Consultation on Building Standards Enforcement and Sanctions

Consultation outcome report

June 2024

Scottish Government
Riaghaltas na h-Alba

Contents

1. Introduction

This consultation outcome report sets out an overview of findings and a summary of responses to the Scottish Government's consultation entitled 'Building Standards Enforcement and Sanctions' (hereafter referred to as 'the consultation'). In addition, it sets out the Scottish Government's response to the consultation and a summary of next steps.

The consultation was open between 6 October 2023 and 22 January 2024. Of the 12 closed questions, 10 included an option to provide additional explanatory comments. The questions mostly centred on strengthening provisions in the Building (Scotland) Act 2003.

Respondents were invited to respond by post, via Citizen Space, or by email. The vast majority of responses were submitted via Citizen Space. The Scottish Government would like to thank all respondents for their contributions.

2. Background

The building standards system was established by the Building (Scotland) Act 2003 to ensure that all building works are safe, and that the system protects the public interest. Following the fire at Grenfell Tower in 2017, a Ministerial Working Group was set up to review building and fire safety regulatory frameworks. The Group commissioned two Expert Review Panels for building standards; recommendations by the Review Panel on Compliance and Enforcement concluded that, whilst the core elements of the current building standards system should be maintained, some reshaping of the system was necessary to ensure that it addressed identified weaknesses.

The Building Standards Futures Board was set up to provide guidance and direction on developing and implementing the recommendations. The Board's remit is strategically advising and directing a broad programme of work to improve the performance, expertise, resilience and sustainability of the building standards framework and services across Scotland.

A 2018 consultation on Building Standards Compliance and Fire Safety confirmed strong support for increased fines for those not complying with building regulations. A subsequent Compliance and Enforcement consultation in 2021-2022 proposed ways to strengthen the building standards system for High Risk Buildings, including introducing a Compliance Plan approach and hiring a Compliance Plan Manager.

The Building Standards Enforcement and Sanctions consultation aimed to gather views about proposals to strengthen the existing enforcement powers of local authorities and change the penalties for building standards offences. The findings from this analysis of responses to the consultation will be used by the Scottish Government to finalise their proposals.

The consultation was open between 6 October 2023 and 22 January 2024. Of the 12 closed questions, 10 included an option to provide additional explanatory comments.

The questions mostly centred on strengthening provisions in the Building (Scotland) Act 2003, with proposals to:

- include owners in the offences for occupation without completion (section 21).
- include removal of work, introduce a standalone stop notice, and clarify the scope of section 27 to take action after acceptance of a completion certificate for High Risk Buildings (HRBs) with a time limit for serving enforcement notices (section 27).
- increase penalties for offences (section 48) that will also apply to offences by bodies corporate etc. (section 49).

3. Summary of responses and Scottish Government response

In total, 43 consultation responses were received. Almost all were submitted via the online consultation platform, Citizen Space. Those received in an alternative format, were manually uploaded to Citizen Space.

All respondent who agreed to have their responses published are available on the Scottish Government's consultations webpage at www.consult.scot.

Individuals provided 18 responses to the consultation; the remaining 25 were from organisations. To aid analysis, organisations were grouped on the nature of their work.

The largest number of organisations were from local authorities and their associated bodies (15), professional associations and membership organisations (7) and commercial organisations and manufacturers (3).

4. Section 21 – Occupation or use without a completion certificate

Q1 asked - Do you agree with the inclusion of holding owners accountable for new/converted buildings which are occupied illegally?

There was widespread support for this proposal. Among all respondents, 90% agreed to some extent; 60% strongly agreed and 30% agreed. Over four fifths (84%) of individuals agreed (56% strongly). All but one organisation agreed (96%, with 64% strongly agreeing), and all local authorities and professional associations were in favour.

Three quarters of respondents left a qualitative response in Q1, reiterating strong support for the proposal. Most highlighted that the change would result in improved enforcement, while other individuals and organisations expressed their agreement that the building owner, rather than tenants, should be held responsible. While there was widespread support for the proposal, some respondents asked for further clarification on certain issues.

The most prevalent theme was agreement with the proposal to improve enforcement and ensure buildings are not occupied without a completion certificate or temporary occupation certificate.

