildings and availing of energy retrofit grants in parallel with remediating defects.

In such a case, the retrofit work would be at the OMC's discretion, and carried out in accordance with the terms and conditions of any grant scheme, with any additional costs arising to be borne by its members.

The terms of any remediation scheme should make it clear that any direct or indirect costs, such as the use of external scaffolding, the presence of different contractors working alongside each other on site, remediation programme impacts or delays etc., that arise from such energy retrofit works, are outside the scope of any remediation scheme.

2.3 Industry capacity / resource constraints

- (a) The report of the Working Group to Examine Defects in Housing noted the capacity constraints in the construction industry, particularly relating to building professionals, and in the local authority fire services and that it will take many years to address all buildings affected by defects. Therefore, resources and works will need to be prioritised. It recommends that the programme to address fire safety, structural safety and water ingress defects in apartments and duplexes should be planned, prioritised and adequately resourced over a suitable period of time.

The Inter-Departmental and Agency Group agrees that the capacity to carry out this remediation work both in the private and public sector is constrained and will impact on the time required to complete remediation works.

The Group is of the view that resource planning, training and development of appropriate professional registers will need to take place in tandem with the design of any scheme e.g. for local authority fire services and for other construction and fire safety professionals etc..

- (b) The Inter-Departmental and Agency Group is also concerned that the resources required to complete this work are the same as those required for other competing objectives such as other remediation schemes, the national retrofit

programme and the construction of new housing - all of which are currently experiencing resource constraints.

- (c) The Inter-Departmental and Agency Group agrees with the Working Group to Examine Defects in Housing that it is likely to take many years to complete the remediation of defects in all affected apartments/duplexes.

2.4 Standard of remediation

- (a) The report of the Working Group to Examine Defects in Housing recommends that fire safety, structural safety and water ingress defects in apartments/duplexes should, where practicable, be remediated to the standard that applied at the time of their original construction. Where this is not practicable alternative approaches and options should be considered that provide a reasonable level of life safety protection.

The Inter-Departmental and Agency Group agrees that any remediation scheme should employ this approach.

2.5 Code of practice

- (a) The report of the Working Group to Examine Defects in Housing recommends the development of a Code of Practice in accordance with the Fire Services Acts to ensure a consistent approach nationwide to remediation.

The Inter-Departmental and Agency Group supports this recommendation and notes that an advisory group has been established to develop a Code of Practice in the context of the Fire Services Acts, to provide guidance to relevant professionals, including guidance on interim safety measures.

Additional guidance may also be required in the context of structural safety and water ingress defects.

2.6 Role of the Owners' Management Company (OMC)

- (a) The report of the Working Group to Examine Defects in Housing identifies the OMC as being central to executing the remedial works, due to their legal responsibilities and ownership of common areas.

It notes that OMCs are the only entity with a legal right to undertake remedial work in common areas, and suggest that any potential scheme should ensure that the OMC is central to the remediation process.

It recognises that most OMC directors take on the role in a voluntary capacity and they may not have the necessary experience to manage the remedial works process. Therefore, it considers that the establishment of an effective advice and information service is an essential support for OMCs and homeowners (who are also members of the OMC).

The Inter-Departmental and Agency Group agrees that the OMC should have a key role in the remediation process.

It acknowledges that the competence and capability of OMCs varies and that the advice and support service as recommended by the Working Group to Examine Defects in Housing should be an integral part of any remediation scheme to assist OMCs in this regard.

- (b) The Inter-Departmental and Agency Group is of the view that the options for contracting the remediation works to maintain the key role of the OMC may include:
- (i) The OMC as the contracting authority.
 - (ii) The OMC as the contracting authority with the support of the State in terms of providing a framework of assessors, contractors and programme managers.
 - (iii) A central agency as the contracting authority on behalf of the OMC, similar to the Pyrite Remediation Scheme.

The nature of required remedial work to address defects will vary significantly from development to development unlike the Pyrite Remediation Scheme which employs repeatedly the same standard solution. Even within a large development, remedial works to address defects may vary from one apartment building to another and even from floor to floor within the same building. Remedial work plans will need to be customised to cater for whatever issues exist within every affected apartment/duplex building.

Each of the options above will require further analysis and development, in the context of the design of a scheme, however, the Inter-Departmental and Agency Group is of the view that, in principle, option (ii) is the most preferable, because:

- It enables the OMCs to have a significant degree of autonomy in progressing the assessment, interim and remediation works, while using assessors, contractors and programme managers that they can be assured meet the criteria to be included on frameworks administered by the central agency.

- It facilitates the progression of multiple remediation projects, led by OMCs or their agents, in parallel thus addressing the issues more quickly.

2.7 Financial Supports

- (a) The Inter-Departmental and Agency Group is of the view that the variety of tenures in apartment/duplex building presents significant challenges in relation to delivering financial support through any scheme. The following tenures can exist in apartment/duplex buildings - owner occupiers, landlords (Individual, companies, institutional investors (REIT, IREF)), local authority, Approved Housing Bodies and commercial/retail operators.

