

Consultation Response

Proposals for a Heat in Buildings Bill: Consultation

8 March 2024



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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Property and Land Law Reform sub-committee and Property Law Committee welcome the opportunity to consider and respond to the Scottish Government's consultation: *Proposals for a Heat in Buildings Bill* (the "**Consultation**").¹ They have the following comments to put forward for consideration.

General Remarks

We welcome the publication of the Consultation, following our ongoing engagement with the Scottish Government and interest in the proposals.

We have limited our comments below to the proposed legislative changes and legal considerations, in line with the remit and expertise of our membership, and do not look to comment on the policy considerations. We would note, however, that there are many other wider and non-legal specific factors relevant to the proposals. Whilst these points will generally pertain more to practical matters, these will impact on the operation and deliverability of the proposals. Such factors include ensuring appropriate resourcing and capacity for the delivery of the proposals – including options for financing changes and improvements to properties, such as funding packages and incentives.

An overarching comment in respect of the Consultation is that we consider a greater level of detail regarding the proposals is required for a fully informed response and to clearly understand how the general policy proposals will be implemented, and what the legal effects of the changes will look like.

The proposals represent major changes to the legislative framework in this area. Whilst the detail of the proposals and the roadmap for implementation is still to be determined, we consider this will necessitate an extensive awareness-raising campaign so as to make individuals and businesses aware of the revised requirements and help support compliance.

It is important that there is clarity and certainty in the law in order that individuals and businesses can guide their conduct appropriately. We highlight the importance of any proposed changes being finalised and communicated to stakeholders as early as possible to allow for necessary planning, preparation, and additional engagement.

¹ [Proposals for a Heat in Buildings Bill: Consultation](#)



The proposals do not make clear the extent to which the detail of the new regime will be set out in primary legislation or through secondary legislation. We consider that it is essential that appropriate parliamentary scrutiny, and stakeholder engagement, is given to secondary legislation, particularly any regulations which modify primary legislation or make material changes to the scope or operation of the proposals.

We also note the ongoing and prospective legislative and policy reform within the wider net zero and property law landscape – including, for example, those in relation to the Circular Economy. We highlight the importance of considering the interplay and overlap between such reforms to ensure a consistent and aligned approach across all policy developments.

We note that the proposals detail mandatory timescales for the relevant changes to take effect, for example those detailed at the third, fourth, and fifth “points in time” at page 12 of the Consultation. It is important for a range of reasons that a clear and workable legal framework has been developed and communicated to affected stakeholders in advance of these timescales, not least to aid compliance and public engagement.

We welcome the wide-ranging stakeholder consultation undertaken by the Scottish Government on the proposals, and have found the stakeholder sessions that the Society has participated in helpful when developing our response to the Consultation. We remain committed to engaging with the Scottish Government and other stakeholders as the proposals develop.

Questions

The Heat in Buildings Standard - covering heating and energy efficiency

Questions 1-3

We have no comments to make.

Question 4. Do you agree with our proposal to set a minimum energy efficiency standard that can be met by either installing a straightforward list of measures, or showing a good level of energy efficiency based on a reformed EPC fabric efficiency metric?

Neither support nor oppose

We welcome progress being made to improve the energy efficiency of homes in Scotland, and the environmental and consumer benefits that this can bring. These points are primarily practical, rather than legal ones, although we would note that it is important there is sufficient clarity within the proposals to allow consumers to make informed decisions. For example, clarification on what the references to "as many [measures] are feasible for the type of home they live in" will mean in practice is necessary and would be welcomed.

We anticipate that progress will be required on many areas of the proposals to allow for this, including on aspects relating to funding and related points around the deliverability of the proposals.



We would highlight our general comments above, noting the importance of consumers and other affected stakeholders (including legal advisers) having a clear understanding of what the legal implications of the proposals are.

Questions 5-7

We have no comments to make.

Question 8. Do you agree that the use of bioenergy should continue to be permitted in certain circumstances?

We do not have any substantive comments to make. However, as alluded to above, we highlight the importance of considering the interplay and overlap between such reforms to ensure a consistent and aligned approach – including particularly the interaction with existing bioenergy facilities.

