LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

AGENDA

13th Meeting, 2017 (Session 5)

Wednesday 3 May 2017

The Committee will meet at 11.00 am in the James Clerk Maxwell Room (CR4).

1. **Building Regulations in Scotland:** The Committee will take evidence from—
   - Nicola Barclay, Chief Executive, Homes for Scotland;
   - Malcolm McLeod, Director, NHBC Scotland;
   - Stephen Kemp, President, Scottish Building Federation;
   - Dave Aitken, Local Authority Building Standards Scotland;
   - Jim Gilmour, Board Member, Federation of Master Builders Scotland.

2. **Subordinate legislation:** The Committee will consider the following negative instrument—

3. **Consideration of evidence (in private):** The Committee will consider the evidence heard at agenda item 2.

4. **Work programme (in private):** The Committee will consider its work programme.

Clare Hawthorne
Clerk to the Local Government and Communities Committee
Room T3.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5232
Email: Clare.Hawthorne@parliament.scot
The papers for this meeting are as follows—

**Agenda item 1**

Note by the Clerk LGC/S5/17/13/1
PRIVATE PAPER LGC/S5/17/13/2 (P)

**Agenda item 2**

Note by the Clerk LGC/S5/17/13/3

**Agenda item 4**

PRIVATE PAPER LGC/S5/17/13/4 (P)
PRIVATE PAPER LGC/S5/17/13/5 (P)
Local Government and Communities Committee

13th Meeting 2017 (Session 5), Wednesday 3 May 2017

Building Regulations in Scotland – Note by the Clerk

Purpose

1. This paper provides background information on the Committee’s evidence session with stakeholder organisations on building regulations in Scotland.

Background

2. The Committee agreed to undertake a short, focussed piece of work on the building standards verification scheme.

3. The Building (Scotland) Act 2003 gives Scottish Ministers the power to make building regulations to—

   • secure 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;
   • further the conservation of fuel and power; and
   • further the achievement of sustainable development.

4. Scottish Ministers re-appointed all 32 Scottish local authorities as verifiers under section 7 of the Building (Scotland) Act 2003 from 2011 to April 2017. Their role is to implement the regulations set out by the Building (Scotland) Act 2003 when building work or a conversion takes place, and grant building warrants when they are satisfied the work meets requirements.

5. Current building warrant and associated fees are set out in The Building (Fees) (Scotland) Amendment Regulations 2004.

6. The Scottish Government launched a consultation on increasing these fees which closed on 9 January 2017 and the intention is to introduce new fees on 1 April 2017. The fees structure has not changed since 2005. The Scottish Government intends to publish the responses to the consultation imminently.

Local Government and Communities Committee Consideration

7. At its meeting on 1 February 2017, the Committee agreed to launch a call for views and online survey on building regulations in Scotland. The call for views
and online survey were issued on 7 February 2017 and closed on 28 February 2017. The Committee received 33 responses to the call for views, 26 from organisations and 7 from individuals. One of the responses\(^1\) represented the views of 8 members of the organisation. There were 2\(^2\) duplicate responses to the call for views and one response was endorsed by 3 other organisations\(^3\).

8. The responses received to the Committee’s call for views can be found at the following link:

http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/103554.asp

9. A summary of the written submissions received was also produced and can be found at the following link:


10. The Scottish Parliament Information Centre (SPICe) produced a summary of the responses received to the online survey and that can be found at the following link:


11. At its meeting on 3 May 2017, the Committee will take evidence from Homes for Scotland, NHBC Scotland, the Scottish Building Federation, Local Authority Building Standards Scotland and the Federation of Master Builders Scotland.

12. Written submissions from Homes for Scotland, NHBC Scotland, the Scottish Building Federation and Local Authority Building Standards Scotland are attached at Annexe A.

Next Steps

13. Following the evidence session, the Committee will have an opportunity to reflect upon the evidence received and consider what, if any actions, it wishes to take.

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1 Scottish Disability Equality Forum response.
2 Inverclyde Council, Aberdeen City Council.
3 Homes for Scotland’s response was endorsed McCarthy and Stone, the Walker Group and Miller Homes Scotland and similar responses were submitted from Whiteburn Projects Ltd, Robertson Homes, Springfield Properties, Persimmon Homes East Scotland, Persimmon Homes West Scotland, Persimmon Homes North Scotland.
Annexe A

Written Submission from Homes for Scotland

1. Homes for Scotland (HFS) is the representative body for the home building industry in Scotland, representing some 200 organisations who together help deliver 95% of all new homes built for sale each year as well as a significant proportion of affordable homes. We are committed to improving the quality of living in Scotland by providing this and future generations with warm, sustainable homes in places people want to live.

2. HFS represents members on a wide range of issues affecting their ability to deliver much needed homes. Our views are developed and endorsed by operational committees utilising the skills and experience of key representatives drawn from member companies.

3. The performance of the building standards verification service plays a crucial factor in the delivery of new homes of all tenures. Feedback from our member companies raises concerns regarding local authorities’ capacity and ability to deliver this service, reporting significant delays to completions, and generally describing the service as poor and deteriorating. Ensuring the Building Standards Service is fit for purpose will be vital if the Scottish Government is to deliver year on year growth in housing completions as well as the overall goal of delivering 50,000 new affordable homes by the end of this parliament.

Should verification of building standards be extended to other organisations other than local authorities?

4. Homes for Scotland (HFS) believes that there is an opportunity to extend the verification function to other reputable organisations such as warranty providers who have a vested interest in the quality and durability of new build homes and the standards they have been built to.

5. We believe opening up the building standards verification function to warranty providers offers a sensible approach to the future of building standards verification as well as offering incentives to improve performance to organisations already undertaking this role on behalf of the Scottish Government.

6. We are aware that in England non-local authority organisations can act as building standards verifiers. This includes organisations such as NHBC, Premier Guarantee and LABC (Local Authority Building Control) that can provide verification services as well as warranty provision for new build homes. Their involvement in warranty provision places them in an ideal position to put in place inspection regimes to ensure that new homes comply with appropriate building regulations and relevant British Standards, as well as their own technical standards. Indeed, given the involvement of LABC in such provision, there does
not appear to be any conflict in interest of an organisation providing both services.

7. HFS is aware of the concerns raised around private sector verification within the APPG report into the Quality of New Build Homes in England. It should be understood that these concerns are explicitly related to new build homes in England and Wales, not Scotland where currently only local authorities can undertake the role of building standards verifiers. Whilst this is the case we are aware from our discussions with Scottish Government representatives that these concerns are not aimed at every private verifier in England. Nevertheless, we understand that these concerns can have an impact on the perception of new build homes in Scotland. We have therefore undertaken work with our members to help address many of the issues raised by the report.

8. The feedback we have received from members raises concerns regarding local authorities' capacity and ability to provide a verification service that supports the delivery of the new homes that this country needs. While our members experiences with the service is mixed, with some authorities operating more effectively than others, overall our members are of the opinion that for the amount the process costs and uncertainties of timescales and outcomes, the service provided is generally poor and deteriorating. The Scottish Government’s own research (Pye Tait, 2016) notes that the time taken to grant a building warrant has increased 19% between the years 2013/14 and 2014/15, going against one of the main key performance indicators which aims for a year on year reduction in turnaround of building warrants.

