

HOUSING (CLADDING REMEDIATION) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament’s Standing Orders in relation to the Housing (Cladding Remediation) (Scotland) Bill (“the Bill”). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 36–EN);
 - a Financial Memorandum (SP Bill 36–FM);
 - a Policy Memorandum (SP Bill 36–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 36–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

OUTLINE OF BILL PROVISIONS

4. The provisions in the Bill are all intended, one way or another, to contribute towards the elimination or mitigation of risks to human life that are (directly or indirectly) created or exacerbated by a (at least partly residential) building’s external wall cladding system. The provisions are organised into 5 Parts, as follows:
 - Part 1 requires the Scottish Ministers to maintain a cladding assurance register.
 - Part 2 empowers the Scottish Ministers to arrange for the carrying out of single-building assessments on buildings with external wall cladding systems and remediation works (including urgent works) identified via a single-building assessment, and to order the evacuation of buildings where necessary. It also confers powers of entry and contains other associated provisions, including around the giving of notice of the carrying out of single-building assessments or remediation works,

appeals against the carrying out of such works, and the provision of information required in connection with the carrying out of a single-building assessment.

- Part 3 makes additional provision in relation to the commission of offences under Parts 1 and 2.
- Part 4 allows the creation (via regulations made by the Scottish Ministers) of a responsible developers scheme. Such a scheme would ensure that eligible developers who do not join the scheme face certain consequences relating to their ability to carry out development in future. The intention of creating such a scheme would be to encourage developers to contribute to the remediation of buildings with which they are associated.
- Part 5 contains interpretation provisions and other usual final provisions.

RATIONALE FOR SUBORDINATE LEGISLATION

5. The Bill contains delegated powers in respect of (a) creating a responsible developers scheme (sections 20-24) (b) changing the types of building in relation to which a single-building assessment may be carried out (section 26) (c) making ancillary provision (section 29) and (d) commencement (section 31).

6. In deciding whether provisions should be in the Bill or in subordinate legislation, and in deciding on the appropriate level of scrutiny of subordinate legislation, the Scottish Government has given due regard to:

- The need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation.
- The need to allow detailed administrative arrangements to be kept up to date within the basic structure and principles set out in the primary legislation.
- The need to ensure proper use of parliamentary time.
- The possible frequency of amendment.
- The need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

7. The relevant provisions are described in detail below, with a short explanation of what each power allows, why the power has been taken in the Bill, and why the selected form of Parliamentary procedure has been considered appropriate.

DELEGATED POWERS

Section 20: Power to establish scheme

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative

Provision

8. Section 20 provides that the Scottish Ministers may by regulations establish a responsible developers scheme (or more than one), and sets out the purpose of such a scheme or schemes. Sub-section (3) requires the regulations establishing a scheme to include provision about (a) who is eligible to be a member of a responsible developers scheme, (b) the conditions of becoming, and remaining, a member, (c) loss of membership and (d) the consequences of a person who is eligible to be a member not being a member. The matters provided for in sub-section (4) provide a non-exhaustive list of matters which the regulations may set out in creating a responsible developers scheme, such as making provision about who is to operate a scheme.

9. Sections 21 to 24 give further details about what may be included in regulations made under section 20 establishing a responsible developers scheme.

10. Section 21 gives further detail on the provision which may be made by regulation under section 20(3)(a) in relation to eligibility for membership. Regulations must make being eligible for membership depend on a person (a) being a developer and (b) having a connection to a building of a kind described by the regulations that has “problematic cladding”. “Problematic cladding” is defined in subsection (6) as an external wall cladding system in relation to which a single-building assessment report states that (a) (directly or indirectly) the cladding system creates or exacerbates a risk to human life, and (b) work needs to be carried out to reduce or eliminate that risk. The regulations are also to describe the kind of connection to a building that a developer must have in order to be eligible. The connection may be of an indirect kind. Subsection (5) makes it clear that the regulations may specify eligibility criteria additional to those set out in subsection (2). “Developer” is defined in subsection (6).

11. Section 22 gives further detail on the provision which may be made by regulation under section 20(3)(b) in relation to conditions of membership. Subsection (2) provides a non-exhaustive list of the conditions of becoming, and remaining, a member of the scheme, that regulations may provide for. In particular, this may include conditions relating to (a) carrying out single-building assessments and the carrying out of work identified as needed in a single-building assessment, (b) making financial contributions towards meeting costs associated with carrying out single-building assessments and the carrying out of work identified as needed in a single-building assessment, (c) the provision of information to the Scottish Ministers or any other person, (d) abiding by the terms of an agreement. Subsection (3) sets out that regulations may provide for a right of an appeal to court against a decision of the person operating a scheme to refuse to allow another person to become a member of the scheme on the grounds that the person does not meet the conditions for becoming a member.

