BUILDING (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Building (Scotland) Bill introduced in the Scottish Parliament on 18 September 2002. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 65–EN.

POLICY OBJECTIVES OF THE BILL

2. The policy objectives of the Bill are to:

   • modernise the Scottish building control system (now to be known as “building standards”);
   • make the system more responsive to the needs of the general public and industry;
   • create more flexibility for designers to promote new and innovative design;
   • provide more information to house buyers on work carried out on buildings;
   • provide greater reassurance for those using tradespeople;
   • strengthen local authority powers to identify dangerous buildings;
   • support Scottish Executive aims of providing excellence in public services and encouraging sustainable development;
   • help to meet the Scottish Executive’s obligations under the European Construction Products Directive.

EC Construction Products Directive

3. The Building (Scotland) Bill facilitates the Executive’s compliance with the EC Construction Products Directive (Council Directive 90/106/EEC). The Directive came into force in 1990 and its aim is to create a real and effective single market in construction products. It was implemented in the UK by the Construction Products Regulations 1991 and these require that technical specifications set in the UK make use of harmonised standards issued by Europe. This means in Scotland that where building regulations cite a British Standard for a construction product, it will have to be replaced by one or more European Standards when they are produced.
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4. If a manufacturer can show that the failure to use such harmonised standards is disadvantaging their products in a member state, then it is quite possible that the European Commission could consider taking infraction proceedings against the state concerned. In the instance of the Scottish building regulations responsibility rests with the Scottish Ministers. The production of the first harmonised standards in 2000 left the Executive open to the threat of European infraction proceedings.

5. There is a need to adopt a system which can cope with a rolling programme of harmonised European standards to be issued over the coming years. The production of these standards is now steady and should increase rapidly over the next two years. The threat of infraction proceedings will also increase exponentially. In practical terms, it is considered necessary to make the building standards system in Scotland more flexible in order to accommodate changes whenever new harmonised standards are issued. The present system requires standards to be prescribed, and the system would become overburdened if regulations were required every time a harmonised standard was issued. The section below on Setting Standards explains how the system of building standards will be changed to facilitate compliance with the Construction Products Directive.

Modernising the building control system in Scotland

6. The statutory framework for building control in Scotland is currently found in the Building (Scotland) Act 1959. The 1959 Act deals in the main with the setting of building standards, compliance with and enforcement of those standards, and powers in relation to dangerous buildings. The standards themselves are prescribed in regulations, supported by Technical Standards for compliance with these regulations. The purpose of building standards as set out in the 1959 Act is the protection of the public interest and this will continue to be the justification for setting standards for building. The issues of public interest presently considered to be relevant to building standards are the health, safety and welfare of the occupants and the general public; the conservation of fuel and power; and the accessibility and usability of buildings by everyone irrespective of their abilities or disabilities. These issues will also be covered by the Bill, and the purposes defined in it will offer sufficient robustness and flexibility to cope with demands placed on the system in the future.

7. The present system is essentially pre-emptive. It is based on the principle of identifying problems at the design stage, so that the building can be built to a set of plans which have been approved and for which a building warrant has been issued. There is provision for inspection during the construction process to help the local authority, which administers the application of building standards, ascertain whether the building is being constructed in accordance with the building warrant. The issue of a completion certificate certifies that the building complies with the building warrant so far as can be ascertained after taking reasonable steps to do so. There are provisions for the relaxation of any building regulation or standard, and these powers have now been fully devolved to local authorities.

8. This Bill replaces the 1959 Act, though the intention is to amend the existing system rather than to create a completely new one. The general framework is to be retained though some of the procedures involved in the building control process will be changed to make them simpler, to reflect practice and to facilitate compliance with European obligations. The opportunity is
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being taken to address problems in a system which, while working well generally, is now over forty years old and is in need of updating.

9. Modifications to the system in the 1980s and the continual updating of the Technical Standards have failed to resolve, and may even have made worse, the underlying problem with the existing system. This is the rigidity of the 1959 Act, which makes the system slow, unresponsive and very heavy handed for minor building works. Since the introduction of the Act over 40 years ago there have been major changes in building design, procurement and technology, and in public aspirations and concerns.

SETTING STANDARDS

The current system

10. The current system of setting standards for building is very prescriptive. Building regulations are set by statutory instrument and the only way to comply with these regulations is to conform to the standards set out in the Technical Standards, which have full statutory force. Relaxations of these standards can be granted by local authorities but this process can be slow. This has created a system which is not only a barrier to the Executive meeting its obligations under the EC Directive as outlined above, but one which is considered to act as a barrier to the use of innovative approaches to design and to construction.

11. At present, building regulations are set in a functional form i.e. they are set by reference to the function which must be carried out, for example, requiring the ground floor of a building to be accessible to wheelchairs. The Technical Standards for compliance with these regulations are a mixture of prescriptive and performance requirements. Performance standards are those set by reference to a measurable level of performance, for example requiring the structure to be able to survive the effects of a fire for a set period of time. Prescriptive standards specify precisely how a building must be constructed, for example requiring the external walls to have a given thickness of insulation.