9. Extending verification services to other reputable organisations can only help local authorities free up resource to deal with householder applications and commercial development, as well as provide wider public services including, for example, statutory enforcement, safety at sports grounds, emergency planning, reporting on licencing for premises and structures. We would therefore welcome the opportunity for the verification function to be extended to new build home warranty providers in Scotland.

**Should procedural regulation specify a minimum requirement for the inspection of ongoing building works, to ensure compliance with building standards?**

10. Yes. HFS believes that inspections should always take place for items contained within the Technical Handbooks that are not already covered by approved certifier of design schemes; where warranty providers do not already undertake inspections; or where the designer does not hold sufficient professional indemnity insurance to cover such failures.

11. As noted within question one, warranty providers already undertake a robust inspection regime on items covered within their technical guidance.
Should there be a statutory system to provide redress for new home buyers whose properties are subsequently found not to meet building standards requirement?

12. No. New home buyers are already able to find redress by way of the Consumer Code for Home Builders which was developed to make the home buying process fairer and more transparent for purchasers. As part of this, it provides an independent dispute resolution service for home buyers who believe their builder has failed to meet the requirements of the Code. This includes, amongst other items, the provision of information of the standards to which the home is being built (e.g. relevant building regulations, planning conditions and home warranty body technical requirements) during pre-reservation, reservation and pre-contract periods. The Code applies to complaints arising and made within two years of the date of legal completion of the first purchase and covers all home builders registered with the UK’s main new home warranty providers (NHBC, Premier Guarantee and LABC Warranty).

13. New home buyers can also find redress through their warranty provider. In terms of NHBC, we understand that the warranty cover prescribes that all work complies with all relevant building regulations and other statutory requirements relating to the completed construction work and that structural works are undertaken to the appropriate British Standard codes. NHBC also offers a dispute resolution service.

Are the current building warrant and associated fees set at the correct level?

14. This question directly relates to the recent Scottish Government consultation on Building Warrant Fees and the aspiration that the Building Standards System becomes fully cost recoverable. It is worth noting that, given the impact the proposals could have on the home building sector, we were disappointed that the timescale for the consultation was shortened from 12 to 8 weeks and, additionally, that the consultation period ran during the December holiday period. In practice, with many companies working toward end of year targets and likely under-resourced over the Christmas period, this resulted in the industry only having around 6 weeks to review and respond to the proposals. We welcome this additional scrutiny of the proposals set out by the Scottish Government.

15. As noted within the HFS consultation response, and following additional evaluation of the evidence put forward by the Scottish Government, we do not believe that there is sufficient evidence to justify an increase in building warrant fees at this time. The reasons for coming to this conclusion are outlined below.

Statistics & Data

16. The financial and performance statistics referred to within the consultation and supplementary evidence are unclear given that they do not provide a detailed breakdown of the income and costs for the overarching Building Control function.
as reported by the Scottish Local Government Financial Statistics (SLGFS) or that of the verification service provision as reported by the Local Authority Building Standards Annual Return (LABSAR). Trying to compare ‘apples with apples’ to draw conclusions regarding the financial operation of the system is made more difficult given there have been significant changes to accountancy and reporting practices between 2011 and the present day. The table below shows the relevant Building Control figures extracted from the SLGFS and highlights the lack of detail reporting as noted above.

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Table 1. Scottish Local Government Financial Statistics 2010-2015

17. Following a review of the SLGFS, LABSAR and the Evaluation of the Performance of Local Authorities as Building Standards Verifiers (Pye Tait, 2016), we have produced a table that cross-references the figures provided for both Building Control and verification services and an analysis of the income and costs below.
Table 2. Analysis of Local Government Financial Statistics and Building Standards Annual Returns

Objectives for Building Warrant Fee Increases

18. The objective for building warrant fee increases is clearly noted within the consultation paper as being to ensure the Building Standards System is fully cost recoverable, and that fees are charged to the “true users” of the system to cover the costs to the public purse for providing the service. Furthermore it is noted that “true users” are:

“those who apply for permission to build, through the submission of building warrant applications, and are required to construct buildings in such a way that satisfy matters that are in the public interest.”

19. However, we understand that the Building Standards Service, currently provided by Local Authority Building Standards Scotland (LABSS), has a much wider remit and stakeholder base than solely those seeking permission to build through the submission of a building warrant application. LABSS outlines a number of services it delivers outwith verification as including: statutory enforcement, safety at sports grounds, emergency planning, reporting on licencing for premises and structures, solicitors property enquiries for letters of comfort, and street naming and numbering. It is clear that the Building Standards Service is not just used by the development community through the verification process but also aims to deliver wider public benefit.
20. Both LABSAR and Pye Tait reports highlight that the building standards verification service currently operates at a surplus, making a significant contribution to the overarching building control budget. Table 2 shows the derived balance of Building Control finances where verification and non-verification incomes and expenditures are isolated. In referring back to the terminology used within the consultation, the “true users” of the building standards system already subsidise the non-verification related services provided by local authority building control. Indeed, Pye Tait reports that one verifier describes building standards as a “cash cow” for their local authority which leads to the suggestion that the “profitable” element of the building standards service is being targeted, with surpluses used to fund other services within a local authority, given they are not ring-fenced to support the service they are derived from. The figures contained within the Pye Tait report for 2013-14 and 2014-15 certainly support this position, suggesting that fee income, as a percentage of staff costs, has risen from 141% to 150% across these years. Yet this comes at a time where the sector has experienced a significant drop in the performance of verification services across local authorities.

21. If the objective is to make the Building Standards System fully cost recoverable, firstly greater detail should be provided with regard to the income and expenditure relating to the system and, secondly, revenues generated from the system must be ring-fenced to support the service. Additionally, the Scottish Government and local authorities should consider how costs are recovered for each of its services, not simply placing an additional financial burden on users who utilise a verification service that already produces significant surplus to support the system. This is the only way in which the service can begin to be made more sustainable and transparent in the long-term.

Fees Discounts and Further Efficiencies

22. Our members continue to highlight that there is little recognition, financially or in terms of service, of the efficiencies experienced by local authorities when dealing with warrant applications that have gone through an approved certifier of design or through the Scottish Type Approval Scheme (STAS). Whilst the sector welcomes proposals to increase the discounts available through the approved certifier’s schemes, there are no such discounts available for warrants pre-processed through STAS, where fees are paid for STAS approvals as well as full fees paid on individual warrant applications thereafter. In effect, home builders are double-charged through the verification process.

23. More generally it is noted that home building offers significant efficiencies given the level of repetition of house types on any given development. To illustrate the resource savings by a local authority, it is useful to consider a typical 100 unit development with construction costs of £100,000 per unit and a warrant fee in excess of £25,000. Given the likelihood of around 10 different house types repeated across the development, a building control officer could reasonably be required to assess only 10 different house types. In this situation the fee charged is not truly reflective of the resource required by a local authority to verify the development.
Fees for a Service or Wider Public Benefit

24. The proposals put forward by the Scottish Government seek to incorporate the costs of Building Standards Division into the building warrant fee. The industry is not supportive of this proposal. We believe there should be a clear distinction between the work undertaken by the Scottish Government for public benefit and that of a local authority delivering a service to the end user.

