

**EXPLANATORY MEMORANDUM TO
THE BUILDING (AMENDMENT) REGULATIONS 2008**

2008 No. 671

1 This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2 Description

2.1 The Building (Amendment) Regulations 2008 (“the Amending Regulations”) amend the Building Regulations 2000 (“the Building Regulations”) for the purposes of:

- 2.1.1 designating (in a new building regulation) certain provisions of building regulations to which an extended time limit applies for bringing prosecutions for contravention;
- 2.1.2 making an amendment to Schedule 2A to the Building Regulations, which lists categories of work covered by, and the operators of, self-certification schemes, membership of which exempts persons carrying out relevant work from the requirement to notify an intention to carry out the work;
- 2.1.3 correcting a minor error.

3 Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4 Legislative Background

4.1 Section 1 of the Building Act 1984 (“the Act”), as amended by the Sustainable and Secure Buildings Act 2004, enables building regulations to be made for the purposes of:

- a. securing the health, safety and welfare of persons in and about buildings;
- b. furthering the conservation of fuel and power;
- c. furthering the protection or enhancement of the environment;
- d. facilitating sustainable development,

and other purposes not relevant to this Memorandum.

4.2 Building regulations may be made with respect to the design and construction of buildings and the services, fittings and equipment provided in buildings, and the various specific matters set out in Part I of, and Schedule 1 to, the Act. The Building Regulations have been made pursuant to these powers.

4.3 The Building Regulations impose various procedural and general functional requirements for building work carried out in England and Wales. They are supported by technical guidance in the form of Approved Documents, which set out detailed practical guidance on ways of complying with the Building Regulations.

4.4 Section 35 of the Act provides for a penalty if a person contravenes any provision in building regulations (there are exceptions in respect of provisions designated in building regulations). By virtue of section 127 of the Magistrates’ Courts Act 1980, proceedings usually have to be brought within 6 months from the time when the offence was committed.

4.5 Section 35A of the Act (inserted by section 13(1) of the Climate Change and Sustainable Energy Act 2006) extends the time limit for prosecuting contraventions of certain provisions in building regulations, where those provisions have been designated in regulations. Subsection

(3)(a) provides that a provision may only be designated if made for the purpose of furthering the conservation, or in connection with the use, of fuel or power, or for the purpose of reducing greenhouse gas emissions (within the meaning of the Climate Change and Sustainable Energy Act 2006 – greenhouse gas is defined in section 26 of that Act). In addition, subsection (3)(b) provides that a provision may only be designated if contravention of it would be an offence under section 35 of the Act.

4.6 Regulation 12 of the Building Regulations requires a person to give a building notice to, or deposit full plans with, the local authority where that person intends to carry out building work. These requirements do not apply where the work consists only of work described in column 1 of the Table in Schedule 2A if the work is to be carried out by a person described in the corresponding entry in column 2 of that Table. Most of the entries in column 2 refer to a person registered by specified bodies in relation to the type of work specified in column 1. Such a person can self-certify that the work complies with building regulations. These are known as self-certification schemes.

4.7 The amendments to the Building Regulations made by the Amending Regulations fall within the following categories:

- a. inserting new regulation 22A, which designates, under the power in section 35A(2) of the Act, certain regulations to which extended time limits for bringing prosecutions for contravention will apply;
- b. amending an entry in column 2 of paragraph 10 of the Table in Schedule 2A. The amendment is made to reflect a change in the ownership of a particular self-certification scheme in relation to that work. As a consequence, the company which formerly owned the scheme has been removed from the list, and the company which now owns the scheme has been added to the list;
- c. amending paragraph (5) of regulation 12 to omit text which became unnecessary when the current Schedule 2A was substituted for the previous Schedule 2A by SI 2006/652.

5. Territorial Extent and Application

5.1 This instrument extends to England and Wales. By virtue of subsection (6) of section 35A of the Act, the extended time limit applied by new regulation 22A does not apply in relation to contraventions committed before 6th April 2008.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 In recent years concerns have been expressed to the Department that the sanctions available to combat non-compliance with the requirements of the Building Regulations have not been sufficiently effective to deter breaches of the requirements. In particular, there has been criticism that the provisions concerning the use of fuel and power or the emission of greenhouse gases are not being complied with, leading to higher emissions of carbon dioxide (CO₂) than should be the case.

