EXECUTIVE NOTE

THE BUILDING (SCOTLAND) AMENDMENT REGULATIONS 2009

SSI 2009/119

The above instrument was made in exercise of the powers conferred by sections 1 and 8(8) of the Building (Scotland) Act 2003 (The 2003 Act). The instrument is subject to negative resolution procedure.

Background

The SSI amends the Building (Scotland) Regulations 2004 which apply to the design, construction or demolition of a building, the provision of services, fittings or equipment in or in connection with a building, and the conversion of a building. The SSI is required as a result of the commencement of section 53 of the 2003 Act to bind the Crown and the restriction to the exemption from regulations 8 to 12 affecting the size of paved areas or hardstanding .

The Building (Scotland) Amendment Regulations 2009 will come into force on 1 May 2009.

Policy Objectives

Additional work types that do not require a building warrant have been added to Schedule 3 to include certain works done to a prison, a building where a person may be lawfully detained or lawfully held in custody, the Scottish Parliament and property owned by Her Majesty in her private capacity. The new types cover the erection of a new building, work to or in a building or conversion of a building and will be exempt from the requirement to gain building warrant approval.

A restriction to the exemption contained in Schedule 1 reduces the size of paved areas or hardstanding that can be built without compliance with building regulations. The objective of the policy is to maintain natural rainwater disposal to the ground and avoid overloading the surface water drainage system.

Consultation

The Building (Scotland) Regulations and subsequent amendments have already been subject to extensive public consultation . Consultation on the provisions for Crown bodies took place between November 2006 and January 2007. This consultation included a wide range of Crown bodies and all 32 Scottish local authorities. The Building Standards Advisory Committee (BSAC) was advised of the need for the amending regulations. The Scottish Association of Building Standards Managers has also been consulted and is supportive of the amendments.

Financial Effects

There are no consequential financial effects from amending this SSI.

Directorate for the Built Environment
March 2009

REGULATORY IMPACT ASSESSMENT

COMMENCEMENT OF SECTION 53 OF THE BUILDING (SCOTLAND) ACT 2003 TO REMOVE CROWN IMMUNITY FROM BUILDING REGULATIONS

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REGULATORY IMPACT ASSESSMENT

COMMENCEMENT OF SECTION 53 OF THE BUILDING (SCOTLAND) ACT 2003 TO REMOVE CROWN IMMUNITY FROM BUILDING REGULATIONS

1.0 PURPOSE AND INTENDED EFFECT

1.1 Objective

1.1.1 This Regulatory Impact Assessment (RIA) addresses the issues surrounding the removal of Crown immunity from the requirement to comply with building regulations. Section 53 of the 2003 Act requires Crown buildings to achieve the same standards as those required of all other buildings. The principle aim of removing Crown immunity is to bring all buildings in Scotland under the same regulatory framework by ensuring that Crown development projects require to follow the established procedures for obtaining warrant approval and presenting completion certificates using the same forms and fees as for all other buildings. It is intended that Section 53 will be commenced on 1 May 2009.

1.2 Background

1.2.1 The Scottish building standards system established under the 2003 Act came into force on 1 May 2005 and included uncommenced provisions in Section 53 to bind the Crown. Under the previous system, the Crown was not bound by the Building (Scotland) Act 1959. It was decided not to commence Section 53 of the 2003 Act in 2005 to ensure a smooth introduction of the new system. It has always been the intention of the Act to bind the Crown but this was delayed to ensure a level transition in 2005. The removal of immunity was indicated to Crown bodies from late 2005 and work has been underway since early 2006. It has always been accepted that Crown bodies have a policy of ensuring work complies with building regulations. Procedures have been developed to ensure compliance is achieved and designs are usually checked by independent consultants prior to work starting. Documentation provided for these processes mirrors the forms used in the building standards system to a large degree. Careful project management of development projects by the Crown bodies ensures that sign-off is achieved at each stage prior to gaining approval for work to continue.

1.2.2 Scottish Ministers have appointed the 32 Scottish local authorities as verifiers, each for their own geographical area, for a period of 6 years from 1 May 2005. It is intended that verification of Crown development projects will be undertaken by the local authority verifiers. This approach regularises the building standards procedures for all buildings in Scotland and follows arrangements made in June 2006 to introduce statutory planning procedures for Crown developments. All applications for building warrants will be handled by the local authority verifier, i.e. the building standards department, using the same forms and table of fees for all applications.