The new hierarchy of building standards

12. Under the new system, the Scottish Ministers will have the power to set building regulations which set out minimum functional standards. These would be set by statutory instrument by negative resolution, as regulations are set currently. There will be a series of levels within the system. Functional standards will be the mandatory level. Subordinate to the functional standards will be performance requirements and prescriptive specifications. Neither of these will be mandatory unlike their existing equivalents. They will be set by the central building standards body (see paragraphs 47 to 52) on behalf of Ministers after consultation with stakeholders and will have the status of guidance.

13. These changes are intended to free the sector from excessive prescription while maintaining a structure which will ensure continuing protection for the public and which will continue to offer the public and the construction industry guidance on how to meet the prevailing standards.
Sustainable development and other policy objectives

14. This new hierarchy of standards, with a set of mandatory functional standards, supported by a range of guidance, will enable new and innovative design solutions to be used to meet the requirements of the standards. This system has the potential to make a significant impact in many areas, such as sustainable development. The new, more efficient and flexible system will be better able to deliver on existing and new sustainable development objectives as they are set. The ability to be innovative in meeting building regulations is regarded as particularly important in relation to sustainable development, which is an explicit purpose of the Bill and which is a relatively new field for designers and where a wide range of potential solutions may be applied to address sustainable development issues.

15. This also holds true for other areas such as disabled access or fire-safety engineering. At present, designers are restricted to the solutions to disabled access etc prescribed in the Technical Standards for compliance with building regulations. Under the new system only the functional standards will be mandatory, so designers will be free to develop new and innovative solutions to issues of disabled access to and within buildings. Guidance will still be available but designers will no longer be restricted to this.

Scope

16. Section 1(1) of the Bill sets out the purposes of building regulations as (a) securing the health, safety, welfare and convenience of persons in or about buildings and of others who may be affected by buildings or matters connected with buildings, (b) furthering the conservation of fuel and power, and (c) furthering the achievement of sustainable development. Without prejudice to the generality of that provision, schedule 1 sets out matters within the scope of building regulations.

CONSULTATION

17. The Executive has carried out extensive consultation on the proposals for a new building standards system in Scotland. The first consultation paper Improving Building Standards (a consultation paper inviting ideas on the reform of the building control system in Scotland) was launched in April 2000. This sought to identify problems with the present system and to seek ideas on what a new system might look like. At the same time, a working party was formed to review the building control system, which consisted of members of the Executive’s Building Standards Division and three external assessors, selected for their expertise in areas relevant to building standards. The consultation was issued to over 800 organisations and individuals and received 191 responses. The responses came from a range of stakeholders including local authorities, individual building control officers, professional institutes, housebuilders, consultants, fire brigades, disabled groups and the general public. In addition to these written responses, several key organisations, including the Building Standards Advisory Committee, CoSLA, the Institute of Building Control, the National House-Building Council and the Royal Incorporation of Architects in Scotland, were invited to make formal presentations to the working party.

18. This first consultation fed into the review process lead by the working party and the responses informed a report which the working party produced in 2001. This report formed the basis of the second consultation, Improving Building Standards, which was launched in July
2001. This moved from identifying problems to suggesting possible solutions and giving framework proposals for a new building standards system. One hundred and twenty six responses were received to this consultation from a similar range of stakeholders. The responses to this consultation were considered carefully and resulted in significant changes being made to the proposals. These included an extension of the central body’s auditing role to cover the certifiers of design and construction and the removal of the proposal that building work may start before a building warrant is granted.

19. Most of the proposals were carried on to the third and final consultation *Improving Building Standards: Proposals*, issued in March 2002. Probably reflecting the fact that the proposals were substantially the same as those contained in the second consultation, 69 responses were received by the closing date in June 2002. On 21 June 2002, the Executive held a consultation workshop with individuals and organisations with an interest in disabled access issues. This was facilitated by the Disability Rights Commission and gave the Executive the opportunity to hear the views of those directly affected. Most of the issues raised were pertinent to the later stages of the process, and will inform the preparation of regulations and guidance. The Executive gave an undertaking that there would be future consultation with access interests at those subsequent stages of the process.

20. The Executive also held discussions with the Building Standards Advisory Committee, local authorities, fire authorities, the Fire Brigades Union and others.

21. From the second and third consultations which outlined and developed the Executive’s proposals, a consensus has developed among key stakeholders. There is clear support for the central proposals of moving the mandatory line in relation to building standards, for the creation of a building standards register and for the creation of approved certifiers where their competence could be demonstrated. There were mixed views about the creation of private verifiers. Public sector consultees were keen to maintain this role exclusively with local authorities, whereas private sector consultees, including house builders and potential verifiers, were keen to see private sector verifiers appointed.

**THE NEW SYSTEM**

22. The new standards will require a new system of administration, duties and procedural requirements. The duty to comply with the regulations will rest with the owner of the building. Expert assessment and enforcement will be undertaken by verifiers, which in the first instance will be the local authorities, while certain groups of professionals will be approved to certify that specified parts of the process have met the required standards. If the situation arose where a local authority was not a verifier it would still retain some enforcement responsibility. Certain functions, which are required to ensure fairness and national consistency, will fall to the central body.