The second most prevalent theme in responses was explicit agreement that the building owner should be held accountable, hence the need for the change.

Scottish Government Response

Section 21 of the Building (Scotland) Act 2003 will be amended to enable a local authority to take action on owners and make them accountable where a building is being occupied illegally.

In relation to respondents request for further clarification on certain issues, these issues are addressed below.

- Whether owners should be accountable if squatters occupy a building.

The consultation refers to owners 'allowing occupation' e.g. for rent/short term lets without a completion certificate or temporary occupation being in place. In relation to squatters, the building would be considered as occupied and as such the owner is accountable for allowing occupation of the building**.**

- What work constitutes an alteration.

Section 21 is only applicable to the erection of a new building, a conversion or an extension. Work undertaken where it solely an alteration is not applicable.

- Who is responsible for buildings with multiple owners, leased arrangements, or where local authorities mandate or undertake work if owners cannot, such as in tenement flats.

The building owner(s) are responsible. The local authority has existing powers under the Act to serve a notice, and take action where owners do not, and recover their costs by charging the building owner.

In most instances, the owner of the building will be identified on the title deeds which will enable the local authority to pursue the building owner(s). Where there are multiple owners, the title deeds of the building usually confirm how the costs should be shared between the owners. If this is not stipulated in the deeds or there are gaps in the deeds then the Tenement Management Scheme (TMS), schedule 1 of the Tenements (Scotland) Act 2004 applies.

Under the TMS, all owners pay an equal share of the costs of maintenance and repairs, except:

• when the work involves a part of the tenement that is not used by everyone (in which case only the owners of the flats involved should pay)
• when the floor area of the biggest flat is more than one-and-a-half times the floor area of the smaller flat (in which case repair costs should be split so the owner of the larger flat pays more)

5. Section 27 – Removal of work

Q2 asked - Do you agree with the proposal to include a new provision for the removal of work on the section 27 Building Warrant Enforcement Notice?

Over four fifths (83%) supported this proposal; over half (53%) strongly agreed, and three in ten (30%) agreed. Three quarters (78%) of individuals were in favour (56% strongly agreed), compared to almost nine in ten organisations (88%, with 52% strongly agreeing). However, none of the three commercial organisations who responded to the consultation strongly agreed.

Many agreed with the proposal to include a new provision for the removal of work on the basis this would deter unauthorised work, encourage better quality buildings, and strengthen enforcement measures. The proposals were seen as a positive change to support compliance by deterring unauthorised works and the provision would offer greater flexibility and choice for local authorities and owners.

Scottish Government Response

Section 27 of the Building (Scotland) Act 2003 will be amended to include the option to remove work.

6. Section 27 – Stopping work

Q3 asked - Do you agree that the provision of a standalone stop notice under section 27 would act as a helpful deterrent?

High levels of total agreement with this proposal were recorded among all respondents (86%), individuals (89%) and organisations (84%), with over half of each audience strongly agreeing and one third agreeing. The level of agreement varied by type of organisation, with 60% of local authorities strongly agreeing compared to 43% of professional associations and 33% of commercial organisations.

The common theme was that the separate stop notice would send a clear and compelling message that compliance would be enforced. A few responses said a stop notice would be more effective than notices to suspend works or a statement in an enforcement notice. A professional/membership body thought it would be a helpful deterrent, particularly where issues are recorded, publicly available and communicated to regulators. One local authority agreed but suggested that the implementation of the new approach should be kept simple to allow it to be used quickly and easily when needed.

Concerns were raised by local authorities around the need for additional resources and the burden on council services to monitoring enforcement.

Scottish Government Response

Section 27 of the Building (Scotland) Act 2003 will be amended to make provision for a separate standalone stop notice.

In relation to concerns raised by local authorities around the need for additional resources to carry out their enforcement role, Scottish Government increased building warrant fees on 1 April 2024. This is the first increase as part of a 3-year model agreed following a public consultation of increasing building warrant fees Building standards - building warrant fees: consultation - gov.scot (www.gov.scot) that ran from 21 July 2023 to 24 October 2023.