Property Purchases

Question 9. To what extent do you support the requirement to end the use of polluting heating following a property purchase?

Neither support nor oppose

This is an area of the Consultation where greater detail would be particularly welcomed. As mentioned, we consider that until further clarity is provided, it is difficult to assess the potential legal implications and challenges. We also express a need for a degree of flexibility with the proposals to account for this lack of detail, for example relating to potential practical issues regarding capacity and resourcing.

Notwithstanding our comments about welcoming greater detail on the proposals, we would highlight concerns about the extent to which property purchasers will require advice on these matters. Solicitors are trained and insured to advise only on matters within the scope of their expertise. A solicitor acting for property purchasers may therefore be able to advise their clients on the requirements of the eventual proposed legislation, but not on the specific applicability of the legislation to the property in question (as this would require more practical knowledge of the property and also existing/proposed heating systems than a solicitor would have). Installation of some alternative heating systems may require legal advice, on property law matters, for example, where the new system is to be wholly or partly sited on common or shared property, or insofar as title conditions are concerned; but also on matters of planning and building regulations. Such advice would not normally be within the scope of standard advice given by a solicitor during a property purchase.

It is important that the scope of the proposals, and the relevant definitions in the legislation are clear. For example, we would welcome clarity on the proposed scope of property purchases intended to be included under the proposals. This would include whether the proposals are intended to apply in a number of scenarios, for example, part-purchases, property sales between

family members, sales pursuant to a court order or due to the separation of the occupants, or sales between connected companies.

We highlight that the proposals, particularly depending on the detail and operation once finalised, carry a risk of disrupting the property market. It is important that the proposals are workable, and the potential market impacts are fully considered. Also, more details must be provided on financial assistance for those who cannot include the funding for clean heating in their mortgage package and cannot meet the credit requirements of other companies offering product finance.

We consider that greater detail on the proposals for enforcement and monitoring is necessary for more detailed consideration of the potential issues. We note challenges in this context with other (to some extent) analogous reforms, for example the changes introduced in 2021 in relation to fire and smoke alarms.

Question 10. We are proposing to give those purchasing a property a ‘grace period’ to end their use of polluting heating. Do you agree with this proposal?

We have no comments to make.

Question 11. To what extent do you support our proposal to apply a cost-cap where people are required to end their use of polluting heating following a property purchase?

Neither support nor oppose

We note the discussion of the cost cap in the Consultation, and the potential options for how this could be calculated. We consider there are aspects of the proposals that require greater clarity and that we would welcome further information on as the proposals develop.

For example, in relation to how the value of the property would be determined for these purposes (if this is based on the purchase price of the property), there is a clear need to find a way for this to be applied and considered on a consistent basis. We anticipate that issues could arise depending on the application of this, for example since registered dispositions do not always list a purchase price, and also that when purchasing a property the price can be apportioned between heritable and moveable property. Other aspects of the proposals would merit further information, including on how a potential cost cap would work in respect of subsequent purchases of the property – for example, whether a subsequent purchaser could rely on a previous owner completing works up to the cost cap, or whether this would in effect reset upon each purchase.

Another point of detail around the operation of the cap that would merit consideration is the interaction between (i) any requirement to spend up to a cost cap; and (ii) scenarios where the expenditure does not fit neatly within that cost cap, noting a potential/practical risk that purchasers may need to incur a final expenditure which has relatively little benefit, other than to exhaust the cap.

More generally, in relation to caps based on valuation, important considerations may include: ensuring that there is consistency in how and when the property is valued for the purposes of a



cap (noting that not all sales will involve a Home Report); and how or whether the property valuation is updated over time to account for changes in a property's value.

We would note that specific consideration needs to be given to how such a cap would apply across the housing stock in Scotland as a whole, in particular in relation to rural and listed properties where works may be more expensive or have specific requirements. Consideration could be given to whether the cost cap could apply as a percentage of the cost of the works required (perhaps with the cost estimate in the EPC for each property).

Question 12. Which of the following methods of applying a cost-cap do you support?

We refer to our comments at question 11.