*Duties and responsibilities*

23. The following people or organisations will be involved in the process:

- the owner, who will be responsible for complying with the requirements of the Bill;
• the verifier, who will be responsible for verifying this compliance and who may also be the enforcement authority;
• approved certifiers of design who will be individuals and organisations which are recognised as competent to certify the standard of design of a building or part of a building;
• approved certifiers of construction, who will be individuals and organisations which are recognised as competent to certify the standard of installation of certain elements of a building; and
• a central building standards body, which will be responsible for setting building standards, auditing verifiers and certifiers and verifying Crown buildings.

Owners

24. For the purposes of the new building standards system, owners are responsible for compliance with building regulations. They are obliged to apply to a verifier for a building warrant and to receive it before starting work. Upon completion of the building or building work, the owner must submit a completion certificate confirming to the verifier that granted the building warrant that they have complied with the building standards. It is only at the point that the verifier has indicated that it has accepted the validity of the completion certificate that the process of building standards is complete on relevant work. The acceptance is the point at which the building is deemed to have satisfied building standards and may be occupied. It would normally be an offence to occupy a new building, or accommodation newly created by conversion, before the acceptance of the completion certificate.

Building authorities: verifiers and certifiers

25. Section 7 of the Bill makes provision for the Scottish Ministers to appoint bodies or individuals who will verify that building standards have been complied with. As well as the power to appoint public sector bodies (local authorities at present), Ministers will now have the power to appoint private sector bodies and individuals. There will also be a power to approve bodies or individuals who will certify to the verifier that elements of the design or building work comply with building standards.

Verifiers

26. Since building standards are to be mandatory for all building work, there is a need for some form of verification that they are being achieved. When there are issues considered to be of such public interest that they should be mandatory, it is reasonable to require independent confirmation that they have been fulfilled. To be of any value, a mandatory system requires to have some form of verification. A verifier has to grant a building warrant once the verifier has checked that the design will satisfy the functional standards. The verifier has to ensure that design and construction is in accordance with the building warrant and, when the owner submits a completion certificate, the verifier has to check its accuracy to determine if it can be accepted.
27. The system for verifying that the building standards have been achieved should be as clear, simple and fair as possible. At present, the verifiers within the Scottish building control system are the local authorities.

Criteria for verifiers

28. To be a verifier, an organisation should fulfil certain criteria related to the better regulation guidance, in particular transparency, accountability and consistency. Verifiers should be impartial and their working practices should be transparent. They should be independent of, and separate from, the organisation they are verifying. Verifiers should be competent and consistent in their activities. It is self-evident that to assess the work of others, the verifiers should be fully competent in the work themselves. This will require them to be properly qualified and suitably experienced.

29. Verifiers should also be accountable. As they are acting in the public interest to ensure that mandatory standards are achieved, it is clearly necessary that they can be held to account for their actions, as with all other bodies having mandatory powers.

Approved inspectors

30. In England and Wales persons carrying out building work may choose to have projects checked either by the local authority or by an approved private sector inspector of their own choice. The Office of the Deputy Prime Minister (ODPM) is the Government Department responsible for building regulations in England and Wales. There is a performance standard which has been commended to Approved Inspectors and local authorities and which they have agreed to meet in delivering building control services. There is competition on charges between Approved Inspectors, and between local authorities and Approved Inspectors. The Institute of Building Control (since merged with the Royal Institute of Chartered Surveyors), in its response to the Executive’s consultations, was keen to highlight the benefits of competition in raising the profile and funding of building control within local authorities and improving the professionalism of the building standards profession. It also improves choice and flexibility for the public and industry alike.

31. However, there are some concerns about the appointment of private sector verifiers under the new arrangements in Scotland. The Approved Inspector system has been in place in its present form only for a fairly short time. As yet, there has been no systematic study of the effects of competition on the performance of building control bodies in the local authority and private sectors. It can also be argued that as the builder appoints the Approved Inspector, safeguards would be needed against any conflict of interest, going beyond those in the current Building Act applying in England and Wales and the regulations made under it.

32. A benefit of using an Approved Inspector is consistency for the developer; they can use the same Approved Inspectors in whatever part of the country they are working and, once having established an acceptable design for a building in one location, they can then replicate that anywhere they wish. There is therefore consistency for the developer. However although there may be internal consistency within one particular operation, it may also be that there are greater inconsistencies between similar buildings constructed in the same locality where one is checked by the local authority and one by an Approved Inspector.
Local authorities

33. At present, the verifiers within the Scottish building control system are the local authorities and they fulfil the necessary criteria. They are independent, competent and they are accountable to the local electorate. They are also subject to Best Value, which means they are committed to the concept of continuous improvement. The Executive believes that local authorities have done a good job in administering the building control system over the past 40 years and there are no plans to extend their verification role to the private sector. However it is not proposed to exclude the possibility of private sector verification at some time in the future if the issues of impartiality, accountability and access to enforcement powers can be resolved. The Bill therefore makes provision for the Scottish Ministers to appoint other verifiers, to prescribe differences between different verifiers, either on an individual or class basis e.g. limiting a verifier to a particular region or to certain types of building. The developing experience of Approved Inspectors in England and Wales will clearly be very important in future decisions on the appointment of private sector verifiers.

