



Law Society
of Scotland

Stage 1 Briefing

Housing (Cladding
Remediation)
(Scotland) Bill

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.

The Housing (Cladding Remediation) (Scotland) Bill¹ (the **Bill**) was introduced by the Cabinet Secretary for Social Justice on 1 November 2023. We previously submitted written evidence,² and then provided oral evidence in January 2024,³ to the Local Government, Housing and Planning Committee of the Scottish Parliament as part of its Stage 1 consideration of the Bill.

The Local Government, Housing and Planning Committee Stage 1 Report on the Bill (the **Stage 1 Report**)⁴ was published on 29 February 2024.

We welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 1 debate scheduled for 12 March 2024.

General Remarks

We welcome measures to improve the safety of residents and owners of buildings with an external wall cladding system in Scotland, and note that the Bill is intended to facilitate the Scottish Government's Cladding Remediation Programme. We recognise the importance of rapid progress being made as a priority, given the urgent need to remediate the safety issues posed by cladding.

We have highlighted in our evidence and engagement on the Bill areas where greater clarity and further consideration would be welcomed to better achieve its aims, ensure the proposals operate effectively, and integrates effectively and consistently with the wider legal framework in this area. We provide details on these points below in relation to the relevant sections of the Bill.

We consider that the proposed Cladding Assurance Register (the "**Register**") may not fully deal with the current challenges around re-mortgaging, buying, selling, and insuring – and the Bill and supporting documents would benefit from greater clarity around the question of what happens once a property is placed on the Register, in addition to other transactional and transitional matters as detailed below.

¹ [Housing \(Cladding Remediation\) \(Scotland\) Bill](#)

² Accessible [here](#).

³ More information can be found [here](#).

⁴ [Stage 1 Report](#)



We broadly consider that the structure of the Bill gives the Scottish Ministers an effective and time-efficient process to arrange for remediation works to be carried out. The speed and cost effectiveness of the remediation works will be a function of the ability to carry out a single-building assessment (“SBA”), to design and specify the works to be carried out, and to carry out the works. These pertain more to practical matters.

We note that there is substantial detail to be set out in regulations, in particular in relation to the Responsible Developer Scheme (“RDS”). We recognise the potential benefits of this approach, for example allowing greater flexibility in designing and implementing the underlying proposals, particularly should these evolve over time. We nonetheless highlight the need for flexibility to be appropriately balanced against ensuring there is clarity in the law, appropriate levels of parliamentary scrutiny underpinning legislative and policy developments, and meaningful stakeholder consultation. Without greater detail as to the proposed measures and how they will operate in practice, it is difficult to fully understand and assess their likely impacts, particularly on those operating in the sector.

We note generally that the Bill will place commercial pressure on developers to fund remedial works without building a coherent legal framework for distributing that cost between all the relevant parties. There are also related commercial, practical, and legal points raised by the proposals which may produce unintended consequences or effects. We would also welcome greater consideration of the impact of alterations and services installation on the creation of the risk posed by cladding.

We welcome the consideration of our evidence at Stage 1 to date by the Scottish Government and the Local Government, Housing and Planning Committee,⁵ and would be pleased to engage further on these areas if we can be of assistance.

Comments on Sections of the Bill

Part 1 (The Cladding Assurance Register)

Part 1 sets out the provisions relating to establishing and maintaining the “Cladding Assurance Register”.

Section 1

The Bill provides that once remediation is completed as agreed, the developer’s obligation to remediate is met and the building put on the Register. Future obligations then lie with the owners to maintain the building at this standard. We anticipate that any insurer, lender, or purchaser will want clarity around any future work required and the associated costs.

The Register, as currently proposed, will not provide such information. Instead, it creates a snapshot of a building at one point in time – the point the developer has completed remediation.

⁵ Noting, for example, paragraphs 52-54 of the Stage 1 Report.

We note that the Bill does not have any obligation that the Register be maintained and kept up to date. This may reduce the reliability of information within it and ultimately render the Register out of date as time passes. If the policy intention is for the Register to only be relied on as a record of initial remediation, greater clarity of this would be welcomed in the Bill and supporting documentation to help reduce uncertainty as to the Register's purpose.

Section 2

We have no specific comments on this section at this stage.

Part 2 (Power to assess and address danger)

Part 2 sets out the powers of Scottish Ministers to arrange for the carrying out of an SBA on buildings with external wall cladding systems and remediation works (including urgent works) identified via an SBA. It also includes provisions to order the evacuation of buildings where necessary, confers powers of entry and contains other associated provisions, including around the giving of notice, appeals, and the provision of information.

Single Building Assessments – General Comments

We would welcome greater detail on the proposed methodology for assessing whether works are identified in an SBA report as being required, and also for determining if such works have been completed. We note the current requirements under the EWS1 process and form. We consider that potential issues – such as causing market disruption – could arise if the methodology used in relation to SBA reports is materially different. For example, if this would mean that a property could be compliant under the methodology used in relation to one, but not under the other.

Additionally, greater clarity would be welcomed as to how a purchaser would be able to access information on the status of an SBA or subsequent works regarding a property it is intending on purchasing. As drafted, an entry would be created in the Register once an SBA has been carried out and works are not identified as being required, or have been identified and completed (section 1(2)). It is unclear how a purchaser will know the status of a property when an SBA has either (a) been instructed but not carried out, or (b) which has been carried out and the SBA report identifies works to be done, which have not yet been completed.