1.2.3 An Order under Section 104 of the Scotland Act 1998 has been developed to make provisions for reserved matters relating to security and national defence. Full exemption from the provisions of the Building (Scotland) Act 2003 will be provided for buildings used or to be used for the purposes of national security or defence. The exemption covers the procedural and technical requirements of the Scottish building standards system and it is based on a Government policy statement confirming that works will comply with all relevant regulations. All development projects taken forwards by devolved Scottish Crown bodies will lose immunity from the requirement to comply and will be required to gain warrant approval for work.

1.3 Rationale for Government Intervention

1.3.1 There is no evidence of any building failures as a result of Crown development projects not being controlled by the Scottish building standards system. However, there is a lack of consistency in the methods for checking compliance with mandatory functional standards. A minimum level of compliance has become the norm and this may impact on the public interest if the system for checking designs and procedures for onsite inspections are not streamlined. Scottish building regulations set standards for the health, safety and convenience of persons in and around buildings, further the conservation of fuel and power and furthering the achievement of sustainable development. These standards are supported by guidance contained in the Technical Handbooks. There must be a single method of verifying the achievement of these standards if the Scottish Government is to meet its policies, commitments and targets for raising compliance and improving sustainability.

2.1 CONSULTATION

2.1.1 Building Standards Division consults on a statutory basis with the Building Standards Advisory Committee (BSAC). The removal of Crown immunity from building regulations has been a standing items on the BSAC agenda and an update paper is provided for every meeting. Membership of BSAC includes representatives from the construction industry who are considered to be experts in their particular discipline. Observers at meetings have included the Department of Communities and Local Government in addition to building standards counter-parts from other part of the UK.

2.1.2 Wide consultation is taken place within Government. Dialogue has continued with SG Property Advice Division, Scottish Procurement Directorate SG Planning Division; SG Scottish Fire & Rescue Advisory Unit; Historic Scotland; Defence Estates, Department of Work and Pensions, Scottish Courts Service; Scottish Prison Service; The Scotland Office; National Library for Scotland; National Galleries of Scotland and National Archives of Scotland amongst others.

2.1.3 An information gathering exercise was undertaken to examine how Crown bodies manage development projects, the procedures followed and the use of consultants to ensure work complies with building regulations. A number of face-to-face meetings with Crown bodies and consultancy firms

took place and a wide ranging survey of 54 Scottish Crown bodies and 4 consultants was undertaken in 2006. Follow-up meetings were held with selected Crown bodies to uncover more details on an ongoing basis. A wealth of information was provided covering:

- the number of sites;
- number of buildings;
- occupation and use;
- the level of checking by consultants at design and construction stages;
- the number of building projects per year; and
- an estimate of the cost of the work.

2.1.4 The findings were explored in detail and options for providing a Crown verification services were developed. At the same time, discussions were initiated with UK Departments over reserved matters. Detailed discussions were held with Department of Communities and Local Government, the Ministry of Defence and the Security Service over their heightened security requirements. These special cases were investigated and discussions focused on how buildings with security concerns or work of immediate national importance can be incorporated into the building standards system. Following an options appraisal exercise the proposals were included in a public consultation exercise in late 2007. The consultation exercise focussed on gaining responses from Government departments, agencies, NDPBs and other Crown bodies. The consultee list was extensive and included approximately 70 individuals and organisations indentified as being affected by the removal of Crown immunity from building regulations.

2.1.5 The proposals were generally well received and viewed as introducing a more robust, accountable and transparent system for dealing with Crown buildings. Whilst there was overall support there was potential for an increase in the workload of local authority verifiers. The impact of this increase may have implications on existing resources and the turnaround time for dealing with building warrant applications. Crown bodies noted the extra time for processing a building warrant application and accepted that proper project planning would ensure that additional time would be allowed for making the application and granting of the building warrant. Many of the likely impacts of the policy could be reduced by the use of transitional provisions which would allow work already contracted to begin to continue under the previous arrangements. Protecting security sensitive information was of vital concern to many respondents and proper procedures will feature in supporting guidance materials being prepared.