Auditing of local authority performance

34. The use of performance requirements demands a level of competence from both the designer and those charged with verifying the adequacy of the design in fulfilling the functional standards. Clearly, more understanding is needed with performance requirements than with prescriptive specifications. It is easier, for example, to physically measure a pipe or count the air vents in a wall than it is to assess performance by reference to published test data or codes of practice. The demands of showing compliance with the functional standards directly, without reference to the performance requirements, should lead to increased professionalism throughout the sector.

35. There is therefore a need for the central body to play a monitoring and auditing role in relation to verifiers in fulfilling their building standards functions, be they local authorities or private sector inspectors. For local authorities, this work will complement the more general performance audits undertaken on behalf of the Accounts Commission for Scotland. Assessments in relation to the work of local authority planning departments are already undertaken by the Scottish Executive and these might well form a model for such work in relation to building standards departments.

36. As part of the quality control mechanism for building standards, Ministers will have the power to prescribe procedures and responsibility for the audit of verifiers’ performance and will be able to remove any body as a verifier where that body has failed to meet the performance criteria or for any other reason. Where any body has been removed from the verification role, Ministers would be able to appoint a successor verifier to take over the responsibilities of that verifier. This may be another local authority, a private sector verifier or both.

Certifiers

37. The importance of independent verification was stressed by many that responded to the consultations, but there were some that wanted to see an extension of certification by architects and designers. Structural design may already be self-certified by competent professionals if they so wish. Certification is the statement by a qualified and competent person that what they are proposing to do, or have done, satisfies the functional standards. Certification has to be checked,
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and that remains the role of the verifier. Certification does not negate the need for verification, but changes its focus from the checking of the design to the checking of the competence of the certifier. In this way, verification does not automatically mean plan checking or direct inspection on site; it may mean verification of the competence of professionals undertaking particular tasks. Certification and verification are therefore complementary rather than alternatives. Certification can be either at the warrant stage, where it is certification that a design will fulfil the functional standards, or it can be at completion of construction as part of the completion certificate, where evidence is provided that a particular installation or part of the building has been competently and properly undertaken.

Approved Certifiers of Design (ACDs)

38. The moving of the mandatory line to the level of the functional standards will enable design professionals to certify compliance at the design stage directly with the functional standards. There will be greater freedom in achieving design solutions, and more onus will be placed on the designers and their technical advisers in showing compliance. What is now envisaged is an expansion to cover other areas of the design and, in time, possibly the total design of the building should a designer prove to have sufficient competence. Designers and developers might either wish to develop the competence to certify themselves or employ specialist building standards professionals as an integral part of the design team providing advice and certifying compliance with the building standards. It would be important to establish the competence of those certifying and this will be formalised by the creation of a register of Approved Certifiers of Design. This register will be of individuals and of bodies corporate or unincorporated, including public bodies.

39. Buildings designed by teams including an ACD would still require verification from the local authority. However, this should be a simpler process as, for those areas covered by the Approved Certifier of Design, it would be checking that the ACD was competent, rather than checking the building design. The option of Approved Certifiers of Design should also encourage designers to accept more responsibility themselves rather relying on the local authority to pick up errors. The creation of a second group of building standards professionals, as Approved Certifiers of Design rather than verifiers, might also provide an incentive for improvements within local authorities. Thereby, the claimed benefits of private sector competition might be achieved, while retaining accountable and enforceable verification.

Approved Certifiers of Construction (ACCs)

40. This second type of certification will be undertaken by installers or tradespeople who will certify that the work they have undertaken on site is compliant. This already exists within the present system both explicitly and implicitly. Electrical installations have to be certified as complying with the relevant codes and British Standards. Gas fittings can only be installed by competent gas fitters. Many other fittings and installations are implicitly certified when the local authority accepts them because they have been done by competent tradespeople in accordance with British Standards or industry specifications. It is anticipated that there will be a growth in the number of trades and organisations that will wish to certify particular parts or elements within a building. Such organisations, once they have proved their competence, could become Approved Certifiers of Construction. However, it is not anticipated that there will be approved certification by contractors of entire buildings for some time.
41. It is clearly important that procedures for appointing, auditing and removing approved certifiers are robust and that will be a matter for the central body. Other safeguards would exist in the system to support these procedures. Where contractors or installers are Approved Certifiers of Construction and present certificates, the local authority will still have the duty to verify before accepting the completion certificate. Should there be any concerns about the certificates presented, the local authority would still have the right to inspect and, if necessary, take enforcement action.

Benefits to industry and the public

42. The most obvious benefit of extending this system from the general public’s point of view is the creation of Approved Certifiers of Construction. Many people have concerns as to whether the tradespeople they use such as electricians and plumbers will act in a professional manner. Nationally-held lists of ACCs should offer the public greater reassurance. The use of ACDs and ACCs will provide more choice and flexibility for the public and industry. It will have the benefit of potentially streamlining the construction process at the verification stage as local authorities will normally accept the certification of ACDs and ACCs. Some of the rigidity and barriers to quicker approvals should therefore be removed and benefits of potential savings in time and money may be offered.

Public information

Building standards register

43. Under section 21 of the Bill, each local authority must establish a building standards register on which it will record all building warrants, accepted completion certificates and unaccepted completion certificates in its area and other information required by regulations made by Ministers. The other information might include details of buildings where unauthorised work had been undertaken or where there had been inconclusive action under a repairs notice or a dangerous building notice. Each local authority must make its building standards register accessible to the public. Ministers will have a power to prescribe fees and in what format and by what means the register is made available. This may mean for example that the register is held electronically enabling easier access for the public, solicitors etc.

