

# **BUILDING (SCOTLAND) ACT 2003**

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## **EXPLANATORY NOTES**

### **THE ACT - AN OVERVIEW**

#### **Part 5: General**

##### ***Section 31: Building Standards Advisory Committee***

98. This section makes provision for the continuation of the Building Standards Advisory Committee, established under the 1959 Act. It sets out the purpose of the committee and places a duty on the Scottish Ministers to consult relevant interests before appointing members to it. It also makes provision for Ministers to make regulations with regards to specific aspects of the committee and for Ministers to pay members remuneration and allowances.

##### ***Section 32: Exercise of local authority functions***

99. Under *subsections (1) to (3)* the Scottish Ministers may give directions to local authorities about their functions under the Act. Under *subsections (4) and (5)* Ministers may, if they so direct, exercise local authority functions under Parts 3 and 4 of the Act in place of that local authority. Ministers could, for example, use this provision to compel a local authority to repair one of its own buildings (e.g. the city chambers) where it refuses to do so.

##### ***Section 33: Procedure regulations***

100. This section sets out the power of the Scottish Ministers to make regulations relating to procedures to be followed in connection with various matters under the Act including applications, completion certificates, the issue of certificates by certifiers, functions of local authorities under Parts 3 and 4 of the Act and the appointment, removal and exercise of functions of verifiers and certifiers. In addition to the general matters listed in *subsection (1)*, *subsection (2)* provides for the regulations to deal with the specific matters set out in schedule 3.
101. *Subsections (3) and (4)* make provision for the possibility of combining applications under the Act and planning applications in a single application. This would allow for a joint building warrant and planning application.

##### ***Section 34: Reports and information***

102. *Subsection (1)* places a duty on local authorities, verifiers and certifiers to provide the Scottish Ministers with reports or information on their functions under the Act. Ministers might, for example, require information in relation to performance measures set by them.
103. *Subsection (2)* creates an offence where any local authority, verifier or certifier knowingly or recklessly provides information under subsection (1) which is false or misleading.

***Section 35: Scheduled monuments, listed buildings etc.***

104. *Subsection (2)* places a duty on local authorities to consult before serving notices under Parts 3 and 4 of the Act on persons in relation to the types of buildings listed in *subsection (1)* or carrying out work to a dangerous building of any of those types. For example, where a listed building presents a danger to the public, a local authority must consult the Scottish Ministers (which would ensure that Historic Scotland was consulted), the planning authority and any other body which they think fit, before the authority can serve a dangerous building notice on the owner. In the case of a dangerous building, consultation is required only if it is reasonably practicable. *Subsection (4)* provides that a requirement in a notice under Part 3 or 4 of the Act to carry out work in relation to buildings listed in *subsection (1)* has effect only where it is consistent with the Acts specified in that subsection e.g. a notice served on a listed building must be consistent with the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

***Section 36: Forms***

105. This section makes provision for the Scottish Ministers to make regulations setting out the form and content of any document used under the Act. Such regulations could, for example, provide that building warrants are to have the same appearance across Scotland and are to include the same information.

***Section 37: Service of notices etc.***

106. *Subsection (1)* provides that where a local authority serves a notice under sections 25 to 29, it must also serve a copy on the owner, occupier and any other person having an interest in the building.
107. *Subsection (2)* applies the provisions in relation to notices under section 192(1)-(4) of the Local Government (Scotland) Act 1973 to notices etc. served under the Act.
108. For the purpose of enabling any notice to be served, *subsection (3)* requires the persons specified in the subsection to provide information on those who have an interest in the relevant building. *Subsection (4)* creates an offence of refusing or failing to give this information or deliberately or recklessly making false or misleading statements in respect of it. Level 3 on the standard scale is currently £1,000.

***Section 38: Fees and charges***

109. This section enables Ministers to make regulations setting fees and charges in respect of functions performed under the Act.