25. It is our view that it is the role and responsibility of the Scottish Government to undertake research, update legislation, consult stakeholders and produce guidance that ensures Scotland’s built environment is constructed in a way that is safe and sustainable, delivering wider social and economic benefits to Scotland’s people. As building warrant fees are a mechanism to support the verification service, they should not be used to fund the activities and responsibilities of the Scottish Government which should be drawn from general taxation.

Any other issues relating to the regulations which you wish to bring to the attention of the Committee?

Performance of Local Authorities in their Role as Building Standards Verifiers

26. As previously noted, the feedback we have received from members raises concerns regarding local authorities’ capacity and ability to provide a verification service that supports the delivery of the new homes that this country needs. While our members’ experiences with the service is mixed, with some authorities operating more effectively than others, overall our members are of the opinion that for the amount the process costs and uncertainties of timescales and outcomes, the service provided is generally poor and deteriorating. The Scottish Government’s own research (Pye Tait, 2016) notes that the time taken to grant a building warrant has increased 19% between the years 2013/14 and 2014/15, going against one of the main key performance indicators which aims for a year on year reduction in turnaround of building warrants.

Long-term Thinking Around Scotland’s Built-Environment Systems

27. We are keen that the Scottish Government explores alternative options to achieve full cost recovery for the Building Standards System. We would argue that the current approach to building control is fragmented, resulting in significant variances in income, costs and performance across Scotland’s 32 local authorities. Given the sector is also considering proposals put forward under the Planning Review, it is worth considering how a more strategic, national approach to built environment services constructed around a more centralised system, structured around core strategic planning areas, could help deliver financial efficiencies and drive performance improvements in the service.
28. Taking a holistic approach to built environment services, integrating planning and building standards services could help generate a more streamlined and aligned approach to the consents process as well as provide greater joined-up thinking across built environment professions.

Michael Barton-Maynard
Policy Manager
Written Submission from NHBC Scotland

1. NHBC welcomes this opportunity to provide written evidence to the Local Government and Communities Committee as it conducts an inquiry into building regulations in Scotland. In particular, we welcome this timely inquiry as Scottish Ministers are soon to reappoint Building Control verifiers and it will provide a level of consultation that otherwise might not have taken place.

About NHBC

2. Established in 1936, NHBC is the home warranty provider of choice, currently insuring over 1.6m homes, with a market share of approximately 80%. Over the course of our history, we have provided warranty for around 30% of the total existing housing stock in the UK, which equates to over 7 million homes.

3. NHBC is an independent and non-profit distributing company. With no shareholders, we are able to invest any surplus generated into our purpose of raising standards to improve the quality of UK house-building. As an authority on the housing industry, active in research and development, we work with governments, parliaments and stakeholders to help shape housing policy. The ultimate governing body is the NHBC Council, which comprises the stakeholder bodies as listed in Appendix A.

4. NHBC’s prime purpose is to engage with builders and support them in improving the construction quality of the new homes they are building. This purpose is underpinned by NHBC’s Virtuous Circle business model (see opposite). NHBC’s checking and inspection of building work for Building Control purposes complements this model. The aim is to ensure that homes are built to a high standard and the likelihood of defects being built into new homes is minimised.

5. NHBC is the largest single provider of Building Control Services in the UK and have been delivering this service since 1985. Last year we carried out a full Building Control service i.e. plan checking and on-site inspection to nearly 90,000 new homes.

Background

6. The Scottish Government will soon take a decision to appoint verifiers of building standards for new homes for a five year period this spring. The Building (Scotland) Act 2003 came into force on 1 May 2005 and gave the Scottish Minister the authority to appoint Verifiers, Verifiers being defined under the Act.

7. With the introduction of the new system in 2005 the Minister decided that the responsibility for verification of building standards should be placed with local authorities for their geographical areas, at that time the Minster stating that this was to allow the new system to “bed in” with the clear inference that alternative
forms of verification delivery would be considered in the future. The Act which NHBC commented on at draft and Bill Stage was written with the express intention of allowing the Minister to appoint verifiers other than local authorities.

Should verification of building standards be extended to organisations other than local authorities?

8. Yes – NHBC provides this service in England and Wales to the benefit of the end user and Government and believes if it is given this opportunity in Scotland similar benefits would arise.

9. This is not a mandatory public service and the local authorities are licensed by the Minister to deliver this service. There is no legal obligation on local authorities to provide a full Building Control service.

10. The Building (Scotland) Act 2003 was written to enable the Building Control service in Scotland to be delivered by alternative providers working alongside local authorities. It requires no secondary legislation to appoint alternative providers but requires Ministerial approval.

11. Yet 14 years since it was enacted with this express purpose successive Ministers have steadfastly refused to approve any organisations other than local authorities to deliver this service. This is despite the fact that house builders continue to experience significant delays in receiving both building warrant consent and acceptance of completion certificates.

12. An NHBC registered builder benchmarked the time taken to obtain a stage 2 building warrant from a number of different Scottish local authorities. This showed that time could stretch from 9 weeks to 98 weeks. For a stage 1 building warrant the timings ranged from 2 weeks to 45 weeks.

13. If you extrapolate this common experience across the house building sector in Scotland, significant delays to housebuilding completions will impact on the Scottish Government’s ability to reach its yearly housing targets and the overall goal of completing 50,000 new affordable units by the end of this parliament.

14. In reality the current delays inherent in the system are encouraging builders to start work without the proper Building Control consents in place and in addition to this being illegal it raises questions of how compliance can be demonstrated or checked.

15. Opening up the building control service to more providers would offer choice and competition in this sector which would combat these delays leading to service improvements that would increase the build rate of new homes in Scotland without compromising safety.
Consumer protection

16. Local authorities are not liable to the home owner if they fail in the delivery of the Building Control service unless it can be proven that they were intentionally negligent. In England and Wales NHBC provide added insurance to protect homeowners if it fails in delivering its Building Control obligations. NHBC therefore has a vested interest in ensuring its plan checking and on-site inspection processes are robust.

17. Compliance with Statutory Requirements is a requirement of demonstrating compliance with NHBC Technical Standards and accordingly our Building Inspectors in Scotland are trained to check new homes under construction are complying with the Building Standards.

18. Over the last five years local authorities provide an average of 0.54 visits per building warrant issued based on 40,219 applications. For larger developments where a warrant will cover a number of houses this means that visits to individual properties will be significantly lower. In comparison NHBC carries out a minimum of 4 Key Stage inspections on every new home, this being supplemented by “frequency inspections” which are programmed on a regular cycle dependent on project risk and referred to in paragraph 24.

Service improvement

19. Local authorities have not delivered on their service improvement obligation. The government’s own evaluation suggests that the time taken to grant warrants will actually increase. Only five local authorities have reduced the average time to issue warrants and the total number of working days dedicated to the verification process is increasing.

20. The time taken to process building warrant applications is generally not improving and this, in conjunction with a flawed inspection regime, is causing delays and frustrations in commencing projects.