44. This provision will make more information readily available to prospective house buyers, enabling them to be better informed when making decisions on which property to buy. At present, house purchasers and their lending institutions are normally very keen to establish that the property has no outstanding building control problems. Where it is a new building or where there is a recent completion certificate available for improvements, this is simply solved. However, for most properties such documentation is not available and this register will start to address this problem. By highlighting properties with rejected completion certificates and potentially also properties where there had been inconclusive action under a repair or dangerous building notice, this should also provide an impetus to upgrade the existing building stock.

Building standards assessment

45. As outlined above, where house purchasers wish to establish that a property has no outstanding building control problems, they will normally expect to establish the existence of completion certificates for building work carried out on the property. As these are very often not
available, the practice has developed in recent years of seeking an assurance from the local authority that it is not likely to be undertaking any enforcement action in respect of the building. A system of “letters of comfort” has developed to fill this need. Such letters are available for a fee from all local authorities. However, their value is limited as they do not provide a guarantee of compliance with standards, and there is enormous variation between local authorities in what the letter represents (some are based on a survey while others are not) and in fees charged. There have been frequent calls for a more meaningful and consistent system of reassuring purchasers.

46. Therefore, the “letters of comfort” currently issued by most local authorities would be replaced by an assessment of the building which is more meaningful and consistent. Section 6 of the Bill places a duty on local authorities to inspect properties for compliance with the functional standards when requested to do so by the owner. The local authority should provide the owner with a building standards assessment, identifying measures that fall short of the functional standards. As one of the main problems with existing “letters of comfort” is the lack of consistency between local authorities, both in content and cost, the format of the building standards assessment should be consistent throughout Scotland. The fees charged by local authorities should also be set nationally in the interests of fairness and may not differ significantly from the average of those currently charged for “letters of comfort”.

47. A building standards assessment would be against the standards in force at the time of the assessment and not against those in force when the work was done. This would simplify the assessment process and have the effect of penalising those who had not had a completion certificate accepted at the time of building work, should the standards have risen in the interim. The assessment of existing buildings against current standards might also possibly lead to upgrading. As the building standards assessment would be against the mandatory functional standards rather than against the performance requirements or prescriptive specifications, it would deal with the overall functional performance of the building. The expanded functional standards are also likely to change less often than the more detailed guidance. Although a buyer could ask the seller to obtain a building standards assessment he or she would have no power to insist. However, the requirement to obtain a building standards assessment might in time become a normal condition of the missives.

**Dangerous buildings**

**Powers of inspection**

48. The death on 29th June 2000 of Christine Foster, who was hit by falling masonry at Ryan’s Bar in Edinburgh, and other similar events with lesser consequences have highlighted the issue of buildings falling into a state of disrepair to the extent that they present a danger to the public. With an ageing building stock, especially in some of Scotland’s major cities, it is important that those who enforce building regulations are in a position to deal with this problem effectively. The Bill makes provision to strengthen local authority powers in relation to identifying dangerous buildings. At present a local authority must have reasonable cause to believe a building is dangerous before being permitted to inspect any premises. Section 36 will allow local authorities to gain entry with a view to identifying buildings which may be dangerous. This would, for example, permit regular inspection regimes to be initiated with a view to identifying potential dangers to the public before they become critical. Local authorities would retain the power to serve a notice requiring an owner to carry out operations to remove the danger. The power would also be retained for the local authority to carry out the necessary work...
where it had not been completed by the owner and to recover the costs of such operations from the owner. Equivalent powers of inspection and enforcement would also exist in relation to buildings in disrepair and buildings where work had been carried out without a building warrant.

Application to existing buildings

49. Although there is no proposal to apply the building standards generally to existing buildings where no building work is being conducted, there may be exceptional cases where it is imperative in the public interest that improvements are made, for example in regard to means of escape from fire. Therefore, section 22 of the Bill provides a power for Ministers to require a particular class of building to be brought up to the standards currently in force. This will be restricted to the issues of public interest outlined in the Bill i.e. securing the health, safety, welfare and convenience of persons in or about buildings and of others who may be affected by buildings or matters connected with buildings and furthering the conservation of fuel and power and the achievement of sustainable development. Similar powers in relation to existing buildings currently exist in section 11 of the 1959 Act, but they are rarely used, and it is not anticipated that retaining such powers in a reformed system would lead to much greater incidence of their use.

Crown exemption

50. At present Crown buildings are broadly exempt from the building control system. The Executive’s policy is that all Crown buildings should achieve the same standard as that required within the Technical Standards and so it can be argued that there has been no damage to the public interest by this exclusion. However, application of the provisions to the Crown is consistent with the Executive’s policy that the Crown should, in general, be subject to regulatory and enforcement arrangements on the same basis as others, except where there is a legitimate reason for exemption, for example on grounds of national security. In line with other Executive Bills binding the Crown, the Bill’s provisions mean that enforcement action in the courts would be confined to seeking a declarator of non-compliance and would stop short of exposing the Crown to criminal prosecution.