The Group is of the view that consideration should be given to exploring mechanisms whereby the funding provided to remediate apartments within a development can be fairly apportioned with a view to recouping the allocated funding from certain types of property owners such as institutional investors, while at the same time allowing the OMC to proceed with the works to the whole building, to achieve the important objectives of the remediation scheme as set out above.

Commented [PC1]: Suggest changing to “such as commercial owners that have purchased units in recent years”

- (b) The Inter-Departmental and Agency Group has identified the following options for delivering financial support:

- Fully funding OMCs to carry out the necessary remediation works, with specific limitation/exemption on certain commercial owners e.g. institutional landlords.
- State guaranteed loans to OMCs with targeted financial support for specific tenure individual homeowners. While this would ensure an equitable approach to DCB scheme, it comes with a significant administrative burden, may present challenges to ensuring the work is carried out on the entire building and may result in a default on repayments.

Commented [PC2]: As above, suggest deleting “institutional landlords”. The issue is one of due diligence, a commercial entity should have done its due diligence before purchasing a building. The State has no role in alleviating incompetence/negligence on behalf of private commercial entities

The Group is of the view that, in light of the complex nature of the remediation of apartments/duplexes, any scheme established should be as simple as possible to apply to and administer and ensure that required life safety remediation works are carried out on a whole building basis.

2.8 Governance

The Inter-Departmental and Agency Group is of the view that the following governance measures should be considered:

- (a) Any potential scheme must be well governed, with appropriate oversight and adequately resourced. The governance structure and lines of accountability need to be clearly defined and outlined.
- (b) This work will require a central agency to administer a scheme on a nationwide basis. Given the role of the Housing Agency in other defects schemes, it is proposed that the Agency would act as the central agency for any potential scheme.
- (c) Interaction and interdependency with local authority fire services and others will need to be considered, with the remediation of fire safety defects carried out to the satisfaction of the local authority fire services.
- (d) The report of the Working Group to Examine Defects in Housing identifies the challenges with scoping the level of the defects in a building, the need for thorough due diligence to avoid scope creep during construction works and the follow on management of funding.
- (e) In order to provide a means of certification in relation to the works carried out to remediate defects in an apartment/duplex building, a form of certification, signed by competent building professionals and competent builder, should be provided for within any remediation scheme. This is important for a range of stakeholders and processes e.g. insurance bodies, financial institutions, conveyancing etc. The form of certification will be addressed through the code of practice referred to in Section 2.5 above.

2.9 Interim Measures

- (a) The Inter-Departmental and Agency Group notes that there are concerns that the proposed introduction of a Government supported could mean that there is a temptation to postpone urgent fire safety **works** or to avoid carrying out ongoing maintenance of fire safety systems. However, existing legal responsibilities continue to apply to all persons in control of a premises as set out below.
- (b) A person having control of premises has statutory fire safety responsibilities under section 18(2) of the Fire Services Acts 1981 and 2003. Section 18(2) places a duty on persons having control over a wide range of premises types, including apartment and duplex **buildings**.

The person having control may be an individual person, a number of persons or an organisation, such as an owners' management company, approved housing body, real estate investment trust, a housing authority or property services company etc.

Commented [PC3]: Not just fire safety works. The risk is that all works are postponed including structural (balconies for example)

Commented [PC4]: As per above, is it not the case that the OMC etc. has a responsibility to ensure overall health and safety, not just in relation to fire? If so, should be highlighted

In general, the person having control is required to guard against the outbreak of fire on the premises and to ensure as far as reasonably practicable the safety of persons on the premises in the event of an outbreak of fire.

The person having control is legally required to make provision for fire safety on the premises; this includes providing a premises that is safe including structural fire precautions, such as fire resistance of elements of structure, protection of escape routes and compartmentation appropriate to the building. These statutory fire safety duties include management of fire safety, ensuring that all necessary reasonable fire safety measures and procedures are in place.

Following the publication of the report "*Fire Safety in Ireland*"(2018) of the Fire Safety Task Force, which was set up by the then Minister following the tragic Grenfell Tower fire in London in 2017, a code of practice has been developed as a result of a specific recommendations in the report.

This code of practice titled: "*Fire Safety Guide for Building Owners and Operators - Guide for Persons having Control under Section 18(2) Fire Services Acts 1981 & 2003*", following a public consultation process, is due for publication shortly.

It is intended that this code of practice will provide a framework for the on-going management and maintenance of buildings with respect to fire safety and contains guidance specific to buildings containing flats/apartments. It will provide for clarity and consistency of approach nationally in making reasonable provisions for occupant safety. It is expected that this code of practice will be of assistance to building owners and operators in providing standard guidance and advise on the range of duties with respect to fire safety. It will complement and provide updated guidance to the existing suite of guidance documents published by the Department.