12. Section 23 gives further detail on the provision which may be made by regulation under section 20(3)(c) in relation to loss of membership. Subsection (2) provides that the regulations must enable a person who has become a member of a scheme to choose to stop being a member. Subsection (3) sets out that regulations may provide for a right of appeal to a court against a decision of the person operating a scheme to stop another person's membership of a scheme on the grounds that the person has not met the conditions for becoming or remaining a member (as set out in the regulations by virtue of section 20(3)(b) and section 22). It is implicit in the provision made by subsection (3) that the regulations may provide for the operator of a responsible developers scheme to be able to remove members from the scheme on the grounds that the member has not met the conditions for becoming or remaining a member of the scheme.

13. Section 24 gives further detail on the provision which may be made by regulation under section 20(3)(d) in relation to consequences of not being a member. Subsection (2) provides that the person operating a scheme is to publish a list of persons who are eligible to be members of the scheme but are not ("a prohibited developers list").

14. Subsection (3) then provides an exhaustive list of things that the regulations can do in relation to developers who are included in such a prohibited developers list. Those things are: prohibiting the developer from carrying out any development (or development of kinds described in the regulations); preventing the developer from applying for a building warrant to be granted or amended; and requiring a verifier to reject any completion certificate submitted by the developer.

15. Subsection (4) provides that the regulations may modify any enactment for a purpose mentioned in subsection (3). Subsection (5) provides that such modifications may in particular include modifications of Part 6 of the Town and Country Planning (Scotland) Act 1997 providing for anything done by a developer on the prohibited developer list in contravention of a prohibition on them carrying out development to be treated as if it was a breach of planning control under that Part.

16. Subsection (6) provides for another way the regulations can provide for developers on the prohibited developers list to be sanctioned for carrying out prohibited development – the creation of offences. Subsection (7) sets out the maximum penalties that the regulations can provide for in relation to any such offences, which includes the possibility of an unlimited fine, if the court so decides.

17. Under subsection (8), the regulations may provide for developers who are included on a prohibited developers list to be able to appeal their inclusion on the list to a court.

Reason for taking power

18. A regulation making power is necessary in order to create a fit for purpose responsible developers scheme or schemes. The purpose of such schemes is to ensure that developers address or contribute towards the cost of remediating buildings with external wall cladding systems, that are wholly or partly residential. The nature of a responsible developers scheme is such that it is necessary to take the flexible approach which a regulation making power provides. Work to identify buildings across Scotland with problematic external cladding systems is ongoing. In turn, the number and nature of developers connected to all such buildings is still to be fully understood.

Whilst a number of property developers have agreed to the principle of developer remediation, engagement with developers is ongoing regarding the detail of membership conditions.

19. Section 21 sets out the scope of eligibility by making it clear that eligibility must as a minimum relate to being a developer and having a connection (including an indirect connection) to a building with problematic cladding, though additional eligibility criteria may be specified in the regulations.

20. In order to be effective in encouraging developers to join a scheme for the purpose of addressing or contributing towards the cost of remediating buildings, section 24 provides for regulations to set out the consequences of being placed on “a prohibited developers list”. One of the possible consequences is for the regulations to prohibit such a person from carrying out any development or development of a kind described in the regulations

21. To enforce a prohibition on development, regulations may in particular modify the provisions of Part 6 of the Town and Country Planning (Scotland) Act 1997 so that it applies as if a breach of the prohibition on development were a breach of planning control. This will allow regulations to be made which give local authorities the powers to enforce the prohibition on development through existing mechanisms for breach of planning control. Such regulations will require detailed provision to be made, in consultation with local authorities and other stakeholders (with whom there has already been initial engagement), to ensure that the prohibition on development can be enforced effectively through planning controls. By doing so by regulations, this allows the possibility of further adjustment, should this become necessary.

22. In addition, however, subsection (6) provides that regulations may create offences in connection with a breach of the prohibition on development, and subsection (7) sets out the maximum possible penalties, including an unlimited fine on conviction on indictment (sentencing always being a matter at the court’s discretion). The regulation making power to create offences is needed in order to set out the precise circumstances in which an offence or offences may be committed (which is inter-dependent on regulations being made under subsection (3)(a) to prohibit development and the scope of prohibited development). The possible penalties for such offences must be appropriate and sufficiently impactful to discourage development continuing when a person is prohibited from doing so.