51. The Executive’s proposal is that the verification role in relation to Crown buildings will in future be carried out by the central body. This body might choose to contract out some of the verification procedures to competent agents and such agents could be in the public or private sectors.

A central building standards body

52. It is clear that the proposed changes in the building standards system will require changes in the roles and responsibilities of national and local government. Key functions presently carried out by the Executive will continue to be undertaken centrally, though there are several options for the form of any new or reformed central body. The key concern for the majority of respondents to the public consultations was that this body should have clear lines of accountability to Ministers. The central building standards body may take the form of an extended division or unit within the core Scottish Executive or may be an executive agency, directly accountable to Ministers. Final decisions have yet to be made on the type of body and costs issues will clearly be a central concern. The central body will not appear on the face of the
53. Present activities of the Building Standards Division within the Scottish Executive, such as advising Ministers and drafting the building standards and their supporting technical documents, would be carried out by the central body. Under a reformed system, some new activities would be carried out nationally; some of which have been discussed already such as auditing the competence of verifiers (i.e. local authorities at present) and of Approved Certifiers of Design and Construction. The body would also verify the compliance of Crown buildings with building standards.

54. In the consultation virtually all respondents accepted that there was some inconsistency in the application of building standards across Scotland at present and that any reform should strive to reduce this. The idea of functions being undertaken at a national level received broad support as one way of improving consistency.

55. One of the most common suggestions in the public consultation was for more, and better, guidance and for the introduction of some form of technical appeals system to remove dispute resolution from the courts. With the introduction of alternative methods of showing compliance with functional standards there will be a need to provide some form of mechanism for resolving doubt over whether what is proposed does satisfy the functional standards.

56. Section 12 of the Bill therefore makes provision for referring to the Scottish Ministers instances where there is doubt as to whether an application for a warrant meets the requirements of the regulations.

57. Under the current prescriptive hierarchy of building standards, the solutions laid out in the Technical Standards for complying with building regulations are sometimes impractical to achieve. Local authorities therefore have the power to relax or dispense with certain regulations and this happens frequently. The decision to move the mandatory line to the functional standards will dramatically reduce the number of times that the standards need to be relaxed. These standards get to the heart of what the regulations are trying to achieve and so can only rarely be compromised. The Bill makes provision for a reference to Ministers for a view on compliance with building regulations. This is expected to replace relaxations as the normal manner of dealing with innovative or contentious designs. However, there are likely to be rare occasions when it may be necessary to relax the functional standards. This power will be reserved to the central body, rather than delegated to local authorities as at present, to ensure it is used consistently and sparingly.

58. The Explanatory Notes cover in detail the offences created in the Bill and the fines which may apply to these. The offences broadly follow the model in the 1959 Act, that is to say
offences generally relate to non-compliance with notices, the provision of false or misleading information and the obstruction of powers being exercised under provisions in the Bill.

ALTERNATIVE APPROACHES

EC Construction Products Directive

59. The Construction Products Regulations 1991 require that “technical specifications” make use of harmonised European standards. The current system means that each new harmonised test method or product standard requires to be reflected in Scottish regulations. Regulations are currently produced at roughly 2-yearly intervals. In order to keep up with the promulgation of new European standards each new standard would need to be reflected in Scottish regulations within six months of being issued. Presently, the process of developing new regulations and Technical Standards for compliance with these regulations, going out to consultation on these, including consultation with Europe, and laying the regulations before the Scottish Parliament takes around 2 years.

60. It would therefore be impractical to maintain the present system, not only in terms of the timescales involved but in terms of devoting the amount of Parliamentary time to the sheer volume of new regulations which would be required to be produced. Even if there were sufficient resources within the Executive and sufficient Parliamentary time to consider each set of regulations, such a solution would be inefficient and would offer no obvious gains to the construction sector, including the building control functions of local authorities. As explained above, the shift to the new hierarchy of standards means harmonised standards would not need to be reflected in regulations.

Private verifiers

61. Section 7 of the Bill empowers the Scottish Ministers to appoint verifiers, including private sector verifiers. As explained above, the intention is that this power will not be exercised in relation to private sector verifiers for the foreseeable future. If a model were to be developed which would satisfy criteria relating, in particular, to competency, transparency, accountability and impartiality and would be of benefit the general public, such verifiers may have a role to play. As outlined above, they could play a positive role in terms of offering choice to the general public, while possibly offering competitive fee levels. They would offer flexibility and consistency to house builders for example, who could use the same verifier across the country. They may also raise the profile of building standards within local authorities and improve the professionalism of the building standards profession. While recognising present concerns in relation to the ability of the private sector to meet the outlined criteria for verifiers, the Executive considers it more appropriate to include this provision in section 7 than to exclude the possibility altogether.

Auditing verifiers

62. The role of the central body in scrutinising local authorities in relation to their building standards functions has been outlined above. The option of not carrying out this role is not considered appropriate by the Executive. Under the existing system the prescriptive and restrictive structure of building standards where designers have little option on how to comply with building standards means that local authorities and designers alike do at least have the
opportunity to become very familiar with what is required. Under the new system, building standards officers will have to assess a wider range of design options against the standards and this calls for a higher degree of professionalism and competency. It is crucial that in the public interest, building standards continue to be enforced appropriately and consistently in this new environment. The possible future introduction of private sector verifiers increases the need for this auditing role, as they may not have the same proven track record as local authorities.