3.1 OPTIONS PROPOSED

3.1.1 Four options were identified and two of these were dismissed immediately for the following reasons:

Option 1: Do nothing

The removal of Crown exemption is a long standing issue and it has always been the intention to commence Section 53 of the Act to bind the Crown. The decision to remove Crown exemption reflects current Government policy as demonstrated by the new planning legislation.

Option 2a: In-house service managed by The Scottish Government Building Standards Division

Building Standards Division develops building standards policies and technical guidance and does not have the resources necessary to provide an in-house verification service under the new procedures. This would require a significant shift in the business of the Division which cannot be delivered within the planned staffing structure of around 40 staff.

3.1.2 An investigation of the remaining options was recommended to the Minister. This would be conducted by holding a series of bilateral meetings with representatives from Scottish Association of Building Standards Managers (SABSM) and from building consultancy firms that have past and present experience of working with Crown bodies.

Consideration was also given to a hybrid option using strengths identified from both options. The hybrid option must deliver a service that meets the unique requirements of Crown bodies.

Option 2b: Contracted out service managed by Building Standards Division

Building Standards Division would be the Crown verifier and the service would be contracted-out to building consultancy firms. A procurement exercise would be run and would dictate the timetable for implementation.

Option 3: Service provided by local authorities as an extension to their verifier role

There is no evidence to confirm that local authorities are precluded from assuming the role of Crown verifier simply because they are a lower tier of Government. The verifier role, currently being carried out by Building Standards departments, could be extended to include Crown buildings and Building Standards Division may be permitted to ”call-in” projects by issuing a direction to that effect.

Hybrid: Option 3 with flexibility to include option 2b when necessary for nationally urgent or sensitive work.

3.1.3 Ministerial approval was given to pursue the two options shown below:

Option 1: Contracted-out service managed by Building Standards Division.

Building Standards Division may be appointed as the Crown verifier but contract the verification work out to building consultancy firms including those currently providing this service to their Crown clients. A procurement exercise would be run to develop either a framework agreement or a call-off list of approved contractors. This option would be attractive on the basis that existing relations between Crown bodies and their preferred partner for verification services could be preserved. Building consultancy firms have professional staff who are qualified and experienced with a good awareness of the types of projects and the necessary constraints placed on work due to the nature of some Crown properties. These firms are able to provide a relatively low cost and fast response service under the current arrangements. However, this may change following the removal of Crown exemption when all Crown bodies will be obliged to have every building project which requires a building warrant to be verified.

- **Option 2: Service provided by local authorities as an extension to their verifier role.**

Under the new building standards system the verification role sits in the public sector with the building standards department of each local authority. There is no intention to introduce private verifiers in the foreseeable future. The suggestion that local authorities are precluded from assuming the Crown verifier role due to the issue of a lower tier of Government having jurisdiction over a higher level has no precedent and cannot be proven as fact. Appointing local authorities as Crown verifiers would allow them to extend their current role using the same forms, fee structure and working processes.

3.2 Risks associated with each option

3.2.1 Both options allow Building Standards Division to maintain the right to bring any application in-house for consideration when the project is of national importance or when work must be allowed to progress quickly. A series of bilateral meetings took place with representatives from the two leading building consultancy firms and separately with members of the Scottish Association of Building Standards Managers (SABSM). The purpose of these meetings was to discuss the two options in depth, consider the likely impact of each, gain feedback on feasibility and identify a preferred option.

Option 1

3.2.2 There are only two building consultancy firms operating in Scotland who provide this service to Crown bodies. Other individuals who provide limited services have been identified but in general terms there is a limited pool of qualified professionals in this field. However, it is expected that other firms would tender for the work but the number of eligible firms and their

suitability cannot be accurately gauged. Appointing the two firms already identified carries a significant risk if either one ceases to trade and the other cannot cope with the volume of work.

3.2.3 Building consultancy firms are diversifying their remit to offer new services such as advice on Crown fire standards and disabled access audits. They do not wish to lose the Crown verification work and feel that this would be detrimental to their business and may result, in the worse case, in the loss of two or three surveyor jobs. These firms reported a quick turnaround of applications and that staff work longer hours to accommodate peaks in activity. The break up of existing arrangements may result in the firms being out of the loop with clients and less able to link with them for other services.