21. The shortage in technical skills extends across the construction industry and equally affects Scottish local authority building control departments. NHBC has its own bespoke internal training academy where we can identify and train employees to meet demand. The current local authority building control departments are under resourced. This was clearly identified in the Government’s research published in March this year entitled “Evaluation of the performance of local authorities in their role as building standards verifiers. Following statement about local authority performance from that evaluation” Given the constraints on public expenditure along with the overall lack of skilled professionals this is unlikely to improve.
22. As referred to NHBC has a comprehensive nationwide inspection process whereby we ensure that every home covered by NHBC warranty receives a number of inspections. The builder is obliged to call out our inspectors to inspect at a number of key stages during construction. These are: the foundation when it is being excavated and before the concrete is poured; the superstructure - usually when it is at mid-build (to check the construction of walls and avoid an Edinburgh School situation); pre-plaster to check wiring, plumbing and insulation before it is covered; and a final inspection when the home is complete. Additionally our inspectors carry out “frequency inspections” dependent on the risk level given to the site – High requires a visit every 5 days, Medium every 15 days and low every 30 days. NHBC also undertake fire safety inspections in flats to check means of escape and fire stopping, and benchmark the specification of specific work at the start of projects e.g. roof coverings.

‘Profit before compliance’?

23. The Scottish Government’s independent evaluation of the current verification process claims that current system does not put ‘profit before compliance’. However, this assertion is not supported by any evidence and neatly evades any reference to the Edinburgh Tenement Repairs scandal.

24. In England and Wales it is an offence under the Building Act 1984 to put profit before compliance. Such statute could be replicated in Scottish legislation to mitigate any perceived risk on the role of private sector verifiers.

25. All members of NHBC’s Building Control Department have to demonstrate their competency and professionalism when NHBC applies for its Building Control license in England and Wales. Furthermore the majority of NHBC’s Building Control Surveyors are professionally qualified (mainly RICS) and in addition to NHBC’s own employment policies are bound by rules governing the membership of their professional institution.

Should procedural regulations specify a minimum requirement for the inspection of ongoing building works, to ensure compliance with building standards?

26. As referenced in paragraph 18 of this submission, local authorities currently average around 0.54 visits per building warrant – not per property. Setting procedural regulations to set a minimum requirement could lead to improvement in service if this is properly established in terms of linking inspection on a project by project basis to construction risk. The inspections would need to be meaningful and have an inbuilt process for re-inspection and recording. However the recent government research evaluating the performance of local authority verifiers stated that this service is “Facing considerable resourcing pressures” so increasing the requirement for a comprehensive inspection process will increase
this pressure and will lead to additional service delivery challenges and will increase public sector costs.

**Should there be a statutory system to provide redress for new home buyers whose properties are subsequently found not to meet building standards requirements?**

27. As referenced in paragraph 16, local authorities are not liable to the home owner for a failing service. By allowing NHBC to verify building standards in Scotland, home owners could benefit from added consumer protection through linked inspection and insurance and warranty cover and would therefore have a system of redress.

28. In terms of statutory system of redress, NHBC would point towards what has been achieved via the industry’s approach to self-regulation and how this has improved overall consumer satisfaction against increasing burdensome regulation on the house building sector. Since the Barker Review in 2004, the UK home-building industry has significantly improved levels of customer satisfaction. NHBC was directly involved in establishing the processes behind the national new home customer satisfaction surveys which have been in place since 2004. The industry continues to demonstrate its voluntary commitment to maintaining high standards of product delivery which in turn leads to high levels of customer satisfaction.

29. NHBC was instrumental on leading on the development and introduction of the Consumer Code for Homebuilders and the most recent Code requirement came into effect on 1st April 2013 and applies to all new private home-buyer reservations from that date. It contains a set of 19 requirements and principles that requires the home-building industry to deal effectively with its customers throughout the entire home-buying process.

30. From pre to post occupation, the Code helps ensure a consistently high level of customer service is maintained by monitoring customer satisfaction and industry compliance. Where there are disputes about whether a builder has complied with the Code and the home buyer is out of pocket as a result, there is an independent dispute resolution service.

31. The Code is enforced by a change in the Rules for NHBC and those of other co-operating warranty bodies; gross non-compliance of the Code would be a breach of the Rules and can end up in the ultimate sanction - being removed from all co-operating warranty bodies’ registers.

32. Customer satisfaction and industry compliance with the Code is measured and data on performance reported back to the industry, government and consumer interest bodies.
Are the current building warrant and associated fees set at the correct level?

33. The aim of the current consultation on building warrant fees is purely aimed at achieving full cost recovery and making the local authority service sustainable over time. It is not clear if the fee increase proposed is being linked to the delivery of a better, higher quality service which should be the fundamental objective.

34. The fees for building warrants are not “ring fenced” against that service therefore the income is likely to be used to support activities across local authority budget expenditure rather than being used specifically to address resource and efficiency with the local Building Control department.

35. The current fee income is structured so that the cost of large applications for building warrants are supporting the cost of processing smaller building warrant applications, this is itself is patently unfair and suggests that the proposed approach is a blanket exercise not properly addressing the identified cost issues in the system.

36. The fee increases are being proposed to meet the cost of the service to the public purse. Building standards is not a mandatory public service as it is licensed by government; consequently, if the service is deemed a burden to the public purse, NHBC questions why local authorities continue to deliver this service without competition.

37. The fee increases as proposed are stated as delivering £2m to support local authorities, equating to each local authority receiving £62,500. This is not a significant amount if the aim is to support improvements and recruit new resources into the building standards service. It is also not clear if the majority of the funding will be shared by Scotland’s two largest authorities, Edinburgh and Glasgow.

38. If the fee structure is to be revised, improvements to the service could be achieved if an improved service is linked to an increased fee. If fees are increased uniformly it will not lead to an improvement in the service.

39. The fee structure should be broken down and split between the two distinct operational processes carried out by local authority verifiers; i.e. the fee should be apportioned between the plan checking process and the number, type and quality of site inspections carried out. The latter inspections should be clearly linked to a risk management strategy and should be capable of being measured to determine the extent of meaningful support they provide in terms of identifying breaches to Building Standards. The current performance framework is flawed in this regard.
### Appendix A: The NHBC Council

The following organisations are represented on the NHBC Council:

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<th>Organisation</th>
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<td>NHBC Warranty Holders</td>
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<td>British Property Federation (BPF)</td>
<td>Institution of Civil Engineers (ICE)</td>
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<td>British Standard Institute</td>
<td>Joseph Rowntree Trust</td>
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<td>Building Research Establishment (BRE)</td>
<td>Law Society</td>
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<td>Chartered Institute of Housing (CIH)</td>
<td>National Association of Estate Agents (NAEA)</td>
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<td>Construction Products Association (CPA)</td>
<td>National Housing Federation (NHF)</td>
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<td>Council of Mortgage Lenders (CML)</td>
<td>Royal Institute of British Architects (RIBA)</td>
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<td>Design for Homes</td>
<td>Royal Institution of Chartered Surveyors (RICS)</td>
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<td>Energy Saving Trust</td>
<td>Trading Standards Institute (TSI)</td>
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In Scotland NHBC’s operations are overseen by a Committee which is Chaired by Sir Muir Russell and has representation from the following organisations.

