

PARTIAL - BUSINESS AND REGULATORY IMPACT ASSESSMENT

**Building (Scotland) Act 2003, amendments –
enforcement and sanctions**

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Partial Business and Regulatory Impact Assessment

Building (Scotland) Act 2003, amendments – enforcement and sanctions

PURPOSE AND INTENDED EFFECT

1. Background

The Building Standards System in Scotland

The building standards system in Scotland is established by The Building (Scotland) Act 2003 (The Act). The purpose of the building standards system is to protect the public interest.

The building standards system is pre-emptive and is designed to check that proposals meet building regulations. The main principles of the system are that a warrant must be obtained before work commences on site and a completion certificate is accepted by a verifier if, after undertaking reasonable inquiry, they are satisfied the building work meets the building regulations, prior to the building being occupied.

The buildings standards system relies on the building warrant applicant, normally the building owner, to control the work on site. They are also normally the ones certifying the work complies with the building warrant and building regulations at the completion stage.

Responsibility for compliance with the building regulations lies with the “relevant person” and ultimately with the building owner. For the purposes of the Act the relevant person is -

- any person carrying out the work; that is a self-build owner or tenant,
- a developer who is the builder,
- any person for whom the work is to be done; that is an owner, tenant or developer who is not doing the work but has engaged a builder to do it; and
- the owner; if the owner is different from those persons above.

The thirty-two local authorities in Scotland are appointed by Scottish Ministers as verifiers to administer the building standards system in their geographical areas. The appointment as a verifier is made on the condition that local authorities meet the requirements of the Operating Framework and Performance Framework.

Their primary function is to protect the public interest by providing an independent check of applications for building warrant to construct or demolish buildings, to provide services, fittings or equipment in buildings, or to convert buildings. This includes checking the design before granting a building warrant and checking during construction before accepting a completion certificate.

The Act gives powers to local authorities to take enforcement action. It is for the local authority to determine the most appropriate course of action, taking into account the particular circumstances of each.

Policy Overview

In Scotland, a Ministerial Working Group was set up following the tragic fire at Grenfell Tower in 2017, to review building and fire safety regulatory frameworks. The Group commissioned two reviews of building standards; one to cover compliance and enforcement and the other fire safety. The Review Panel on Building Standards Compliance and Enforcement identified the need for improving aspects of the building standards system (covering procedural compliance, built compliance and enforcement of both procedural matters and non-compliant work).

As part of the compliance and enforcement review, consideration was given to the issues and findings of the Independent Inquires into the construction of both the Edinburgh Schools (Cole Report) and the DG One leisure complex in Dumfries. This included considering the importance of site inspections and supervision and the roles, responsibilities and competency of different persons involved in building projects.

1.1 Objective

The aim is to strengthen existing enforcement powers used by local authorities (LAs), and increase existing penalties for offences to act as a deterrent to persons who commit offences under the Act.

The proposed changes will send an important message to the actors with roles in the Act e.g. building warrant applicant/owner/relevant person, that they should take their responsibilities seriously. By strengthening existing sanctions and increasing penalties for offences this will send a clear message that by not fulfilling their roles set out in the Act, and Building (Scotland) Regulations 2004, as amended (building regulations) their actions could have consequences that affect the health and safety of building occupants.

1.2 Rational for Government Intervention

The proposals contributes to the following objective of the [National Performance Framework](#) –

- live in communities that are inclusive, empowered, resilient and safe
- we value, enjoy, protect and enhance our environment.

Scottish Government is making this proposal to ensure that new buildings and work to existing buildings when constructed meet the requirements of building standards in Scotland, and where they do not that the local authority has sufficient enforcement powers to take action. For those with roles set out in the Act, that they take these responsibilities seriously, and if an offence is committed that the increased penalties proposed, are appropriate for the offence.

2. CONSULTATION

2.1 Within Government

The proposals are solely in relation to the Building (Scotland) Act 2003. Building Standards Division has the sole responsibility within Government to ensure that the legislation is monitored and reviewed to make changes when necessary. A number of local authorities were engaged in the development of the consultation proposals, prior to publication of the consultation as they are responsible for the administration of the building standards system and the enforcing authority.