Option 2

3.2.4 There are also resource implications for local authorities as verifiers are working within limited budgets and some do not have a full staff complement. There may be reluctance in some authorities to accept a higher turnover of warrant applications as this may affect overall performance. Option 2 would increase the workload of local authorities whilst recruitment of new staff, with the requisite understanding of building regulations, is difficult but necessary to ensure that present levels of service are maintained.

3.2.5 SABSM representatives are keen to accept the additional workstream. Based on high level figures produced from the survey returns, SABSM are confident that verifiers can absorb the extra work without it having a negative effect on performance. The long-standing arrangement of public sector verification carried out by building standards staff in the 32 local authorities gives this option inherent strength. Joint working amongst verifiers is generally increasing following the development of consortia groupings for peer reviews. This should promote consistency and help to lessen the impact of Crown verification on those with less resources. As there is some debate over whether a building is considered Crown, this option will provide a single route to gaining building warrant approval regardless of the status of the building. Additionally, this option would also allow a closer alignment of services through improved links between building standards and planning colleagues working on the same Crown projects.

3.3 Implementation and delivery plans

3.3.1 No implementation plan was developed for option1 because option 2 was able to deliver the following benefits:

- There is strength in the delivery of the service by staff in 32 local authorities covering their own geographical areas.
- Promotes sharing of information and closer alignment of building standards and planning services.
- Based on estimated volumes of work, SABSM consider that verifiers can absorb the additional workload without causing a detrimental effect on performance.

- Existing working practices can be extended to accommodate Crown warrant applications
- The growing level of joint working amongst local authorities will provide added support to those verifiers with fewer resources.

3.3.2 Implementation of option 2 will be through the building standards system with additional guidance provided for Crown bodies. Guidance will focus on where existing procedures have been varied for Crown development projects, secure handling of information and transitional provisions covering the initial period when immunity from building regulations is removed. The change process has been supported by an ongoing communication strategy to ensure that all stakeholders are kept informed via regular newsletters.

3.3.3 Full exemption from the Scottish building standards systems will be implemented for buildings used for defence or national security purposes. This wide ranging exemption covers both technical and procedural requirements of the system and recognises the requirements for these projects to proceed without delay for operational reasons. All other Crown buildings will be subject to building warrant approval when immunity from building regulations is removed. The exemptions contained in the Building (Scotland) Regulations 2004 for work types that do not require warrant approval will apply to Crown projects.

4.0 COSTS and BENEFITS

4.1 This section covers the sectors and groups likely to be affected by the policy and the predicted costs and benefits.

4.1.1 The sectors and groups affected include:

- Government Departments with offices in Scotland;
- Executive Agencies;
- Non-Departmental Public Bodies;
- The Crown Estate;
- Ministry of Defence;
- Building Consultancy Firms
- Local Authority Verifiers

Benefits

4.1.2 The benefits of option 2 are outlined in section 3.3.1. The primary benefit is the creation of a single mechanism for processing of all building warrant applications and completion certificates in Scotland. Local authority verifiers will extend their current services for all Crown buildings using the same forms and table of fees. This option provides parity for all building owners in Scotland and ensures that compliance with mandatory building standards is checked in a consistent manner. The risks attached to implementing option 2 are significantly lower than for option 1. The framework of 32 local authority verifiers give this option inherent strength and the ability to deliver effective services to Crown applicants.

4.1.3 The risks attached to option 1 are linked to the exceptionally small number of consultancy firms who would be able to provide a verification service. The impact on the Crown verification service would be highly detrimental should any one of these two firms cease trading. There are also differences in the services provided between the two firms and discrepancies in the number of resources used to deliver design checking and inspections.

Costs

4.2 The costs of implementing option 2 are minimal because Crown development projects will be routed through the existing Scottish building standards systems which is established and well managed.

4.2.1 Crown bodies will no longer require the consultancy services used under the old regime and a significant cost saving will be achieved as a result. However, there will be a fee charged for making an application for building warrant which is set in the statutory table of fees. The fee charged is based on the value of works. Table 1 below shows the number of buildings and projects per year identified in the survey of Crown bodies.