Approved Certifiers of Design and Construction

63. An alternative to establishing a national audited list of ACDs and ACCs is to leave similar schemes to be established and developed by professional institutes and trades bodies. Some trade bodies such as the Scottish & Northern Ireland Plumbing Employers' Federation have established licensing schemes to encourage professionalism in their membership. The principles of such schemes are consistent with what the central body’s lists of approved certifiers would try to achieve. Indeed, it is anticipated that the central body’s lists would often be created and maintained in partnership with professional and trades bodies. The Executive believes, however, that the framework offered by the central body offers benefits of transparency, accountability and consistency on a national basis. The proposals clearly have to be viewed alongside the central body’s role in auditing certifiers (though the professional and trades bodies may play a central role here). This auditing role should provide more reassurance to the public, who use the services of certifiers and to local authorities, who have to have faith in the certifier’s competence when accepting certification as part of the verification process. The nationally held lists also offer a clearer framework for advancing the proliferation of such schemes and encouraging high professional standards more generally.

Independent advice to Ministers: Building Standards Advisory Committee

64. Section 28 of the Bill provides for the continued existence of the Building Standards Advisory Committee. This is an advisory non-departmental public body established under the 1959 Act, which provides advice to Ministers on their functions under the Act and the operation of the building standards regulations. During the course of the consultations on the proposals the question was raised as to whether this body offered the most effective structure for delivering independent advice to Ministers. The Committee has been a very useful source of advice to Ministers over many years, it is low cost and Ministers regard its functions as essential. Respondents to the consultations were keen to maintain the body’s statutory basis and the Executive agrees that the existing structure offers the most effective framework for providing independent advice to Ministers.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Impact on equal opportunities

65. The current building regulations and Technical Standards created under the 1959 Act make provision for disabled people in terms of access to and within buildings and for facilities provided for disabled people. This will continue to be the case under the new system established by the Bill. The benefits of the new hierarchy of building standards in enabling and encouraging the development of new and innovative design solutions to issues of disabled access are explained in paragraphs 14 and 15.
66. Another positive impact, which could be made on equal opportunities under the new system, is the creation of Approved Certifiers of Design. As explained, ACDs will be able to certify that elements of design work, either of a whole or part of a building, comply with building regulations. It is anticipated that this will provide the opportunity for specialisms to be developed by individuals or organisations in relation to elements of a building’s design. Where one company may specialise in the energy performance or structural design of a building, another may choose to concentrate on issues such as disabled access and facilities. This could therefore raise the profile of disabled access issues and encourage the development of new solutions, as well as encouraging building owners to think of disabled access as integral to the design process.

67. The auditing of the performance of verifiers, i.e. local authorities in the first instance, will provide the opportunity to ensure that standards in relation to disabled access and facilities are being applied appropriately. Ministers will have the power to prescribe procedures and responsibility for the audit of verifiers’ performance and will be able to remove any body as a verifier where that body has failed to meet the performance criteria or for any other reason.

Impact on human rights

68. The Executive considers that the Bill is compatible with the European Convention on Human Rights (ECHR). The Bill raises no substantive human rights issues.

Impact on island communities

69. The Bill makes provision for the Scottish Ministers to relax the building regulations where they feel that it is unreasonable that any provision of the regulations should apply. This may have relevance for island communities under particular circumstances. For example, where the building regulations might normally state that access to approach a building should be provided for fire engines, Ministers may deem it unreasonable to apply this to small islands with no fire station.

70. In relation to the function of the central body to set performance criteria for local authorities, the body may set criteria relating to island and/or rural areas. For example, if there was reason to believe that island areas were receiving a poor service in relation to the processing of completion certificates (e.g. because an authority was keen to inspect completed buildings and were slow to do so in rural areas), the central body might decide to set criteria in relation to this. There is no reason to believe that this is the case at present, though this example serves to illustrate how the needs of such communities could be met.

Impact on local government

71. On 9 January 2002 the Scottish Parliament agreed to a Scottish Executive motion which set out the Executive’s priorities. One of these was to deliver first class public services and the provisions in the Bill should aid local government in fulfilling this role in relation to building standards.
Local authority role

72. It is the intention that local authorities will maintain the central role in the frontline of verifying compliance with building regulations and will retain the sole enforcement role. The provisions in the Bill will, however, entail some significant changes to the role of local authority building standards (formerly building control) departments. The changes will occur in terms of who exercises certain powers, how certain powers are exercised and the environment in which they operate.

Professionalism and public service

73. Under the new hierarchy of building standards, designers will have far more opportunities to offer alternative ways of complying with building standards. This in turn demands a greater degree of professional knowledge from those who verify compliance, as it may no longer be sufficient to be familiar with the restricted solutions offered under the present, more prescriptive, system. The new system should in turn offer the opportunity for those employed in local authority building standards departments to develop their professional expertise and therefore offer an improved public service. This is consistent with local authority ambitions under Best Value.