***Section 39: Powers of entry, inspection and testing***

110. This section gives the Scottish Ministers and local authorities powers to enter and inspect buildings and premises and carry out tests on materials in relation to certain functions under the Act. Ministers' powers in this regard are restricted to their function under section 3 of granting a direction dispensing with or relaxing a building regulation (*subsections (1) and (2)*). Local authorities may exercise these powers in relation to their powers in Parts 3 and 4 (*subsections (3) and (4)*).
111. *Subsection (5)* requires owners and occupiers of premises to provide the relevant authority with such assistance and information as may reasonably be required with regard to the authority's powers of entry, inspection and testing. *Subsection (6)* creates an offence of not complying with a requirement in *subsection (5)* and of intentionally obstructing a person exercising such powers. Level 3 on the standard scale is currently £1,000.
112. **Schedule 4** makes further provision on the exercise of powers under this section.

***Section 40: Work required by notice: owner's right of entry***

113. *Subsections (1) and (2)* establish the right of a person required to carry out work for the purposes of complying with the notices specified in subsection (1) to enter the building or adjacent land. The person must give the occupier reasonable notice first (*subsection (3)*). This section might apply where, for example, a landlord wishes to enter a flat which he or she owns for the purposes of carrying out repairs to comply with a defective building notice.
114. *Subsection (4)* makes clear that this right of entry prevails over any term to the contrary in any lease or contract. For example, under the terms of a lease, a tenant may be able to require a long period of notice for the landlord to gain entry to a premises. The right conferred by this section would override this.

***Section 41: Tests of materials***

115. Materials tests may be required to be carried out to establish the quality and strength of a material to confirm that it is suitable for compliance with building regulations. This section makes provision for verifiers and the Scottish Ministers to require specified persons to carry out a test of materials in specified circumstances. Ministers may require such tests to be carried out only after an application has been made to them under section 3 for a direction dispensing with or relaxing a building regulation. Verifiers may require such tests to be carried out by those who have applied for a building warrant under section 9, by those who have submitted a completion certificate under section 17 and by those who are constructing a building in pursuance of a building warrant.

***Section 42: Evacuation of buildings***

116. *Subsection (1)* provides that a local authority must require the evacuation of occupants of a dangerous building (or occupants of any adjacent building) where it considers they are endangered by the state of the building. *Subsections (2) to (4)* provide for an authority to require the removal of the occupants of a dangerous building which is to be demolished or where the occupants may be endangered by certain work which it intends to carry out on the building. *Subsections (6) and (7)* provide that an authority must inform persons removed from a building where it believes the reason for removing them no longer exists. Schedule 5 makes provision about the evacuation of buildings for the purposes of section 42.

***Section 43: Unlawful occupation of evacuated buildings***

117. *Section 43* creates an offence in relation to persons who have been removed from a building under section 42, or have been ejected under schedule 5, and thereafter occupy the building without having been given notice under section 42(7) (that the danger is no longer there).

***Section 44: Expenses***

118. This section deals with the liability of persons from whom a local authority has demanded payment of expenses in relation to work carried out by that local authority to secure compliance with notices under Parts 3 and 4. For example, where a dangerous building notice requires that a building be demolished and an owner has failed to carry out the demolition, the local authority may have to carry out the demolition itself and therefore claim the expenses it has incurred from the owner. *Subsections (2) to (5)* make provision for liability for expenses to be restricted or transferred.

***Section 45: Compulsory purchase where owner cannot be found***

119. This section provides for local authorities to compulsorily purchase a building and its site, where they have carried out work specified in *subsection (1)(a)* in relation to a dangerous building and have not been able to recover the cost of doing so because the

owner cannot be found. The authorisation of the Scottish Ministers is required for the compulsory purchase (*subsection (2)*). *Subsection (3)* provides for the procedure to be followed in relation to a compulsory purchase.

120. *Subsection (4)* provides that, where a compulsory purchase has been made under this section, the local authority may deduct from the compensation payable the outstanding expenses in relation to the work specified in this section carried out by it on a dangerous building.