In the response by local authorities to the fees consultation, they expressed a view that the increase in building warrant fees is for their verification role. Their statutory role is separate to this and should be funded separately. The Scottish Government is considering this further to better understand the issues.

Training for local authorities on carrying out formal enforcement action is being developed in partnership with Local Authority Building Standards Scotland, the Scottish Building Standards Hub and Police Scotland to support effective use of enforcement powers. Any future increase in building warrant fees will support investment in service delivery.

7. Section 27 - Taking action after acceptance of the completion certificate

Q4 asked - Do you agree with enforcement after the acceptance of a completion certificate for High Risk Buildings?

The provisions under section 27 may be used by local authorities to address work not in accordance with the building warrant and building regulations once the verifier has accepted the completion certificate. A few local authorities, out of 32, have utilised this power, albeit on an infrequent basis. However, most local authorities are reluctant to use it for cases after the acceptance of the completion certificate as they do not think the scope is set out clearly in the Act.

To ensure that the legislation is clear, and to reflect the introduction of the Compliance Plan approach for High Risk Buildings (HRBs), the proposals include clarifying the powers under section 27 to ensure local authorities have the option 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 the use of this enforcement power at their discretion.

Overall, two thirds (67%) of respondents supported this proposal to some extent; 30% strongly agreed and 37% agreed. However, 14% of respondents disagreed with the proposal. Support was higher among individuals than organisations - 78% of individuals agreed, with 39% strongly agreeing, compared to 60% total agreement and 24% strongly agreeing among organisations. Both individuals, local authorities and professional associations expressed some disagreement.

The most prevalent theme raised by many, half of whom were local authorities, was an agreement that enforcement after the acceptance of a completion certificate could be required, for High Risk Buildings in particular. One local authority noted that this proposal would align Scotland with the Building Safety Act 2022 in England.

Some, including organisations that either agreed or disagreed with the proposal, did so because they felt the proposal should apply to all buildings, not just High Risk Buildings. One local authority expressed a view that action was more likely to be required for newly built multi-plot housing.

Scottish Government response

Scottish Government will consider this further to understand the impacts of any proposed changes to strengthen section 27 enforcement powers.

In relation to respondents request for further clarification on specific issues, these are addressed below.

- The definition of reasonable inquiry and the specific circumstances where enforcement can be pursued.

Reasonable Inquiry is for the verifier to determine. However, there is defined practice of what reasonable inquiry should include. The verifier undertakes checks during construction and prior to accepting the completion certificate. Verifiers issue a Construction Compliance and Notification Plan (CCNP) to the applicant when the building warrant is approved. The CCNP sets out the construction stages that the verifier has identified for site visits or other alternative methods to check compliance.

- How could the provision be introduced in a way that it applied to only certain building types?

The Building (Scotland) Act 2003 will be amended to include a definition for ‘High risk’ buildings.

- How and on whom would action need to be taken, e.g. could the verifier rather than the contractor be at fault?

The building owner is ultimately responsible for compliance under the Building (Scotland) Act 2003. The Scottish Government has no plans to amend who is responsible.

- If a building has been purchased from a developer, would the developer or the new owner be responsible for compliance after the acceptance of a completion certificate?

The building owner is ultimately responsible for compliance under the Building (Scotland) Act 2003. The Scottish Government has no plans to amend who is responsible.

- Who would be responsible if the main contractor is no longer operating?

The building owner is ultimately responsible for compliance under the Building (Scotland) Act 2003. The Scottish Government has no plans to amend who is responsible.

- Whether particular areas of compliance will be focused on, e.g. life/fire safety, structural safety rather than drainage issues, air tightness, foundation failure, etc.

Enforcement action is at the discretion of the local authority.

8. Section 27 - Introduction of a time limit

Q5 asked - Do you agree that the introduction of a time limit is necessary?

The current power under section 27 of the Act does not contain a time limit for local authorities to take action on all work subject to a building warrant and building regulations. The consultation proposes introducing a 10-year time limit for serving notices.

A majority of all types of respondents agreed with introducing a time limit. Seven in ten (70%) agreed overall, with similar levels recorded by both individuals (67%) and organisations (72%). Support was highest among local authorities (80%).