7.2 Prosecution is used in most cases only as a last resort for very serious breaches or in respect of wilful, persistent or recalcitrant offenders. Local authorities have long maintained that the current period of six months within which a prosecution for a breach of the Building

Regulations must be brought did not allow prosecutions where a breach came to light some time after completion of work or where remediation of the work had been promised but then not carried out. As a result it was not acting as an effective deterrent to non-compliance.

7.3 The Department therefore welcomed the opportunity presented by the Climate Change and Sustainable Energy Bill to amend the Building Act 1984 to enable the lengthening of the period within which to bring prosecutions from six months to two years, with the proviso that within that period the prosecution must be brought within six months of the evidence justifying prosecution becoming available.

7.4 The scope of the Climate Change and Sustainable Energy Bill meant that the extended period for prosecution could be applied only to those provisions of building regulations which concerned the conservation of fuel or power or the emission of greenhouse gases. When the Bill was passed into law, section 13(1) of the Climate Change and Sustainable Energy Act 2006 inserted section 35A into the Building Act. The relevant provisions of section 35A are explained in paragraph 4.5 above.

7.5 The Amending Regulations designate the provisions to which the extended period will apply. The designated provisions comprise all those which may be designated in accordance with section 35A(3)(a) and (b) except for a small number of provisions which regulate energy assessors. The designated provisions all set requirements for building work which if contravened are liable to cause a reduction in the energy efficiency of a building, and so lead to increased greenhouse gas emissions. Additionally, contraventions of such requirements are often only discovered long after work has been completed. Consequently, it was considered appropriate to designate all of these provisions. By contrast, the provisions regulating energy assessors do not make requirements for building work; they simply set standards of performance and behaviour. Contravention does not necessarily have any effect on energy efficiency, nor is there any particular concern about late discovery of a contravention. Consequently, it was not considered appropriate to designate these provisions.

7.6 The Department consulted on implementing the provisions in section 35A by designation of the provisions in the Building Regulations to which the extended period will apply. The responses to the consultation were almost unanimously in favour. The Consultation Document *Longer time limits for prosecution of breaches of Building Regulations* and a summary of the responses are available on the Department's website www.communities.gov.uk.

7.7 The Government considers that the extended period should be applied to all breaches of building regulations and made an undertaking during the passage of the Climate Change and Sustainable Energy Bill to seek an early legislative opportunity to do so. There is a clause to accomplish this in the Housing and Regeneration Bill currently being considered by Parliament.

7.8 Schedule 2A lists the authorised self-certification schemes, which currently apply to 14 types of building work (such as installing a heat-producing gas appliance, installing replacement windows and doors, or electrical installations). The Amending Regulations make a minor change to Schedule 2A. The amendment is to reflect the change of ownership of a self-certification scheme, in respect of the installation of fixed low or extra-low voltage electrical installations, by substituting the name of the new owner for that of the old owner. This follows the sale of an existing scheme to a new company, and the Secretary of State's subsequent authorisation of that new company's proposals to run the scheme.

7.9 The Amending Regulations also change regulation 12(5). SI 2006/652 replaced the previous Schedule 2A with the current Schedule 2A. The superseded Schedule 2A comprised a Table and two interpretation paragraphs, whereas the current Schedule 2A comprises a Table only. The deleted text in regulation 12(5) refers to the interpretation paragraphs which no longer appear in the Schedule. The text should have been omitted as a consequential amendment when the

current Schedule 2A was substituted, but due to an error this did not happen. The amendment to regulation 12(5) rectifies this error.

8. Impact

8.1 A final Regulatory Impact Assessment has been produced in relation to the impact of the designation of certain regulations to which extended prosecution time limits will apply. The Assessment is attached to this memorandum. An impact assessment has not been produced for the other amendments made by these Regulations as no impact on the private or voluntary sectors is foreseen in relation to them.

8.2 The impact on the public sector is negligible, as explained in the attached Impact Assessment.

9. Contact

Ian Drummond at the Department for Communities and Local Government, tel.: 020 7944 4821 or e-mail: ian1.drummond@communities.gsi.gov.uk, can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency: Communities and Local Government	Title: Impact Assessment of longer time limits for prosecution of breaches of Building Regulations	
Stage: Final	Version: -	Date: 7 March 2008
Related Publications:		

Available to view or download at:

<http://www.communities.gov.uk>

Contact for enquiries: Ian Drummond

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What is the problem under consideration? Why is government intervention necessary?