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<tr>
<th>Organisation</th>
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<tr>
<td>Council of Mortgage Lenders Scotland</td>
<td>The Law Society of Scotland</td>
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<td>Scottish Federation of Housing Associations</td>
<td>Homes For Scotland</td>
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<td>Scottish Building Federation</td>
<td>The Royal Institution of Chartered Surveyors Scotland</td>
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<td>The Royal Incorporation of Architects in Scotland</td>
<td>Independent representing consumer interests and previous Council Member of Consumer Focus Scotland</td>
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<td>The Mackintosh Environmental Research Unit</td>
<td>NHBC Scottish Legal Counsel-Shepherd and Wedderburn</td>
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<td>Members of NHBC ’s Executive team and NHBC Scotland Director</td>
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Written Submission from the Scottish Building Federation

Introduction

The Scottish Building Federation is delighted to have the opportunity to submit evidence to the Scottish Parliament Local Government and Communities Committee on building regulations in Scotland.

SBF is Scotland’s leading construction employers’ trade federation representing hundreds of construction companies throughout the country, from Orkney to the Borders. SBF was originally established in 1895 to represent the interests of employers working in the Scottish building industry and to foster cooperation amongst its members on the basis of shared ideals, collective needs and collaborative business practices. More than 120 years later, SBF adheres to those same founding principles and continues to represent the interests and aspirations of construction employers located throughout the length and breadth of Scotland. Above all, our mission is to ensure that the contribution the construction industry makes to the Scottish economy is recognised and valued – and to promote and advocate the positive economic, policy and environment our industry needs for a sustainable long-term future.

Should verification of building standards be extended to organisations other than local authorities?

There has been some ongoing discussion on this matter amongst SBF members. In particular, there is a view amongst many members that outsourcing building control from planning authority in-house staff to approved certifiers could be an effective means of speeding up decision-making and improving consistency. We would support further work being undertaken to explore the potential advantages and disadvantages of such an approach or even to introduce a pilot to trial such an approach on the ground.

Should procedural regulations specify a minimum requirement for the inspection of ongoing building works, to ensure compliance with building standards?

This could be a relatively blunt instrument for ensuring compliance with building standards and is likely to impose substantial additional pressure on planning and building control at a time when these services are already over-stretched. Rather than setting blanket minimum requirements, it would be preferable to consider each project on a case by case basis and to set minimum requirements for the inspection of ongoing building works according to the individual likelihood of building faults occurring and the associated risk.
Should there be a statutory system to provide redress for new home buyers whose properties are subsequently found not to meet building standards requirements?

There are existing consumer codes and warranties covering the new homes sector which we believe already provide appropriate protection for new home buyers.

Are the current building warrant and associated fees set at the correct level?

SBF has already submitted evidence to the Scottish Government’s recent consultation on building warrant fees. In our submission, we emphasised the importance of ensuring that planning and building control departments are suitably resourced to be able to operate effectively and efficiently. At the same time, our members have identified a number of other key concerns in their dealings with planning and building control, not all of which will necessarily be fully addressed through an increase in resources. These include the time taken to reach decisions, a general lack of consistency in decision-making and the need for more flexibility in the interpretation of building standards to enable development, particularly on inner city sites.

We acknowledge the rationale behind the Scottish Government’s proposal to increase building warrant fees, namely that the current fees structure has remained unchanged since its introduction in 2005. At the same time, we are also strongly of the view that any increase in building warrant fees must be accompanied by a corresponding improvement in the standard of service provided – and would seek assurances that improved performance of planning and building control will be a quid pro quo of any increase in fees. At the same time, we have also urged the Scottish Government to consider a more wide-ranging performance review of building control, to include the publication of updated guidance designed to encourage greater consistency in decision-making.
Written Submission from Local Authority Building Standards Scotland

LABSS (Local Authority Building Standards Scotland) is a not-for-profit membership organisation representing all local authority building standards verifiers in Scotland. We are dedicated to protecting the public interest delivered by public sector expertise to ensure buildings are safe, accessible, dry and warm.

Our written response follows the format of the related online questionnaire and is as follows:

Should other organisations be authorised to undertake building standards verification work? Response – No

Competition would improve service standards? Response – No

There is evidence that competition has reduced service standards in England and Wales. Local Authority Building Control (LABC) in the LABC submission to the APPGEBE Inquiry into the Quality of New Build Housing in England, 2015 included survey results that showed that 73% of the complaints received by local authorities over the 36 month survey period were about other organisations providing the building control service – and this didn’t take into account complaints that were made direct to the other building control providers.

Competition would result in reduced fees?

Reduced fees will result in reduced inspections as has been raised as a concern in England and Wales as per:

- The APPGEBE More homes, fewer complaints, Report from the Commission of Inquiry into the quality and workmanship of new housing in England (More Homes, Fewer Complaints) raises concerns that competition in building control might be fueling “a race to the bottom” and that they felt there was a subsequent need to prescribe a minimum number of inspections.
- The Scottish Government commissioned report: Evaluation of the performance of local authorities in their role as building standards verifiers (March 2016) also stated “The fact that building standards verification is currently placed in the hands of local authorities means the system is free from the risk of ‘profit before compliance’ – a virtue which cannot be understated.”

LABSS view is that public interest and health and safety concerns are too important to be run on such a commercial basis.
A private sector verifier could provide a consistent service across Scotland?
Response - No

- Additional verifiers providing verification services would inevitably increase national inconsistency.
- All local authority verifiers already work within the national Verification Performance Framework which drives consistency and is reported to the Scottish Government.
- Service Standards within the public sector building standards system are already high and the national customer satisfaction survey as Key Performance Outcome (KPO5) of the new verification performance framework confirms this. The 2016 survey produced a 7.1 out of 10 for overall national customer satisfaction.

Private sector verifiers could damage the impartiality of the building standards system? Response – Yes

- Local Authority Building Standards Verifiers have been appointed as they meet the conditions of appointment under the Building (Scotland) Act 2003, being: qualifications, competence, accountability to the public and impartiality
- The Scottish Executive Policy Memorandum to the Building (Scotland) Bill introduced in the Scottish Parliament on 18th September 2002 stated “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.” and more recent independent research undertaken by Optimal Economics: - Research Project to Support the Appointment of Verifiers stated: “The current system of verification as operated by the local authorities in Scotland is acknowledged to achieve fully the objective of serving the public interest....” both statements confirm local authority verifiers are best placed to meet these requirements for verifiers.
- The previous Scottish Government public consultation carried out in 2011: Building Standards Verification - Improving Choice in Verification of Building Standards asked for views on extending the independent checking of building work. This was subsequently rejected 3:1 by the respondents. The consultation paper also emphasised that “Verifiers should be consistent and transparent in their work. They should also be independent of, and separate from, the organisation they are verifying to avoid any conflict of interest.”
- Analysis of Consultation Responses as undertaken by Dundas and Wilson on behalf of the Scottish Government (September 2011) additionally highlighted
real concerns with private verification over impartiality and accountability within the key findings of their report.

To date LABSS has not seen any evidence which explains how private verifiers will satisfy these issues and it is particularly difficult to see how organisations such as the NHBC who already provide warranty services to housebuilders could meet this requirement.