- (c) The obligations and responsibilities, set out above, should be made clear to OMCs and occupants of apartments and duplexes. It should be noted that they continue to apply at all times
 - irrespective of the establishment of any scheme, and
 - also during the time period between the identification of fire safety deficiencies and associated remedial works and the completion of required works.
- (d) As noted above, there are suggestions that apartment/duplex buildings that are currently in the process of remediating defects are pausing works for fear of being excluded from any support scheme. This is highly undesirable.

In order to ensure that important life safety works are not paused, the Inter-Departmental and Agency Group is of the view such works as agreed with the local authority fire services, entered into/commenced from [the date of the Government decision] should be covered by any remediation scheme, subject to terms and conditions.

This should be clearly communicated to ensure that those in charge of affected buildings do not delay the undertaking of any remediation work that is considered necessary from a life safety point of view aligning with the obligations under the Fire Services Acts.

Commented [PC5]: Or other relevant laws? Same point as above

(e) It should also be made clear the any defects that originate from:

- Inadequate maintenance,
- A failure of sinking funds to adequately allow for end-of-life replacement of building and safety systems, or
- Inadequate management of later works to the building that have inadvertently resulted in defects

will not be included within the scope of any remediation scheme which the Government may support.

3. Remediation Work Already Commenced or Undertaken

The Working Group to Examine Defects in Housing considered the request from homeowner representative bodies for financial compensation for those who have already undertaken remedial works e.g. refundable tax credits, grants, low-cost loans.

The Inter-Departmental and Agency Group noted that this was not a feature of any other defects scheme in the State. Where buildings are now remediated, there is little public policy rationale to provide any State support. As noted above, no liability for the State has been established, the State's objective is to ensure the health and safety of occupants, not to offer compensation.

This matter will require further detailed consideration.

Commented [PC6]: This line should be deleted.

The group agreed that the scheme was one in relation to health & safety not compensation, so this line has no meaning.

4. Further Strengthening of the Building Control System.

The State is committed to ensuring that the issues with construction defects cannot arise again in the future.

A range of building control reforms which focus on ensuring strong and effective regulation in the building control system and the construction industry and on improving compliance with Building Regulations have been implemented since 2014.

This includes:

- a. implementation of the Building Control (Amendment) Regulations 2014 (S.I. No. 9 of 2014). These Regulations empower competence and professionalism in construction projects and establish a chain of responsibility that begins with the owner. In regard to apartments/duplexes, the owner must assign competent persons to design, build, inspect and certify the building works who, in turn, must account for their role through the lodgement of compliance documentation, inspection plans and statutory certificates. The roles and responsibilities of owners, designers, builders, assigned certifiers, etc. during building works are set out in the Code of Practice for Inspecting and Certifying Buildings and Works. The Code of Practice also provides guidance on use of proper materials and the need to check supporting documentation under the Construction Products Regulation (e.g Declaration of Performance) and additional national guidance (e.g. Standard Recommendations produced by NSAI).
- b. the creation of the National Building Control Management Project and the establishment of the National Building Control & Market Surveillance Office to provide oversight, support and direction for the development, standardisation and implementation of Building Control as an effective shared service in the 31 Building Control Authorities.
- c. The enactment in July 2022 of the Regulation of Providers of Building Works and Miscellaneous Provisions Act 2022. This Act develops and promotes a culture of competence, good practice and compliance with the Building Regulations in the construction sector. The Act will put the Construction Industry Register Ireland on a statutory footing and aims to benefit consumers and the general public by giving those who engage a registered builder the assurance that they are dealing with a competent and compliant operator. The Act also allows for complaints against registered builders to be made on a number of grounds – in particular an entity providing building services in a category in which they are not registered. It provides for a range of proportionate sanctions to be imposed after investigation. Complaints in relation to building regulations will continue to be dealt with under the Building Control Act.

To further support the building control system, work is progressing on establishing an independent Building Standards Regulator to oversee building control nationwide and to act as custodian of the Building Control Management System.

- The Department is in the process of gathering the evidence necessary to inform decisions on the proposed scope, functions, role and structure of a regulator. As a first step, a comprehensive desktop study is being undertaken by the Housing Agency.
- Building on the output of this study, further consideration, with external expert input and/or oversight, will be undertaken to identify the strengths and weaknesses of the operation of the building control system in Ireland and other

Commented [PC7]: I think this para should be strengthened to include something like “and to explore how, in future, individuals and companies can be sanctioned for non-compliance”

countries and to make recommendations on how it should be enhanced to ensure that it is consistent, agile and able to meet the demands and expectations of it. This phase of the work will also set out and assess options for the potential scope, role and functions of an independent Building Standards Regulator.

Other significant pieces of redress and producers' liability legislation which may apply to construction products are the Sale of Goods Act 1893 and the Sale of Goods and Supply of Services Act 1980; and the Liability for Defective Products Act 1991 which fall under the remit of my colleague the Minister for Enterprise, Trade and Employment.