At present local authorities have only six months from the completion of building work to bring a prosecution for non-compliance with building regulations. Evidence received from stakeholders indicates that this period is too short in many cases, for example where latent defects come to light after this period or where remedial work is promised but then does not occur. An extension to the time limit for bringing prosecutions is necessary to provide Local Authorities with a means of dealing with the most serious of such cases and to provide a more effective deterrent to those commissioning breaches. Only legislation can alter the time limits for prosecution so Government action necessary.

What are the policy objectives and the intended effects?

The policy objectives and intended effects are twofold. First to give local authorities a longer period of time in which to bring prosecutions in the most serious cases for breaches of designated provisions of building regulations which have been made to further the conservation of fuel and power or the reduction of greenhouse gas emissions. This will make it more likely that such breaches will be prosecuted effectively. Second, to act as a more effective deterrent to the original commission of such breaches, as the likelihood of detection before the time period is up increases.

What policy options have been considered? Please justify any preferred option.

Two options have been considered:

Option 1: Do nothing

Option 2: Implement longer time limits

Only Option 2 would bring any benefits in relation to the specific problem of inadequate time limits for prosecution. Other action to improve compliance with building regulations is being pursued through other related policy proposals.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Eighteen to thirty months after implementation - once sufficient data on the impact of the policy has become available

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the 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) the benefits justify the costs.

Signed by the responsible Minister:

Iain Wright

.....Date: 10th March 2008

Summary: Analysis & Evidence

Policy Option: 2

Description: Implement longer time limits for prosecution

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition)	Yrs	
	£ -		It is not currently anticipated that there will be any such costs but this will need to be confirmed through the planned post implementation review.
	Average Annual Cost (excluding one-off)		
£ -		Total Cost (PV)	£ not estimated
Other key non-monetised costs by 'main affected groups'			
None.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£ -		It is not currently possible to estimate the key monetised benefits associated with this proposal. It is not intended that there will be an increase in the overall number of prosecutions brought as a result of it but significant benefits are expected to accrue from more effective prosecutions and the expected deterrent effect.
	Average Annual Benefit (excluding one-off)		
£ -		Total Benefit (PV)	£ not estimated
Other key non-monetised benefits by 'main affected groups'			
More effective enforcement of serious breaches of building regulations; a more effective deterrent to non-compliance.			

Key Assumptions/Sensitivities/Risks

Longer time limits will allow for more effective prosecution of appropriate cases.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £ -	NET BENEFIT (NPV Best estimate) £ -
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What is the geographic coverage of the policy/option?		England and Wales	
On what date will the policy be implemented?		6.4.08	
Which organisation(s) will enforce the policy?		Local authorities	
What is the total annual cost of enforcement for these organisations?		Not estimated	
Does enforcement comply with Hampton principles?		Yes	
Will implementation go beyond minimum EU requirements?		N/A	
What is the value of the proposed offsetting measure per year?		N/A	
What is the value of changes in greenhouse gas emissions?		Not estimated	
Will the proposal have a significant impact on competition?		No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium Large
Are any of these organisations exempt?	No	No	No No

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)	
Increase of £ 0	Decrease of £ 0	Net Impact	£ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

1. Title of proposal

Time limits for prosecution for contravention of certain provisions of building regulations. Proposed new regulations in relation to climate change – related provisions (implementing powers created by the insertion of section 35A into the Building Act 1984).

2. Purpose and intended effect

Objectives:

To provide for more effective enforcement and a more effective deterrent to non-compliance in relation to provisions in the Building Regulations relating to the conservation of fuel and power and reduction of emissions of greenhouse gases.

Background:

This proposal would apply the longer time limits provided by section 35A of the Building Act for prosecution of breaches of provisions relating to the conservation of fuel and power and the reduction of greenhouse gas emissions to designated provisions. It is fully supported by the representatives of local authorities who have the statutory function of enforcement. It applies to England and Wales.