Private sector verifiers would not be accountable to elected members (Councilors)? Response – Yes

- In England and Wales concerns have been raised within the House of Commons Hansard Debates that Approved Inspectors are not always operating transparently including with their own customers - particularly following customer complaints - ref New Build Housing (Approved Inspectors) – issues of transparency and control and monitoring of building regulations.
- However local authority building standards services are driven by “public service”, have no conflict of interest or commercial interest/pressure, and are both publicly and politically accountable. The Scottish Executive Policy Memorandum to the Building (Scotland) Bill stated that local authorities “…fulfill the necessary criteria. They are independent, competent and they are accountable to the local electorate.”
- The New Performance Framework that all local authority verifiers work to, controls how local authority verifiers operate. Pye Tait Consulting, produced the report: Evaluation of the performance of local authorities in their role as building standards verifiers (March 2016) stating “In the Act Local Authority Verifiers are required to be impartial and their working practices transparent, to be competent and consistent in their activity and must be accountable for their actions. In order to meet this requirement each verifier is required to fully implement the new performance framework”
- The current verification service provided by local authorities working to the New Performance Frameworks successfully covers all types of buildings and is competent, open, transparent, impartial and independent with no conflict of interest. The service is delivered locally with local political accountability and this brings many benefits for Elected Representatives, (ranging from Councillors and MSP’s to Community Councillors) applicants, architects, builders and, of course, the general public.

It would be very difficult for private verifiers to achieve all of these goals and to remove any one of these positive factors from the current system would not be an improvement in terms of accountability.
Private sector verifiers may lack local knowledge? Response – Yes

However local authority verifiers have the benefit of readily accessing all relevant local authority information, are linked and integrated with other local regulatory services integral to the development process, can link verification with enforcement and, significantly, can provide a fully accountable local service with local knowledge whilst participating without commercial concerns into a national network of experience and best practice. There are also inward investment benefits for the local authority and customers in being able to offer such joined up services.

Other – It is unclear what conditions a private verifier would operate under if introduced and unless designed otherwise, private verifiers would likely target the more profitable building warrant projects. If such “cherry picking” was allowed, over time this would have a very detrimental effect on local authority verifiers, particularly if they were required to be the verifiers of last resort and could be compelled to process the less desirable loss making applications.

This issue and many others were raised during the 2011 Scottish Governments Improving Choice in Verification of Building Standards public consultation and as this consultation was rejected remain outstanding.

Should procedural regulations specify a minimum requirement for the inspection of building works, to ensure compliance with building standards? Response – No

It is opined that no system will ensure full compliance but the national guidance already in place, which all local authority verifiers work to, reduces the risk of non-compliance to an acceptable level.

The Verification During Construction guidance covers the minimum number of inspections and checks based on a risk based approach. Key Performance Outcome 2 (KPO 2) of the National Performance Framework relates and is reported quarterly to the Scottish Government by local authority verifiers and covers successful applicant notifications and inspections.

This would remove flexibility from the system? Response - Yes

The current Verification During Construction guidance recognises risk and best value, further prescription could lead to “tick box” inspections of limited value and would divert resources away from higher risk and/or problematic projects unless additional verification resources was funded.

This would drive up costs? Response – Yes see above response
This would be unlikely to improve compliance with building standards
Response – Yes

- Only those actually carrying out the construction work have the opportunity to ensure full compliance with building standards. The More Homes, Fewer Complaints report recognised that “the responsibility for construction of defect free homes should rest with the housebuilder – who should not rely on third party inspections to drive up quality”.

- These roles and responsibilities are further explained within the Scottish Government’s The Scottish Building Standards Procedural Handbook Third Edition. “Inspections by a local authority in its role as the building standards authority does not provide a system of control on site; this is a matter for the contracts and arrangements put in place between the client and builder. It is the responsibility of the relevant person (typically the owner or a contractor employed by them) to ensure building works are done correctly.”

- Within the formal procedures prescribed within the Scottish Building Standard’s system the responsibilities of housebuilders is even clearer - where the housebuilder by submitting a completion certificate to the local authority verifier certifies that the work is in accordance with the approved building warrant (plans and details) and the building regulations as per: I/We* submit a completion certificate in accordance with the details supplied above and with any necessary accompanying information…. This completion certificate is confirmation that the work was carried out and/or conversion* made in accordance with the building warrant. This completion certificate also confirms that in the case of work for the construction of a building, the building as constructed complies with the building regulations; that in the case of the provision of services, fittings or equipment in or in connection with a building that the services, fittings or equipment provided comply with building regulations….

All persons submitting completion certificates to local authority verifiers should carry out the work and/or supervise the work as necessary so they can properly certify the works in this way.

This would offer additional reassurance to new build property buyers?

In the opinion of LABSS the question is not if this would provide additional reassurance to new build property buyers but why such a profitable sector of the construction industry, building simple repetitive buildings cannot supervise the work sufficiently to meet building standards, customer expectations and the legal requirements of the Building (Scotland) Act 2003. It is accepted that consumers
concerns reach beyond the minimum building standards and of the majority of complaints that were recorded by LABC during their survey contained within LABC submission to the APPGEBE Inquiry, showed that around 70% of the complaints recorded were outwith the scope of building control legislation - raising questions around the adequacy of the current cover NHBC and other warranty provider provide from the customer perspective.

This would ensure a consistent level of inspection of building work across Scotland?

The Verification During Construction guidance already provides for a consistent level of inspection and checking in terms of the building standards within Scotland. LABSS cannot speak for the consistency of inspection that warranty providers achieve.

This would improve compliance with building standards? – see previous responses

Should there be a statutory system to provide redress for new home buyers whose properties are subsequently found not to meet building standards requirements? Response – Yes

This housebuilder sector appears to be uniquely problematic when considered against the wider majority of building standards applicants, as local authority verifiers do not generally receive such complaints from the larger majority of other users of the Scottish building standards system which also rely on the same national risk based inspection guidance.

In this respect one difference that may be a contributing factor is that the construction works in these other customer areas are predominately for the future use of, benefit of and under the control of the owner during construction and not generally for immediate sale for profit upon completion. In these circumstances the building standards system with the primary statutory reliance on the owner certifying and thereby supervising the work as necessary to properly submit the completion certificate to the verifier and the verifier making risk based inspections/checks appears to deliver far less problems and dissatisfaction.

Local authority verifiers primarily approve building warrants and then make inspections and checks to protect the public interest - as is the intention of the building standards system in Scotland. This can properly include the sampling of certain stages of construction across housing developments. Home buyers however expect assurances and warranties to protect their private interests including and beyond minimum building standards and covering their specific house purchase and financial investment.
For the above reasons LABSS considers that this issue of redress is one of private interest and therefore consumer protection, consumer rights and warranty.

In this area, More Homes, Fewer Complaints recommended the setting up of a New Homes Ombudsman to mediate between consumers, their builders and/or warranty providers and to be funded by a levy on the sector - this proposal was seen as the key recommendation to provide more effective consumer redress. The Commission also recommended a review of the laws governing consumer rights and thorough review of warranties as their evidence suggested that current warranties on new homes did not match the expectations of home buyers.

Do you think fees for the various aspects of the building standards system are…..? Response – Too low

From the introduction of the current building warrant fees in 2005, local authority verification costs have risen significantly to cover the increased technical complexity of the Building Standards, the additional inspection workload as required by the New Verification Performance Framework and for example and most recently the investment made by local authorities and ongoing investment required to support the implementation of eBuilding Standards.

Fees have not been raised since 2005 and the recent Scottish Government Fees Consultation and supporting research shows that a building warrant fee increase is well overdue with for example the fixed fees being 40% less in real terms. The building warrant and associated fees should therefore be raised to cover the recognised increased costs of local authority verification from 2005 and to fully compensate for the fee income reduction in real terms.