Scrutiny of local authorities

74. The new auditing role which will be assigned to the central body will clearly be a significant change to the environment in which local authority building standards departments operate, despite the increased emphasis on performance audit under Best Value. There was clear support in the consultations for this role, including from the local authorities themselves. It was recognised that auditing could raise standards in the provision of this public service and improve professionalism within the building standards profession. In extreme cases, the Scottish Ministers would also have the power to remove any body as a verifier if it failed to meet set performance criteria or for any other reason. This is clearly a power which would not be used lightly and without due consideration and discussions with the relevant local authority or private sector verifier, should these be appointed.

Staffing of the central body

75. The extension of the central building standards body’s role from that presently carried out by the Building Standards Division within the Scottish Executive may have minor staffing implications for local authorities. Though it is anticipated that the total number of staff needed to operate the revised building standards system effectively will not be higher than for the existing system, the central body would work in partnership with local authorities and some staff might be drawn, either permanently or on secondment, from local authorities. This is not anticipated to prove onerous to local authorities. It should also provide benefits for building standards professionals within authorities by contributing to an enhanced career structure for these professionals.

Reference to Ministers

76. Where there is a doubt between the owner and the verifier about the extent to which a building or design meets the building standards the matter will be capable of reference to the central body. Where an issue is referred to the central body, the central body may recover part of
the fee from the verifier. Regulations will set out rules to establish when issues should be referred to the central body and whether a fee might be recoverable by the central body.

**Building standards registers**

77. Section 21 imposes a duty on local authorities to hold a register of information relating to building warrants and accepted or unaccepted completion certificates in its area, as well as any other information which may be required by regulations. Local authorities already hold records relating to such issues and the intention of this provision, though extending the range of information held, seeks to ensure that the information is held in a more consistent and systematic way across the country. There was widespread support from authorities on this question.

**Building standards assessments**

78. A new duty placed on local authorities by the Bill is to provide a building standards assessment when required to do so by an owner. This would provide an assessment of the compliance of the building with regulations currently in force and as explained above, is intended to replace the existing “letters of comfort” system. As local authorities already issue these letters, the provision of the new assessments is not expected to impose a significant burden. Where this might have resource implications for authorities, recruitment should be possible as the fees set for these assessments should cover their cost.

**Private sector verifiers**

79. Section 7 of the Bill empowers the Scottish Ministers to appoint verifiers, who may be private sector bodies or individuals, as well as the local authorities who perform this role at present. This power may be used should a model for their terms of appointment be developed which would satisfy the criteria for verifiers outlined above. Should this ever be the case, this would clearly have significant implications for local authorities. Competition (on the England and Wales model) between private sector verifiers (“Approved Inspectors”) and local authorities may offer benefits in terms of the standard of service offered to the public and the standards of professionalism of the verifiers. However, it may have implications for the ability of local authorities to generate fee income. This would clearly have to be carefully considered should such a system be introduced in Scotland.

**Advice to local authorities**

80. Under the new system, there would be a greater role for the central body to provide formal advice to local authorities than exists under the current system. There was a clear desire expressed by the local authorities, in response to the first consultation document, to see more advice and assistance provided nationally. At present, the amount of assistance which can be given by the Scottish Executive is limited, both by resources and by the 1959 Act’s delegation to the local authorities of interpretation of the Technical Standards. In a reformed system the central body could respond to requests from verifiers (currently local authorities) to assist them in particularly unusual or complex projects. A design team may be seeking to show compliance directly with functional standards in a complex building where the verifier does not feel it has the experience or knowledge to properly assess the proposals. In these situations, a verifier, with the central body’s agreement, should be able to transfer the verification of the building or a part of the building to the central body. In so doing, the verifier may also have, of course, to remit the appropriate percentage of the fees involved.
Dangerous buildings

81. As explained in paragraph 43, section 36 gives greater powers to local authorities than exist presently for the purpose of identifying dangerous buildings. This offers the possibility for local authorities to establish regular inspection regimes should they choose to exercise the power in this way. The Bill does not define any kind of duty to establish such regimes and this would therefore be an internal matter for local authorities, taking factors such as resource implications and the age of the building stock into account.

Impact on sustainable development

82. In April 2002, the Scottish Executive set out its key statement on sustainable development. The Executive’s vision for sustainable development, as set out in Meeting the Needs … Priorities, Actions and Targets for Sustainable Development in Scotland includes “minimising the impact of our actions on future generations by radically reducing our use of resources and by minimising environmental impacts” and “to live within the capacity of the planet to sustain our activities and to replenish resources which we use”. In pursuit of this vision, the Executive’s main priority areas are resource use, energy and travel. The provisions in this Bill will enable the Executive to meet this commitment more efficiently. Paragraph 14 sets out how the new hierarchy of standards will encourage new solutions to present and future sustainable development issues.

83. The Bill sets out furthering the achievement of sustainable development and furthering the conservation of fuel and power as purposes of building regulations, and therefore the commitment to make a clear contribution to the sustainable development agenda is explicit. A recent amendment of the existing building regulations set the highest standards for thermal insulation and energy efficiency in the UK and the intention is to carry through these standards to the new system. There is still room for improvement in performance and the new standards system will have a part to play in achieving it. (New building regulations will of course be subject to Parliamentary approval.)
This document relates to the Building (Scotland) Bill (SP Bill 65) as introduced in the Scottish Parliament on 18 September 2002

BUILDING (SCOTLAND) BILL

POLICY MEMORANDUM

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