#### ***Section 46: Sale of materials from demolished buildings***

121. This section allows a local authority to sell any materials from a demolition carried out by it where the owner or person on whom the notice is served has failed to comply with a building warrant enforcement notice under section 27 or the demolition of a dangerous building under the authority's powers in section 29 and 30. The authority may offset any proceeds against other sums owed to the authority by the owner or any other person in respect of work under Parts 3 and 4 of the Act.

#### ***Section 47: Appeals***

122. *Subsection (3)* gives a right of appeal to the sheriff against the decisions and notices listed in *subsection (1)*.
123. *Subsection (2)* allows procedure regulations to specify periods within which certain specified initial (i.e. pre-appeal) decisions should be made. Where such decisions are not taken within the specified period, the decision is to be treated, for the purposes of appeals only, as a refusal or rejection as appropriate. For example, if an owner applies for a warrant under section 8 and a verifier does not make a decision within the specified period on whether to grant one, then in order to allow the appeal procedure to start, the decision is to be taken as a refusal.
124. *Subsection (4)* provides that the effect of a decision or notice listed in *subsection (1)* is suspended until the period allowed for an appeal has elapsed or the appeal is withdrawn or finally determined.
125. *Subsection (5)* creates an exception to the general rule in *subsection (4)*. Where a building warrant enforcement notice under section 27 requires construction work to be suspended, that requirement takes effect as soon as the notice is served and continues to have effect, unless quashed by an order of a sheriff, until the notice is complied with.
126. *Subsection (7)* provides that a sheriff's decision on an appeal under this section is final.

#### ***Section 48: Penalties for offences***

127. *Subsection (2)* sets out the penalties which apply to offences under the Act, with the exception of the offences mentioned in *subsection (1)*. Level 5 on the standard scale is currently £5,000.

#### ***Section 49: Offences by bodies corporate etc.***

128. This section makes special provision in relation to offences committed by bodies corporate, local authorities, partnerships and unincorporated associations (e.g. members' clubs). Specified responsible individuals within these bodies may be liable to prosecution and punishment in addition to the body in question.

#### ***Section 50: Criminal liability of trustees etc.***

129. This section creates a defence for certain individuals such as trustees or liquidators in proceedings for not complying with various notices. The defence applies where the trustee, liquidator etc. has no other interest in a building and that person does not have sufficient funds in that capacity to incur the expense of complying with the notice.

The defence would only apply where the person could prove the matters specified in paragraphs (a) and (b) of the section.

***Section 51: Civil liability***

130. This section provides for the liability of anyone who breaches duties under building regulations and by doing so causes damage, including the death, injury etc. of any person. Under *subsection (2)*, building regulations may create defences in any action for a breach of such duties. *Subsection (3)* provides for certain exemptions for buildings which exist before the section comes into force.

***Section 52: Inquiries***

131. This section makes provision for the holding of public inquiries for the purpose of any functions of the Scottish Ministers under the Act and for the procedures applicable to inquiries under the Local Government (Scotland) Act 1973 to apply in any such inquiry.

***Section 53: Crown application***

132. *Subsection (1)* makes provision for the Act to apply to the Crown (including Crown bodies). Subordinate legislation under the Act, however, may or may not apply to the Crown (*subsection (2)*). *Subsection (3)* restricts the liability of the Crown for contravention of any provision of the Act or subordinate legislation made under it. The Crown may not be held criminally liable, though the Court of Session may declare unlawful any act or omission of the Crown which contravenes any provision of the Act.
133. However, *subsection (4)* provides that persons in public service of the Crown (such as employees of Crown bodies) will be liable like other persons.
134. *Subsection (5)* defines the term “owner” in the application of the Act to the Crown.

***Section 54: Orders and regulations***

135. This section sets out the procedures and scope of powers to make orders and regulations under the Act.

***Section 55: Meaning of “building”***

136. This section defines the use of the term “building” in the Act and how buildings may be classified for the purposes of the Act and any orders and regulations made under it.

***Section 56: Interpretation***

137. This section defines terms used in the Act. It also clarifies how a building which is in the area of two or more local authorities should be treated for the purposes of the Act.