Are there any other issues about the operation of the Scottish building standards system which you wish to bring to the attention of the Committee?

LABSS opposes the introduction of private sector verifiers and does not believe it is necessary, nor in the interest of the building warrant customer, nor in the public interest to do so primarily for the following reasons:

- Independent Research undertaken by Optimal Economics in 2010 made the following observations on the present system of verification of building standards: “The current system of verification as operated by the local authorities in Scotland is acknowledged to achieve fully the objective of serving the public interest and buildings erected in Scotland are generally considered to be safe and comply with building regulations”.
- In terms of the customer, following the publication of the Optimal Economics report, in 2011 the Scottish Governments Improving Choice in Verification of
Building Standards public consultation resulted in the proposed introduction of a private sector verifier (NHBC) being rejected 3:1 – with the majority preferring the current local authority based services and the subsequent successful implementation of the verification New Performance Framework has subsequently strengthened and improved local authority verification services.

Regarding the concerns that the Committee raises around defects and completion certificates in Scotland, LABSS is not aware of the extent and nature of what that the Committee has heard nor has the Building Standards Division of the Scottish Government made LABSS aware of your concerns. LABSS will, however, be very pleased to receive and review these cases so we can understand the Committees concerns and seek to learn from these customer experiences.

On this basis our response to some questions has been based upon the experience and reports on this subject primarily as available for England and Wales and it would be very beneficial to get the Scottish perspective.

However the role and responsibilities of the housebuilder is clear both in terms of the Scottish Building Standards system and from the research cited in this response, particularly the importance of housebuilders building and supervising the work appropriately to achieve compliance and the overall quality customers expect.

The suitability of the warranties as available to customers and the ease of redress against the builder all appear to be factors that could be reviewed.
Local Government and Communities Committee

13th Meeting, 2017 (Session 5), Wednesday 3 May 2017

Subordinate Legislation

Overview of instruments

1. The following instrument, subject to negative procedure, is being considered at agenda item 2 today’s meeting:


Procedure

2. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament.

3. If that is also agreed to, Scottish Ministers must revoke the instrument. Each negative instrument appears on a committee agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendation on it.

Background

The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017

4. The purpose of these Regulations is to update and replace The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (SSI 2011/139) in order to implement paragraphs (1) to (15) of Article 1 of Directive 2014/52/EU (“the 2014 Directive”) which amends Directive 2011/92/EU (“the 2011 Directive”). The Environmental Impact Assessment Directive aims to ensure the authority granting the development consent for a particular project makes its decision in full knowledge of any likely significant effects on the environment. This helps to ensure the importance of the predicted effects, and the scope for avoiding or reducing any adverse effects,
are properly understood before a decision is made. The policy note for this instrument is attached at **Annexe A**.

5. **An electronic copy of the instrument is available at:**


6. **An Equality Impact Assessment (EQIA) has been published and is available at:**


7. **A Business and Regulatory Impact Assessment has also been published and is available at:**


8. **There has been no motion to annul this instrument.**

**Delegated Powers and Law Reform Committee Consideration**

9. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 25 April 2017 and draws the attention of the Parliament to the instrument on the following grounds within its remit in its report published on 26 April 2017:

   The Committee draws the Regulations to the attention of the Parliament on ground (h), as the meaning of regulation 42(1)(c) could be clearer. Regulation 42(1)(c) refers to a notification to “those authorities”. The provision could be clearer, as the intention is to refer to the “consultation bodies” as defined in regulation 2(1).

   The Committee draws the Regulations to the attention of the Parliament on the general reporting ground in light of the following minor drafting errors:

   - Regulation 19(6)(b) refers to regulation 11(1) of the Environmental Information (Scotland) Regulations 2004, but it was intended to refer to regulation 11(2) of those Regulations.
   - There is an error in schedule 6 (revocations) in the citation of the “Waste (Meaning of Hazardous Waste and European Waste Catalogue) (Miscellaneous Amendments) (Scotland) Regulations 2016”, as they are 2015 Regulations.

   The Committee recommends that the Scottish Government takes the opportunity in its planned amending instrument to also correct the error in schedule 6.
10. The Delegated Powers and Law Reform Committee report can be found at the following link:


Committee Consideration

11. The Committee is not required to report on negative instruments, but should it wish to do so, the deadline for reporting on SSI 2017/102 is 25 May 2017.

12. The Committee is invited to consider the above instrument and whether it wishes to report on any issues to the Parliament in relation to them.
The above instrument was made in exercise of the powers conferred by Section 2(2) of the European Communities Act 1972, and section 40 of the Town and Country Planning (Scotland) Act 1997, as amended. Section 40 confers powers to make regulations in relation to the assessment of the environmental impact of development before planning permission is granted. The regulations deal with a wide range of situation and section 2(2) of the 1972 Act is the enabling power for those provisions, for example provisions in these Regulations relating to applications for multi-stage consents. The instrument is subject to negative procedure.

Policy Objectives

Introduction

The purpose of these Regulations is to update and replace The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (SSI 2011/139) in order to implement paragraphs (1) to (15) of Article 1 of Directive 2014/52/EU (“the 2014 Directive”) which amends Directive 2011/92/EU (“the 2011 Directive”). The Environmental Impact Assessment Directive aims to ensure the authority granting the development consent for a particular project makes its decision in full knowledge of any likely significant effects on the environment. This helps to ensure the importance of the predicted effects, and the scope for avoiding or reducing any adverse effects, are properly understood before a decision is made.

The Regulations integrate Environmental Impact Assessment or ‘EIA’ procedures into the Scottish planning system, and supplement the usual planning process to provide a more systematic method of assessing the environmental implications of developments likely to have significant environmental effects.

New provisions take into account the requirements of the amended Directive, which seek to define, clarify and expand upon aspects of the Assessment process, on the basis of minimal additional regulatory burden, whilst ensuring protecting of the environment.

Key changes

The following is a summary of the main changes made to the 2011 Directive by the 2014 Directive as they apply to the Scottish planning system. The 2014 Directive also makes allowance for some transitional arrangements. References to “current” requirements are to those under the 2011 Directive before amendment by the 2014 Directive.
Definition of Environmental Impact Assessment Process

Article 1(1) of the 2014 Directive introduces a definition of “environmental impact assessment” and sets out what an environmental impact assessment process is to consist of. Regulation 4 reflects these changes. The process must include the preparation by the developer of an Environmental Impact Assessment (EIA) report. The content of this is set out in regulation 5. The changes made by the 2014 Directive now specifically refer to a “EIA report”. This is in effect what is currently referred to in domestic legislation as the “environmental statement”. The Regulations therefore refer to an EIA report rather than to an environmental statement.

The next step in the EIA process is the carrying out of consultations required under Article 6 and, where relevant, Article 7. The 2014 Directive includes some procedural changes including a new express requirement to make information available electronically, as provided for in Regulation 21(3)(a). The requirement to consult is however an existing requirement of the 2011 Regulations.

The 2014 Directive requires the competent authority to reach a ‘reasoned conclusion’ on the significant effects of the project on the environment, and to integrate its reasoned conclusion into its decision. Regulations 4(1)(d) and 29 transpose these requirements.