The current legislation (the Building Act 1984) has a four-tier approach to enforcement:

- (a) (often used) Building control bodies (local authorities and private sector approved inspectors) in their examination of plans and proposals for new works will have a close dialogue, on and off site, with clients to ensure they understand the requirements of the law and will typically give information and informal advice;
- (b) (sometimes used) Section 36 is a civil administrative procedure which allows local authorities (who alone have enforcement powers), in cases of non-compliance, to serve notices on building owners to require the removal or alteration of the non-compliant work;
- (c) (used for flagrant breaches) Section 35 allows local authorities to prosecute contraventions via summary proceedings at magistrates' courts. Currently such prosecutions must be brought within 6 months of the commission of the breach;
- (d) (rarely used, backstop for imminent threat to health or safety) Section 36(6) procedure allowing an injunction to be applied for to require removal or alteration of work done in contravention of building regulations.

The current proposal affects (c). It would provide that, in England and Wales, in relation to breaches of designated provisions relating to the conservation of fuel and power and the reduction of greenhouse gas emissions, the time limit for bringing proceedings would be increased. The 6 month time limit beginning on the date of the commission of the offence would be increased to 2 years from the date of the offence. This 2 year limit would be subject to a requirement that proceedings must be commenced within 6 months of the date when local authority prosecutors

have sufficient knowledge to justify proceedings (e.g. discovery of the offence).

Organisations representing local authorities have made repeated representations in recent years about the effect that the current time limits have on their ability to pursue non-compliance. With the 6 month time limit for starting proceedings at magistrates' courts running from the date of the offence, i.e. the completion of the offending works, and the frequent late emergence of (what may not be obvious) building defects, this can easily eat into the time that local authority prosecutors need to prepare an effective case. As a result, cases of non compliance can escape prosecution. The views expressed by Local Authorities in representations to the Department have recently been further supported by a survey of Local Authorities carried out as part of the Review of Building Control. The survey, to which 53% of Local Authorities replied, suggested that of all applications received around 0.07% were subject to formal enforcement procedures but that a further 2% of applications could have been subject to the threat of formal enforcement action if the time limit had been longer.

At meetings with Departmental officials, local authority representatives have highlighted the different, more generous provisions in other legislation and sought change along the lines of the current proposal that would assist them to deliver more effectively their existing statutory functions.

Rationale for Government intervention

- i. The initial impetus for longer time limits for energy related breaches stemmed, inter alia, from a DTI Energy White Paper – “Our energy future – creating a low carbon economy” Cm 5761 published in February 2003. In signalling the need to bring forward the revision and tightening of building regulations to achieve carbon savings the Government committed itself to working “with local authorities and their building inspectors to see whether and how enforcement of the regulations can be cost – effectively improved to achieve better correlation between design and built performance” (para 3.20). Defra’s implementation plan (Energy Efficiency: the Government’s Plan for Action – Cm 6168 April 2004) also identified enforcement (Annex 8 Table A6) as a key risk for delivery of the White Paper energy efficiency goals “Regulatory measures do not deliver expected savings due to poor enforcement – particularly relevant to Building Standards.”
- ii. Similar messages have emerged elsewhere, including from a major survey of stakeholder views on the building control system carried out in 2006 – Achieving Building Standards (by Science Applications International Corporation for the Department). This reported that stakeholders interviewed “saw the need for effective enforcement powers to deal with a small number of cases where the developer is either too determined or too incompetent to comply”. And it quoted the views of representatives of local authority building control (LABC) to a Cabinet Office study on enforcement that “The time limits in the Magistrates’ Courts Act often mean an insufficient period to take action after discovery (The move from six months from committing the offence to 2 years from discovery will help, but this needs implementing across all Parts.)”
- iii. Recent years have seen increasing concerns expressed at the extent to which building regulations are complied with on the ground but much of this is anecdotal. Of the extant research, a 2004 study by Oxford Brookes University (“Building Regulations, levels of compliance”) found that generally “levels of compliance were not always sufficient, though there was no evidence of systematic and purposeful non compliance”.
- iv. The Department is undertaking a more general review of building control which will look at a full range of options for improving compliance and enforcement. This IA deals with only one aspect of this.