TABLE 1 Crown development projects by value of work showing warrant fee

Crown Buildings	947			
Projects per year	862			
Cost Breakdown				
Value of Work Bands	**Projects per year**	**Percentage of total**	**Average warrant fee (£)**	**Warrant fee (£)**
£0 – 5,000	507	59%	100	50,700
£5,001 – 10,000	139	16%	182	25,298
£10,001 – 20,000	77	9%	332	25,564
£20,001 – 100,000	81	9%	670	54,270
£100,001 – 500,000	32	4%	1796	57,472
£500,001 – 1,000,000	7	1%	3842	26,894
>£1,000,000	19	2%	>= 4630	87,970
Total estimated cost				**328,168**

4.2.2 These figures should be viewed in context with the building warrant income for Scotland shown below:

TABLE 2 Crown applications as a percentage of Scotland total

Estimated total number of warrant applications per year	71,000
Estimated current income from warrant applications per year	£33,176,500
Crown applications as a percentage of current income	1%

4.2.3 The majority of projects undertaken by Crown bodies fall into the small works category which attracts a building warrant application fee of £100. An average project cost of £150,000 would incur a building warrant fee of £1180. At the other end of the scale, the 2% of projects where the value of works is at least £1,000000 the fee will be at least £4630.

4.2.4 The fee is likely to have very little impact on Crown bodies and will be a minor consideration when planning development projects. The use of Approved Certifiers on a project would also reduce the fee by 10% for every valid certificate confirming the compliance of work with a whole section of the Technical Handbooks. It is unlikely there will be any additional administrative burden on Crown bodies as the processes and forms used are broadly similar to the processes used by the building consultancy firms that currently provide a checking service.

4.2.5 The lead time for making an application for building warrant should be considered carefully and factored into project plans. Local authority verifiers will usually process applications in chronological order based on date of receipt of a competent application. However, negotiations between the verifier the Crown body may take place to fast-track Crown applications on the basis of impact on the general public and the critical nature of any urgent works. The potential for longer lead times means that this element of project planning is critical and early discussions with the local authority verifier will help ensure plans are accurate.

4.2.6 The removal of Crown immunity from building regulations has been indicated to those affected by the policy since the end of 2005. Every organisation has had time to adjust internal processes and forward plan any upcoming development projects in order to comply with the requirements of the Scottish building standards system. Protracted discussions over reserved matters directly led to a delay implementing the policy and the original target date of 1 May 2008 was put back. This has provided all Crown bodies with additional time for preparatory work. In addition, the transitional provisions in legislation will smooth the introduction and allow work that has been contracted prior to 1 May 2009 and will start before 1 October 2009 to continue with full immunity in place.

5.0 **SMALL/ MICRO FIRMS IMPACT TEST**

5.1 The number of building consultancy firms and sole practitioners actively working with the Crown sector is small. Two firms and two sole practitioners were identified through discussions with a cross-section of Crown bodies. The survey conducted in 2006 identified that one sole practitioner was no longer providing services to Crown clients and the other was exclusively contracted by Defence Estates working on MoD projects.

5.1.1 The remaining two firms do provide services to a range of Crown clients on projects from small-scale alternations to large-scale new build projects. The policy directly impacts on their ability in the future to provide the

same checking and inspections services to Crown clients. This role will be fulfilled by the local authority verifiers.

5.1.2 These firms have wider remits that just Crown projects and provide a range of building consultancy services to variety of clients. The ability to diversify services and develop new markets means these firms will be able to continue trading following the removal of Crown immunity. Services including fire engineering solutions, fire risk assessments, accessibility audits and certification of design enables these firms to play an active and valuable role in the Scottish building standards service. Staff employed on Crown developments will remain working on these projects until completion. The long lead time for the removal of Crown immunity has afforded these firms time for retaining and the development of new services and the identification of new customer groups.

5.1.3 Whilst the policy will no doubt have an impact on the firms affected it should not be directly responsible for redundancies of trained and qualified professional surveyors.

6.0 LEGAL AID IMPACT TEST

6.1 There will be no increased use of legal process or new rights created by the removal of Crown immunity from building regulations and therefore no impact on the need for legal aid.