Before making or amending provisions within the building standards system, Scottish Ministers are required, under section 1(2) of the Building (Scotland) Act 2003, to consult “such persons as appear to them to be representative of the interests concerned”.

Prior to public consultation on proposed changes, this duty is discharged through the development of proposals by a Departmental Working Group, comprising of officials and representatives from local authorities, professional organisations, and industry. This ensured that proposals are measured, and feasible, and there is no conflict with other regulatory requirement.

Prior to public consultation, the Building Standards enforcement and sanctions Working Group held six meetings between September 2022 and April 2023. The group discussed if the existing enforcement powers were fit for purpose and the adequacy of the penalties for offences under the Act.

2.2 Public Consultation

A public consultation was carried out between July to September of 2018. The majority of respondents to the consultation were in favour of the proposals presented. In the 2018 consultation 75% of responses expressed support for increased fines for non-compliance with building regulations.

Another public consultation on Building Standards Compliance and Enforcement was carried out between 11 November 2021 and 4 February 2022. See

<https://consult.gov.scot/building-standards/highriskbuildingcompliance>

The consultation sought views on the proposed changes to strengthen the building standards system initially for High-Risk Buildings (HRBs) by:

- Requiring applicants (building owners and developers) to evidence and document how compliance with the building regulations has been approached from a ‘pre-application meeting’ (initial) stage through to completion of the building project.
- Strengthen compliance across all building types with the new Compliance Plan approach and also to introduce a requirement for independent professional oversight - a Compliance Plan Manager - on high-risk buildings (high rise residential, high public value - schools, healthcare facilities, and also housing sites) to manage the compliance process from start to finish.

- Increasing the current level of fines where work is not carried out in accordance with the building regulations, and
- Asking if the existing powers for local authorities to take action on work not meeting building regulations is adequate.

The responses to the consultation recognised the importance of achieving compliance first time. This is viewed as a critical point, and that any enforcement is always a backstop when all other options for resolution have failed. The current enforcement powers are considered adequate for local authorities to take action on work where it does not meet building regulations or not in accordance with a building warrant. There was however support for strengthen existing enforcement powers and increasing penalties for offences in the Building (Scotland) Act 2003.

This consultation will run from mid/late June to August 2023. The exact timings are to be confirmed.

2.3 Business

A Working Group was established with representation from local authorities, professional organisations, and industry to develop the proposals. Details of the Working Group are set out preceding paragraphs.

3. OPTIONS

3.1 Options proposed

There are two options considered:

Option 1 – Do nothing;

Option 2 – Strengthen existing enforcement powers and increase penalties for offences.

3.2 Sectors and groups affected

The following groups are affected by the proposals:

- a) Local authorities – will need to familiarise themselves with the strengthened enforcement powers and sanctions.
- b) Building standards system users/building owners/tenants/developers/those undertaking building work – building owners/developers/those undertaking work are aware of their legal responsibility under the Act and to ensure compliance with building regulations.
- c) Building designers - All those involved with building design would have to familiarise themselves with the strengthened powers and increased penalties for offences, so they are aware and they can advise their clients of their responsibilities.

Option 1 – do nothing

This option has no change for building owners/tenants/developers/those undertaking building work.

Option 2 – Strengthen existing enforcement powers and increase penalties for offences

This option would require an amendment to the Building (Scotland) Act 2003 to amend the existing enforcement powers and increase sanctions. As such local authorities, building owners/tenants/developers/those undertaking building work, and designers as would need to make themselves familiar with the changes to section 21 Occupation or use without completion certificates, section 27 Building warrant enforcement notices, section 48 penalties for offences of the Act.

Under section 21 of the Act, it is already illegal to occupy new/converted building without the temporary occupation/use being agreed in advance of the occupation/use, or acceptance of the completion certificate by the local authority verifier. Under section 21 it is an offence for any person who occupies or uses a building without the required certificate. Under the proposals, the owner will now also be held accountable for committing an offence. Local authorities could under the proposed change hold the owner to account, so the owner should be aware that it is a new offence under the act that the local authority could pursue.