Between the carrying out of any investigations into a building to completion of any required works, the fact that the building was identified as requiring an SBA will be known to some people. To allow potential purchasers and occupiers to be well informed, we think that it is appropriate for accurate information to be accessible on the Register from an early point in time in the process.

We note the following criteria contained in the definition of an SBA: (a) that a building stands 11 metres or more above the ground (Section 25(a)(iv)) and (b) that it has undergone development between 1 June 1992 and 1 June 2022 (Section 25(a)(v)).

We consider that there would be merit in recording that a particular building is excluded from being within the ambit of an SBA. In particular, for buildings where it is not clear whether or not they would qualify, it would be efficient if this could be determined once, rather than for the question requiring to be answered each time it is sold, and being determined by different people each time (with the risk of different conclusions being reached). At present, we understand similar issues can arise in respect of EWS1 forms when buildings are exempted, such as when lenders nonetheless require these to be produced – which can cause delays and questions as to whether the cost is met by the seller or purchaser of the property.

We would also welcome greater detail and clarity in the primary legislation on the interpretation of the term “risk to human life” (used throughout the Bill, including at sections 1 and 7). For example, there may be merit in this referring to a failure to comply with building standards, such as those in place at the time the cladding was installed or by reference to current standards. Albeit we would highlight the potential consequence if this were by reference to current standards that the work required may extend beyond cladding-related works, as any work can have a knock-on effect to the rest of the building.

Sections 3-5

We have no specific comments on these sections at this stage.

Section 6

We note that Section 6(1) sets out the provisions for Scottish Ministers to arrange for work to be carried out that is identified in an SBA. We envisage that a number of steps will be required in order for there to be sufficient detail to “arrange for work to be carried out”. These may include, for example, (a) once an SBA identifies a risk associated with cladding, identifying the preferred solution to address that risk; (b) generating a detailed design for that solution, including a specification of materials; (c) obtaining any necessary consents; and (d) tendering for the works. Greater clarity of the process here would be welcomed, particularly in relation to the level of detail of the works that the SBA is to contain.

Sections 7-9

We have no specific comments on these sections at this stage.

Section 10

Section 10(1) of the Bill provides that the right to appeal arises following the owner of premises having received notice under section 6 that the Scottish Ministers have “arranged for the work to be carried out on the premises”.

The Explanatory Note refers to the “Scottish Minister’s decision to arrange for work...” (paragraph 43), whereas the Bill uses the terminology that the Scottish Ministers “have arranged for work...” (section 10(1)). Greater clarity on this process would be welcomed.

We note that depending on the interpretation of the text “have arranged for work...” this creates a situation where the Scottish Ministers will not be able to confirm to the contractors when or if



they will be able to start works at the time at which they instruct them. There would be period of uncertainty of at least 21 days during which an owner has a right to appeal without the sheriff's permission, and 42 days if an appeal was made, and during which the works would have to have been arranged on a conditional basis.

We also note that under section 10(5) the appeal is deemed dismissed if the sheriff has not determined the appeal within 21 days. It would be inequitable for an otherwise valid appeal to be dismissed due to delays in a court process. It is important that there are adequate safeguards in this context, for example ensuring sufficient capacity and prioritisation of such appeals to ensure that they can be determined within this timeframe.

Sections 11-17

We have no specific comments on these sections at this stage.

Part 3 (Miscellaneous and General Provisions)

Part 3 makes additional provision in relation to the commission of offences under Parts 1 and 2.

We have no specific comments to make on Part 3 at this stage.

Part 4 (Responsible Developers Scheme)

Part 4 allows the creation via regulations made by the Scottish Ministers of the RDS, which is intended to encourage developers to contribute to the remediation of buildings with which they are associated.

Responsible Developers Scheme – General Comments

As noted above, we consider that there may be merit in greater detail being included within the primary legislation in relation to the RDS. We highlight that without such level of detail on the face of the Bill, it raises challenges in assessing and commenting on the effectiveness and quality of the proposed scheme.

We reiterate the importance of there being appropriate levels of parliamentary scrutiny underpinning legislative and policy developments on the RDS, and meaningful stakeholder consultation. In relation to regulations made in this context, we welcome the use of the affirmative procedure (as provided for at section 30(2)).

Sections 20-24

We have no specific comments on these sections at this stage.



Part 5 (Interpretation and Final Provisions)

Part 5 contains interpretation provisions and other final provisions.

Section 25

Section 25(a)(v) provides that one of the criteria for being within the ambit of an SBA is that the building has undergone development between 1 June 1992 and 1 June 2022. Section 24(9)(a) defines the meaning of “development” as used in section 24, but there is no definition for its usage in section 25. Clarity would be welcomed here.

Section 25(c)(i) refers to the SBA being carried out “in accordance with the standards for the time being specified by the Scottish Ministers”. Greater clarity would be welcomed on whether these are the standards that would specify what amounted to a “risk to human life that is (directly or indirectly) created or exacerbated by the building’s external wall cladding system”, referred to at section 25(b)(i).

Sections 26-27

We have no specific comments on these sections at this stage.

Section 28

We note the definition of “premises” in the Bill. Greater clarity and detail would be welcomed in relation to situations where a developer needs to use additional land – which is owned by someone unaffected by the cladding issue – that is required to carry out remediation work, and the powers to use such land for these purposes.

Sections 29-32

We have no specific comments on these sections at this stage.



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