Q6 asked - Do you agree with the introduction of a 10-year time limit for taking action on non-compliant work?

Mixed views were expressed on the introduction of a 10-year time limit. Overall, just under half (47%) were in favour, a further 47% opposed, and 7% did not answer. Individuals were more likely to be opposed than in favour (56% compared to 44% respectively). Conversely, 48% of organisations were in favour and 40% were opposed. While support was lower among professional associations (29%), they were also least likely to oppose the proposal (29%), with the remaining 43% not answering.

Q7 asked - Do you have any views on the 10-year time limit proposed?

Just under half of respondents agreed with both proposals. Among this group, most left brief comments reiterating their agreement; some reflected on the opportunity to introduce greater alignment and consistency across local authorities and the UK.

One quarter agreed with the introduction of a time limit, but not with the 10-year proposal, primarily arguing that this is too long. Conversely, one quarter disagreed with both proposals; these respondents called for longer limits, or the absence of a time limit for taking action.

Scottish Government response

The 10-year time limit has been supported. However, given the mixed views expressed Scottish Government will consider this further.

9. Section 48 - Penalties for offences

Q8 asked - Do you agree with the level of fines proposed?

There was widespread support for the level of fines proposed. Overall, 79% were in favour, with 72% of individuals and 84% of organisations agreeing. All organisation types agreed, ranging from 93% of local authorities to 67% of commercial organisations.

The most prevalent theme for the widespread agreement was that the fines for High Risk Buildings are currently too low, disproportionate to the offence which can often put the public at risk, and do not act as a deterrent.

Some felt the proposed £50,000 was too low and was insufficient to deter non-compliance. Others suggested an unlimited fine.

Scottish Government response

Section 48 of The Building (Scotland) Act 2003 will be amended to increase penalties for offences.

The maximum level of fine has been benchmarked against similar offences e.g. The Housing (Scotland) Act 2014, and Planning (Scotland) Act 1997 and 2019.

Q9 asked - Do you agree with the option to include a custodial sentence?

Very high levels of support were recorded for the option to include a custodial sentence. Overall, almost nine in ten (88%) of respondents agreed, with the same high agreement recorded by both individuals (89%) and organisations (88%). All types of organisations agreed, ranging from 93% of local authorities to 67% of commercial organisations.

Scottish Government response

Section 48 of the Building (Scotland) Act 2003 will be amended to include the option of a two-year custodial sentence.

10. Impact assessments and other impacts

The consultation included three further questions addressing the potential impact of the proposals on people with protected characteristics, businesses and island communities.

Q10 asked - Are there any proposals in this consultation which you consider impact or have implications on people with protected characteristics?

A majority of most groups felt that the proposals did not impact people with protected characteristics. Overall, 53% felt they did not, 12% that they did, and 15% were unsure or did not answer. Opinion varied among organisations; while all commercial organisations and 67% of local authorities felt there should be no impact, 86% of professional organisations were unsure or did not answer.

Q11 asked - Do you think that any of the proposals in this consultation have any financial, regulatory or resource implications for you and/or your business (if applicable)?

Opinions on whether the proposals could impact businesses varied. Overall, 53% felt there could be an impact, 26% did not, and 21% were unsure or did not answer. While 44% of individuals thought there could be wider implications, this rose to 60% of organisations. Local authorities were notably more likely to believe there would be an impact (73%).

Q12 asked - Do you think that any of the proposals in this consultation have any impact or implications on island communities?

Most respondents were unsure about the implications for island communities (49%) or did not answer (7%). Just over one in ten individuals (11%) and organisations (12%) thought there could be an impact, though organisations were more likely to say they were unsure or not answer (68%).

Scottish Government response

Partial impact assessments were carried out in the development of the policy. Scottish Government will now take into consideration views on impacts as part of the final impact assessment.

Details on the issues raised are available in the consultation analysis report available on the Scottish Government consultation website. Scottish Government consultations - Citizen Space

11. Next Steps

The Scottish Government will seek to amend sections 21, 27 and 48 of The Building (Scotland) Act 2003.

This publication is available at **www.gov.scot**

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