The local authority verifier is responsible for administering the building standards system and the local authority carry out the enforcement role. Local authorities will normally only take enforcement action when, in most cases, their discussion with owners has not concluded to remedy the situation. Where enforcement action is taken the strengthened powers will provide local authorities with more flexibility in their approach under section 27 of the Act as the option to include the removal of work that does not comply with the building warrant and/or building regulations is proposed.

The proposal to amend the wording to make it clearer that section 27 contains powers to stop work should aid local authorities with the correct message to those starting work/continuing work on site without a building warrant or not in accordance with the building warrant and building regulations. Local authorities could use the increased penalties in their discussion with those committing offences to demonstrate the serious implications of not complying with the Act and building regulations as a lever to deter non-compliance in the first place and/or rectify work.

Section 27 provides flexibility when the local authority may take action. In most cases the powers are used where work is started without a building warrant, not in accordance with the building warrant, and/or building regulations. The powers are flexible that where work is found not to be in accordance with the building warrant and building regulations after the acceptance of the completion certificate a local authority could take action. To reflect the work being carried out under the Futures Board, Compliance Plan approach and Compliance Manager role for Higher Risk Buildings (HRBs), the proposals include clarifying /extending the powers under section 27 to give local authorities powers to take action on HRBs after the acceptance of the completion

certificate. The clarification of the use of section 27 would allow local authorities to consider use of this section at their discretion. A time limit of 10 years is considered appropriate.

All users of the building standards system should be aware of the increased penalties for offences under section 48 of the Act that could be applied. Building owners /tenants /developers /those undertaking building work should be aware of their role and legal responsibility under the Act and to ensure compliance with the building warrant and building regulations.

Building designers should familiarise themselves with the strengthened powers and increased penalties for offences, so that they and their clients are aware of the enforcement powers and penalties for offences that could be applied. They should also advise their clients of their responsibilities.

3.3 Benefits

Benefits associated with each option are:

Option 1

There are no changes proposed so there are no benefits as this is a status quo.

Option 2

Strengthening existing enforcement powers and increasing penalties for offences will send a clear message to all building standards users, e.g. building warrant applicant/owner/relevant person that by not fulfilling their roles set out in the Act, and the building regulations, their actions could have consequences that affect the health and safety of building occupants.

Strengthen the existing enforcement powers used by local authorities (LAs) have the following benefits:

- Removal of work started without a building warrant or not in accordance with the building warrant and building regulation gives local authorities more flexibility in how they deal with such cases.
- Clarify the scope of section 27 to take action after acceptance of a completion certificate will give local authorities more confidence in the application of the powers.
- Emphasise that work must be stopped will send a clear message to those committing the offence.
- Compliance with building regulations should reduce the likelihood of delayed occupation of building where work is found not to comply with the building warrant or building regulations. e.g. hotels, schools, and hospitals. For public buildings this provides socio economic benefits.

Increasing penalties for offences has the following benefits:

- Includes owners in the offences for occupation without completion (section 21) will give local authorities powers to hold owners accountable for illegal occupation or use of a building. This will also send a clear message that occupation without the necessary certificates is not acceptable.
- Sends an important message to the actors with roles in the Act, that they should take their responsibilities seriously.
- Acts as a deterrent to persons who commit offences under the Act.
- Reduces the risk of non-compliance with the building regulations and the therefore the rectification/removal of works.
- Ensures that new buildings conform to environmental and energy building standards which will help deliver environmental and carbon emission benefits.

3.4 Costs

Option 1 - Do nothing

There are no implementation costs associated with this option.

Option 2 - Cost of familiarization with the proposals

There will be a full costs benefits analysis review carried out during the consultation period to inform on costs and benefits.

4. Regulatory and EU Alignment Impacts

The regulatory context within which Scottish Government policy is developed changed on 31 December 2020 when the UK left the EU single market. The impacts of the proposed measures have been considered.