Screening

The determination as to whether a project requires EIA is known as a screening decision. Changes to Article 4(4) of the 2011 Directive introduce a requirement for the developer to provide certain information on the characteristics of the project and its likely significant effects on the environment to enable a screening decision to be made. This requirement is set out in Regulations 8(2) and 8(4). Regulation 8(3) specifically provides that the developer may include a description of any measures envisaged to avoid or prevent significant adverse effects on the environment.

Article 4(5) of the 2011 Directive as amended requires the competent authority to make its screening decision on the basis of the information provided by the developer, taking into account the results of any other relevant assessments carried out pursuant to other EU legislation. These requirements are to be found in regulation 7(1).

Under current requirements the screening decision must be made public but reasons do not have to be given for negative screening decisions unless requested. Article 4(5) of the 2011 Directive as amended introduces a requirement for the main reasons for screening decisions to be given with reference to the criteria in Annex III of the Directive (and as contained in Schedule 3 of the 2017 Regulations). This requirement is transposed by regulations 7(1)(a) and 7(2)(a). Article 4(5)(b) of the 2011 Directive also requires that – where there is a negative screening decision – the screening determination must set out any proposed mitigation measures. This requirement is contained in regulation 7(2)(b).
Article 4(6) of the 2011 Directive as amended introduces new time limits for making screening decisions. These should be made as soon as possible after the submission of the requisite information by the developer but in any event no later than 90 days after that date, except for “exceptional cases”. Regulation 9 refers.

Regulation 6(4) sets out the powers to disapply the Regulations in respect of projects whose purpose is in response to civil emergencies, as provided for in Article 1(3) of the 2014 Directive.

EIA report

Article 5(1) of the 2011 Directive as amended refers to the submission of an EIA report and sets out the information to be provided with reference to Annex IV of the Directive (Schedule 4 of the 2017 Regulations). Regulation 5(2) sets out what an EIA report has to contain. The developer is now specifically required to base the EIA report on the scoping opinion, if one has been issued, and to ensure that the EIA report is prepared by “competent experts”. These provisions are transposed by regulations 5(3) and 5(5)(a), respectively.

Article 5(3)(c) of the 2011 Directive as amended introduces express provision such that competent authorities shall, where necessary, seek from the developer supplementary information to ensure the completeness and quality of the EIA report. Regulations 26(2) and (3) refer.

Article 6(7) of the 2011 Directive as amended introduces a minimum public consultation period of 30 days on the EIA report and this is provided for in Regulation 21(2)(f). Currently the 2011 Regulations require a minimum of 4 weeks.

Decisions and Monitoring

Article 1(9) of the 2014 Directive introduces a new Article 8a into the 2011 Directive as amended. Article 8a sets out certain new information to be included in the decision to grant, or refuse, development consent, which must include the competent authority’s reasoned conclusion on the significant effects of the project on the environment, and a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment. Regulation 29 sets out the information which a decision notice must contain and in particular regulation 29(2)(f) requires a decision notice to include a description of any mitigation measures as well as a statement confirming that the planning authority or the Scottish Ministers as the case may be are satisfied that the “reasoned conclusion” on the significant effects of the project on the environment is still up to date. In addition the new Article 8a introduces new provisions on monitoring as transposed by regulations 29 and 30.

Article 1(10) of the 2014 Directive amends Article 9 of the 2011 Directive and concerns the duties of the competent authority to inform the public that a decision has been made to grant or refuse development consent and to make certain information available to the public. The amended terms of Article 9 require that the consultation bodies must also be informed and this is provided for in regulation 31(1)(b).
Coordinated procedure

Article 1(2) of 2014 Directive introduces in paragraph (3) a statutory requirement to carry out, where appropriate, coordinated or joint procedures for EIA and Habitats Regulations Assessment under the Conservation (Natural Habitats, &c.) Regulations 1994. In line with existing best practice, Regulation 53 requires the planning authority, or the Scottish Ministers as the case may be to ensure such assessments are co-ordinated.

Objectivity and Conflict of Interest

Article 1(11) of the 2014 Directive inserts new Article 9a into the 2011 Directive. This introduces an express requirement that member states shall ensure that competent authorities are objective and are not in situations giving rise to a conflict of interest. This is most likely to arise where the competent authority is also the developer. New Article 9a recognises this particular situation and requires an “appropriate separation between conflicting functions”. Regulation 52 sets out the relevant duty.

Offences

New Article 10a, inserted by Article 1(13) of the 2014 Directive, provides for penalties applicable to infringements of the national provisions adopted pursuant to the Directive. Regulations 54 and 55 respectively provide that it is an offence for a person or bodies corporate to knowingly or recklessly make a false or misleading statement or, with the intent to deceive, uses a false or misleading document or withholds material information in order to obtain a favourable decision on an application.

Transitional Arrangements

Article 3(1) of the 2014 Directive provides for transitional measures where a request for a screening decision is made before 16th May 2017 and provides that the relevant screening criteria to be applied are those of the 2011 Directive. This is reflected in Regulations 60(4) to (7).

Article 3(2) of the 2014 Directive provides for transitional measures whereby the 2011 Directive will continue to apply unamended, for applications for planning permission in which the developer has, before 16th May 2017, submitted an environmental statement or where a scoping opinion has been sought for the proposed development. This is reflected in Regulation 60(2) and (3).

Multistage Consents

Where a consent procedure comprises more than one stage (a ‘multi-stage consent’), the Directive requires that the environmental effects of the project must be identified and assessed at the time of the principal decision. However, if those effects are not identified or identifiable at the time of the principle decision, assessment must be undertaken at the subsequent stage. The 2017 Regulations generally bring up to date and replace current provisions on multi-stage consents.
The 2017 Regulations also extend existing provisions to provide for circumstances where an application for multi-stage consent is made following a grant of deemed planning permission under section 57 of the Town and Country Planning Act 1997, as amended (development with government authorisation). Part 8 of the Regulations refers.

**Consultation**

The Scottish Government consulted on proposals for amending the EIA Regulations through *The Consultation on Transposition of Environmental Impact Assessment Directive 2014/52/EU* between August and October 2016, this was accompanied by draft Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017. The comments received have helped to inform the final statutory instrument. The responses, analysis paper and a full list of those consulted and who agreed to the release of this information are available on the Scottish Government website at [http://www.gov.scot/Publications/2016/08/2499](http://www.gov.scot/Publications/2016/08/2499).

**Impact Assessments**

A suite of impact assessments have been undertaken and an Equality Impact Assessment (EQIA) has been published, this found that the legislation is not likely to generate any negative impacts on any of the equalities groups. In addition a strategic environmental pre-screening exercise and Children’s Rights and Wellbeing screening have determined that the legislation is again unlikely to have a significant impact on the environment or a negative impact on children’s rights and wellbeing.

**Financial Effects**

The Scottish Government consulted on a draft partial Business and Regulatory Impact Assessment (BRIA) as part of its August 2016 consultation paper. The partial BRIA concluded that some additional procedural and financial requirements will fall on planning authorities, the Scottish Ministers and the Consultation Bodies, and some additional procedural and financial requirements may fall to developers. The Scottish Government does not consider there will be any significant costs over and above those of compliance with existing statutory provision on EIA. Responses to the consultation have not altered this overall view and minor amendments have been made to the final BRIA to reflect the responses received.

Scottish Government
Directorate for Local Government & Communities
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