7.0 TEST RUN OF BUSINESS FORMS

7.1 There will be no new business forms created as a result of this policy. The existing statutory and model forms used under the Scottish building standards system will be used by all Crown bodies.

7.1.1 Only one additional field has been added to the application for building warrant form, the amendment to building warrant application form and the completion certificate submission. The new field has been added to enable Crown bodies to specify if the local fire and rescue authority is not their enforcing fire authority. There is a unique relationship between Crown bodies and their specific relevant fire authority under the Fire (Scotland) Act 2005. The changes to the forms recognise this relationship and allow the Crown body to notify the verifier at the application stage when the enforcing authority is different from the local fire and rescue authority. The local authority verifier needs this information to ensure that consultation is made with the correct authority.

7.1.2 This minor issue will be explained fully in the guidance documents being prepared for issue to all Crown bodies.

8.0 COMPETITION ASSESSMENT

8.1 There are no significant areas where issues of competition, restriction or imbalance have been identified. The Scottish Government's position in

relation to verification services clearly states that this service should remain in the public sector for the foreseeable future. There is no desire to appoint private companies as verifiers however this policy may be revisited when the current appointment of the 32 local authorities is due for renewal in 2011.

9.0 ENFORCEMENT, SANCTIONS AND MONITORING

9.1 All matters relating to enforcement, sanctions and monitoring will be carried out under the existing processes, which form the building standards system in Scotland, as set out under the Building (Scotland) Act 2003. Parties responsible for operation of this system are the 32 Scottish local authorities, appointed as verifiers under the Act, and Scottish Building Standards.

9.2 Enforcement and sanctions

9.2.1 Generally, work subject to the Building (Scotland) Regulations 2004 requires to obtain a building warrant before work commences and to have a completion certificate accepted once works are finished. Exceptions are set out under Schedule 3 to Regulation 5 of the Regulations.

9.2.2 Where a building warrant is required, proposals are subject to the scrutiny of verifiers who have enforcement powers under the Act to ensure compliance with the Regulations. Where cases of non-compliance are referred to the Procurator Fiscal, persons found guilty of offences in terms of the Act are liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £5000).

9.3 Monitoring

9.3.1 Building Standards Division will review the implementation of any changes made to building standards legislation to monitor the effectiveness of said changes and to ensure that subsequent reviews can be made on an informed basis. In line with Scottish Government policy, any implemented changes will be subject to a revised RIA within a 10-year period.

9.3.2 Local authority verifiers are subject to an audit during their period of appointment by Scottish Ministers. This process allows Building Standards Division to have direct access to staff and the ability to investigate working practices. This audit can be used to monitor the effects of removing Crown immunity from building regulations and the effectiveness of the procedures for handling Crown applications.

9.4 Post-implementation review

9.4.1 Continuous monitoring of the implementation of proposals is available through feedback from local authority verifiers, designers, developers and Crown bodies. These parties are in regular contact with Building Standards Division and the queries raised offer some understanding of how the policy has been implemented. They also identify areas where new procedures may

be unclear and allow clarification of these procedures as part of the ongoing review process. Issues raised in this manner become a matter of record and are used to inform in the continued development of building standards and guidance.

10.0 SUMMARY AND RECOMMENDATIONS

10.1 The Building (Scotland) Act 2003 binds the Crown and commencing Section 53 of the Act is essential to achieve this aim. The removal of Crown immunity ensures that Crown development projects will be subject to the same level of scrutiny and checking of compliance with mandatory functional standards as all other buildings in Scotland. This step protects the public interest and regularises the procedures for Crown buildings in line with changes in 2006 to introduce statutory planning procedures for Crown projects.

10.1.1 Crown bodies have given public statements to confirm the works will be completed to meet building regulations as a matter of policy. The removal of immunity formalises procedures by extending the role of local authority verifiers to process building warrant applications and completion certificate submissions. Costs are minimal and the policy introduces a more robust and transparent system.

10.1.2 Therefore Scottish Ministers are recommended to sign the regulatory impact assessment as the benefits justify the costs of regularising the system for all buildings in Scotland.

11.0 DECLARATION

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed **Stewart Stevenson**

Date **20th March 2009**

STEWART STEVENSON
Minister for Transport, Infrastructure and Climate Change