



Law Society
of Scotland

Consultation Response

Housing (Cladding Remediation) (Scotland) Bill

13 December 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 Parliament's Local Government, Housing and Planning Committee's call for views on the Housing (Cladding Remediation) (Scotland) Bill (the "**Bill**").¹ They have the following comments to put forward for consideration.

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.² 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 highlight concerns, however, that there are many areas of the Bill where greater clarity and further consideration would be welcomed to better achieve its aims and ensure the proposals operate effectively. It is also important that the Bill integrates effectively and is consistent with the wider legal framework in this area.

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.

For example, if developers are not obliged to remediate, concern has been raised that the costs they incur may be regarded as a voluntary assumption of liability and raise challenges in establishing a loss that is recoverable from any third parties who might otherwise be liable. Further, we note that the Bill does not discuss the interaction with prescription in the context of the proposals or consider how the law relating to prescription in this context could be amended (such as in order to revive any rights that developers may have had against contractors or consultants). We would also welcome greater consideration of the impact of alterations and services installation on the creation of the risk posed by cladding.

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

² [Cladding - Building standards](#)

Question 1

1. Do you think this legislation will deliver quick and cost effective remediation of potentially flammable cladding systems found on some modern blocks of flats in Scotland?

We broadly consider that the structure of the Bill gives the Scottish Ministers an effective and time-efficient process to arrange for works to be carried out.

The question of whether the remediation will be “quick and cost effective” 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.

There are several areas which we would welcome greater detail on the face of the Bill. For example:

(a) 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.

(b) 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).

(c) We note that there is substantial detail to be set out in regulations, in particular in relation to the Responsible Developer Scheme (“**RDS**”). We consider that it is essential that appropriate parliamentary scrutiny and stakeholder engagement is given to such secondary legislation. 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. In relation to regulations made in this context, we welcome the use of the affirmative procedure (as provided for at section 30(2)).

(d) 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.

2. What, if any, amendments could be made to the Bill that would further speed the delivery of cladding remediation?

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.

Question 2

1. Do you think the Register will resolve the challenges around re-mortgaging, buying, selling, and insuring properties with potentially unsafe cladding?

We consider that the Cladding Assurance Register (the “**Register**”) may not fully deal with the 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.

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. 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.

We would also 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 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.

2. Are there any other measures necessary to respond to these challenges?

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”. 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.

Question 3

1. Experience shows that it can prove difficult to secure consent for cladding remediation work from all owners within a block of flats. Do the provisions in the Bill adequately address this issue? If not, what changes need to be made?

We have no comments to make.

2. Are the appeal mechanisms and timescales for those appeals sufficient?

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.

Question 4

1. Do you think this scheme will expedite the process of remediating buildings with potentially unsafe cladding?

We consider that this may result in some remediation work being expedited. We would note, however, that the buildings that will be expedited will be determined by the identity of the original developer, and not any relative urgency or risk associated with the cladding issues affecting the particular building.

2. Do you think it is proportionate to prohibit developers who fail to comply with the schemes terms from carrying out major developments and gaining building control sign-off in Scotland?

We would highlight that this could be potentially disproportionate. For example, if the Scottish Ministers were to use this power to prevent completion certificates being issued in relation to buildings that were under construction, then this would prejudice not just the developer but also those acquiring from the developer (including prospective homeowners and housing associations).

3. Much of the detail of the scheme is left to secondary legislation. Should more of the detail be on the face of the Bill?

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 would highlight more generally the absence in the Bill of a requirement to consult with stakeholders and report on the outcome of such consultations when such regulations are made.

Question 5

1. Is there a need to make provision for non-residential buildings with potentially unsafe cladding?

We consider that the provisions of the Bill would not be appropriate for extension to other building types as drafted.

We note the reference in the call for views to “hospitals and student accommodation” falling outwith the scope of the Bill. As most hospital buildings and student accommodation buildings would be under a single ownership, there will not be the same multiple ownership barrier to the carrying out of works, and so less need for the Scottish Ministers’ rights to carry out an SBA and to arrange works.

In relation to the RDS provisions, a separate RDS for those developers would need to be created by the Scottish Ministers. The main achievement of putting such buildings into this scheme would be that there would be a mechanism for identifying buildings at a higher risk through an SBA. On the assumption that most of these building types will be in a single ownership, a simpler and more efficient approach may be to require owners to instruct their own SBA, and to register the result. This then highlights the lack of any consequential obligation on the owner/developer to carry out remedial works.

We would also highlight that with most residential developments the consumer has no input (or knowledge of) the design and specification of the building. For buildings like hospitals and student accommodation, we would expect that the original owner/entity instructing the developer will have had a greater involvement in the specification and construction.

For further information, please contact:

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