Question 13. To what extent do you support the proposal that the Scottish Ministers should be given powers to extend the circumstances in future (beyond a property purchase) in which people could be required to end their use of polluting heating? This could be, for example, preventing the installation of new fossil fuel boilers when replacing the heating in your home or business premises?

Neither support nor oppose

We note that there may be merit in there being flexibility here. However, we would highlight the need for appropriate levels of stakeholder engagement should the parameters of the proposals be materially extended – and also refer to our general comments above about the legislative method for enacting such changes being subject to appropriate levels of parliamentary scrutiny.

Connecting to Heat Networks

Question 14. To what extent do you support our proposal to provide local authorities (and Scottish Ministers) with powers to require buildings within a Heat Network Zone to end their use of polluting heating systems by a given date?

Neither support nor oppose

We consider that there is merit in encouraging people to make changes before being mandated to under the proposals and prospective legal framework. We would highlight, however, that there are practical uncertainties and challenges in developing a coherent approach here – for example, regarding the types of heat networks that are best for different types of geography, and the differences between urban areas, rural areas, and different building types. Whilst these are predominantly practical considerations, there is a need for the prospective legal framework to be clear and workable, which may be challenging if there are general uncertainties regarding the above (and other) points.

We would also note that for certain building types, for example tenement buildings, there will be a need for a joined-up and consistent approach between owners. We consider it important that the proposals are consistent and workable within the legal framework in this context, for example under the Tenements (Scotland) Act 2004, and any prospective reforms.

At a very general level, we would note that the market in heat supply is likely to operate differently from the market for supplies of gas and electricity. We consider that it will be important that the details of the licensing and regulation of the heat supply market are established so that the interaction between the heat network sector and the impact of the proposals to follow from the Consultation can be better understood.

Questions 15-17

We have no comments to make.

Monitoring and Enforcement

Question 18. We will need to have a way to monitor if people are meeting the Heat in Buildings Standard, and discussed two options for this. Which do you support?

We note that these considerations are primarily policy questions, and as such we do not wish to comment on these.

We would highlight, as noted above, that any enforcement and monitoring regime would need to be adequately resourced, and also applied consistently across Scotland to mitigate against potential unfairness to certain consumers (particularly relevant in the context of the proposals for sampling a percentage of buildings).

Greater detail would nonetheless be welcomed on a range of relevant points, for example, what is proposed by way of a regulatory body, and how this will be funded.

Question 19. We will need to have a way to enforce the Heat in Buildings Standard. We discussed possible options to help achieve compliance. What are your views on these ideas?

We consider that greater detail on the key aspects of the proposals would be merited before an enforcement regime can be adequately considered.

We highlight the importance of there being appropriate safeguards in place under the prospective legal framework, and that the responsibility for an enforcement regime rests with the appropriate body.

More generally, we consider that any enforcement regime should be reasonable in the circumstances and reflect the desire to ensure compliance. For example, we note that should compliance be dependent on the availability of materials and qualified consultants and contractors, it is important there is an appropriate level of capacity and availability within the market. The possible penalties themselves should also be well publicised and should be proportionate to the amounts involved.



Question 20. To what extent do you support our proposals to modify the Standard or exempt certain people from the need to meet the Heat in Buildings Standard?

Neither support nor oppose

We would welcome greater detail on this point, and note that the proposals here would benefit from an aligned and consistent approach with other key aspects, for example the proposed cost cap.

It is important that those who are subject to an exemption can be easily identified. Consideration requires to be given as to the need for evidence to be produced and the practical arrangements for this.

Questions 21-22

We have no comments to make.

Question 23. Which people, businesses or types of buildings, if any, should be eligible for extra time?

Whilst we do not wish to make specific proposals on this point, we would note that for certain building types, for example tenement buildings, there are additional legal considerations in making adaptations, due to potential common ownership of the roof and outside walls, and external areas. This could have an impact on the timescales and practical arrangements for making necessary changes (for example compared to completing equivalent works to detached properties), and would merit consideration when determining the scope of the proposals.

Public Sector Buildings

Questions 24-25

We have no comments to make.

Amendments to existing legislation

Questions 26-28

We have no comments to make.



For further information, please contact:

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