4.1 Intra-UK Trade

The measures proposed will not impact on intra-UK trade.

4.2 International Trade

The measures proposed will not impact on international trade and investment.

4.3 EU Alignment

The measures proposed will not impact on the Scottish Government's policy to maintain alignment with the EU.

5. SCOTTISH FIRMS IMPACT TEST

There are no firms affected as these are legislative changes to strengthen enforcement powers that are administered by local authorities. A working group was set up to advise on the proposals and there was face to face input by Local Authority Building Standards Scotland who represent the thirty-two building standards services of local authorities, and six local authorities.

Impacts will be informed from the consultation exercise with a specific question relating to impacts on business.

6. COMPETITION ASSESSMENT

As the proposals will form part of the national building standards system, they will be implemented uniformly throughout the country. There is no impact on competition between companies as these are legislative changes for local authorities to administer.

Having reviewed the four competition filter questions provided within the Office of Fair Trading guidelines for policy makers on competition assessment we are satisfied that the proposed changes will not impact on competition within the market place.

7. CONSUMER ASSESSMENT

There is no adverse impact on consumers as the proposals are to strengthen existing enforcement powers and increase penalties. However, there may be a positive impact as building owners/ tenants/ developers will likely fulfill the roles and comply with building regulations given the increased penalties. This will reduce the likelihood of later costs of correcting non-compliant work.

8. TEST RUN OF BUSINESS FORMS

Local authorities are familiar with the existing form which will be updated as part of these proposals.

9. DIGITAL IMPACT TEST

The measures proposed will be amend legislation so there is no direct impact on digital/online services. The form may require local authorities to update the wording of their own notices but these are not issued digitally, as the notice must be served. Confirmation of any digital impacts will be sought from local authorities during the consultation period.

10. LEGAL AID IMPACT TEST

It is not expected that there will be any greater demands placed on the legal system by this proposal. Accordingly, it is not considered that there will be any effect on individuals' right of access to justice through availability of legal aid or possible expenditure from the legal aid fund.

11. ENFORCEMENT, SANCTIONS AND MONITORING

The 32 Scottish local authorities enforce the Building (Scotland) Act 2003. Building Standards Division currently monitor the types and numbers of notices served.

12. IMPLEMENTATION AND DELIVERY PLAN

12.1 Implementation

The proposal will be implemented under a relevant forthcoming bill which is still to be determined. Implementation dates are still to be informed.

The existing guidance on the building standards system in the Procedural Handbook and for enforcement and penalties for offences in the Enforcement Handbook will be update and published. This information will be made available free of charge, as an electronic download from the Building Standards Division (BSD) website, www.gov.scot.

The Scottish Government will publicise both Handbooks on the Building Standards section of the Scottish Government website and by issuing a building standards eNewsletter/alert to stakeholders. The Scottish Government will also notify all local authorities, professional organisations, industry and Law Society of Scotland of the changes.

12.2 Implementation Period

Stakeholders will be made aware of these changes at the earliest opportunity and ideally at least three months prior to their introduction. The major stakeholders who will be affected by this proposal have been involved in the Working Group.

12.3 Post-Implementation Review

There will be continuous monitoring of the implementation of the proposals through feedback from the local authority verifiers, designers, manufacturers and building owners. These stakeholders are in regular contact with Building Standards Division, and any issues identified will offer a broad view of how proposals are being implemented, if the objective is being achieved and how it is working in practice. Issues raised in this manner become a matter of record and are used to inform any future review.

13. SUMMARY AND RECOMMENDATION

13.1 Recommendation

The recommendation is option 2 as this is the most advantageous for costs and benefits.

13.2 Summary Costs and Benefits Table

At this stage the cost and benefits are not known. Building Standards Division are in the process of appointing an external research contractor to undertake a cost benefit analysis of the proposed changes to enforcement and sanctions. It is expected that this information will be available by the spring of 2024 and will inform the final BRIA.

14. DECLARATION AND PUBLICATION

I have read the Partial Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

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