3. Consultation

The original proposal in the Climate Change & Sustainable Energy Bill (in relation to climate change – related offences) received collective agreement on the basis of an undertaking to the Law Officers that longer time limits would be extended across the regulations as soon as possible. We have also sought the advice of the statutory Building Regulations Advisory Committee.

4. Options

- (a) Option 1 – Do nothing. Would not achieve the objective of providing a more effective deterrent.
- (b) Option 2 – Apply the provisions in section 35A of the Building Act to provide longer time limits for prosecution of breaches of designated provisions of building regulations relating to the conservation of fuel and power and reduction of greenhouse gas emissions. This would in some part achieve the objective but would leave an anomaly that equally serious or flagrant breaches of other provisions of building regulations would have to be prosecuted within 6 months of the completion of the offending work.

The Government's strongly preferred option is Option 2.

5. Costs and benefits

- i. Option 1: No benefits but potential disbenefits and costs to the wider community. Not responding to informed local authority representations on enforcement risks would send a negative signal about the importance of the effectiveness of building control system. Inability to pursue the worst non compliers would risk long term damage to the built infrastructure, and could be seen as a failure to ensure that legislators' intentions (effective regulation and disincentives for non compliance) are maintained.
- ii. Option 2: Clear benefits in allowing local authorities to deal more effectively with serious breaches of designated provisions of building regulations relating to the conservation of fuel and power or reduction of greenhouse gas emissions, and as a result of the wider deterrent effect that this will have. It is not possible to quantify the benefits of this with any certainty at this time given that this will depend on how the powers are used and what specific breaches are addressed, or discouraged, by their existence.
- iii. No significant identifiable costs. Local authorities have requested the changes which they consider will help remove a barrier to effective and efficient management of building regulations. The change will provide them with a more effective deterrent to non-compliance but will not change any other aspect of the way they work and will therefore have no, or minimal, familiarisation costs. It is not expected, and we do not intend, that there will be more prosecutions as a result of this proposal, but instead that a strengthening of the threat of prosecution will enable local authorities to make better use of other enforcement levers. Local Authorities will retain their discretion on whether to prosecute and will have more time to ensure a successful prosecution where they decide to proceed. Over time this will lead to less non-compliance.

- v. We have also looked at costs on other bodies:
- (a) Central government. The only costs would be publicity for the changes. These are very small and likely to be incorporated with the publicity for changes made as a result of the wider Future of Building Control review. Any publicity costs would be borne from current budgetary allocation.
 - (b) Approved inspectors. No costs as they are not involved in prosecutions under Section 35 of the Building Act.
 - (c) Building owners and those carrying out building work. There will be **no new burdens on normally compliant and efficient businesses or building owners** and thus no costs on them.

6. Small firms impact test

We do not consider that this clause will have a significant or disproportionate effect on small businesses as it merely increases the time available to local authorities in which they can take enforcement action. The change will be publicised to businesses including small businesses via representative organisations, trade publications, etc.

7. Competition assessment

In so far as this measure will improve compliance by the small minority of non compliers who merit it, it should contribute to a more level playing field for reputable companies and so assist fair competition and counteract what is in effect a market failure. As such it is consistent with wider government policies on fair trading.

8. Enforcement, sanctions and monitoring

The use of this new arrangement will be by local authorities at their discretion, as now – but they operate within the principles of the Enforcement Concordat and its focus on proportionality. We intend to signal that, while the change is an indication of how seriously Government takes the need for increased energy efficiency in buildings, we are looking not to increase the incidence of prosecutions but for increased compliance by all concerned.

9. Implementation and Delivery Plan

The regulations relating to climate change – related breaches will be brought into force on 6 April 2008. A further extension of the approach for all breaches of the regulations is the subject of a clause in the Housing and Regeneration Bill currently being considered by Parliament.

10. Post-Implementation Review

We will discuss with local authority representatives how the outcome and impact of the changes

can be assessed and when that assessment should be done. Current initial estimates suggest it will take some 18 – 30 months for the necessary data to be available in sufficient quantities to be a useful source of information. The review will therefore be undertaken by October 2010 at the latest.

11. Summary and Recommendation

In conclusion, the proposed legislative changes are expected to bring real benefits in terms of encouraging compliance with important building regulations, at negligible cost and we recommend that we proceed with it.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	Yes	No

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