23. The regulation making powers include the power to make provision for appeals to court, where appropriate (sections 22(3), 23(3) and 24(8)). Disputes may arise in relation to refusing to allow a person to become a member of the scheme, stopping membership of the scheme, and being placed on a prohibited developers list, and so it is necessary to take a power to create an appeal to court to ensure fairness when necessary. As the detail of such appeals is inter-dependent on other aspects of the regulations, it is necessary to take a regulation making power.

Choice of procedure

24. Regulations made under section 20 are subject to the affirmative procedure. The affirmative procedure provides the appropriate level of scrutiny given the importance of creating one or more responsible developers schemes that are fit for purpose. Issues such as eligibility, conditions of membership, circumstances and consequences of loss of membership are significant

issues which require the Parliament to be given the opportunity to scrutinise the final proposals in detail and so that they are not introduced without the active approval of the Parliament.

Section 26: Power to modify section 25

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative

Provision

25. Section 26 provides the Scottish Ministers the power by regulations to modify section 25 (which sets out the meaning of single-building assessment) so as to change the types of building in relation to which a single-building assessment may be carried out. Regulation could for example modify the meaning so as to specify, in relation to the height criterion, a height lower than 11 metres. Use of this regulation-making power could therefore expand (or restrict) the buildings which will be able to be entered in the cladding assurance register in future, and in relation to which the powers to remediate conferred by Part 2 of the Bill are exercisable. However, subsection (2) makes it clear that the modifications cannot result in single-building assessments being carried out in relation to buildings that are wholly commercial in nature or which do not have an external wall cladding system. Such buildings will therefore never be able to be entered in the cladding assurance register, and the powers conferred by Part 2 of the Bill will never be exercisable in relation to such buildings.

Reason for taking power

26. The programme of cladding remediation by the Scottish Ministers is currently aimed at all buildings of 11 metres or more above the ground. However, the programme of identifying buildings with problematic cladding is still ongoing. Therefore, there is a need to provide a power to change the type of building in relation to which a single-building assessment may be carried out, and also in relation to which the powers to remediate are to apply to.

Choice of procedure

27. Regulations made under section 26 are subject to the affirmative procedure. This is an important power as, if exercised, it will affect (potentially expanding the scope of) which properties can be assessed or remediated without owner consent, and it would also have an effect on eligibility for membership of the responsible developers scheme. The affirmative procedure therefore provides the appropriate level of scrutiny given the importance of these issues.

Section 29: Ancillary provision

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative (unless adding to, replacing or omitting any part of the text of an Act, in which case affirmative)

Provision

28. Section 29 enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or savings provision for the purposes of, in connection with, or for giving full effect to the Bill.

Reason for taking power

29. As with any new body of law, the Bill may give rise to a need for a range of ancillary provision. Whilst the Scottish Government has given careful consideration to the provisions of the Bill, this power is considered necessary to ensure that any unexpected issues which require further changes can be dealt with effectively and that the purpose of the Bill is not inadvertently obstructed. The power to make such provision is common in Bills to provide flexibility to make any adjustments in light of experience in relation to the operation of the Act as timeously as possible. It would not be an effective use of Parliament's time, or the Scottish Government's resources to deal with such matters through primary legislation.

Choice of procedure

30. Section 30(3) provides that regulations made in exercise of this power are subject to the affirmative procedure if those regulations add to, replace or omit any part of an Act. Otherwise, such regulations will be subject to the negative procedure. This formulation is standard in connection with ancillary powers.

31. The approach taken here is typical for ancillary powers and recognises the particular interest Parliament has in provisions which modify primary legislation. Whereas ancillary changes to subordinate legislation are likely to be more technical in nature and so merit a lesser degree of parliamentary scrutiny.

Section 31: Commencement

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Laid, no procedure

Provision

32. Section 31 sets out when the provisions of the Bill will come into force (i.e. begin to have effect). Sections 25 to 31 will come into force on the day after Royal Assent. The other provisions of the Bill will commence on the day appointed by the Scottish Ministers in regulations. These regulations will be laid before the Scottish Parliament but will not otherwise be subject to any

parliamentary procedure (see section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

33. In addition, this section provides that commencement regulations may include transitional, transitory or saving provision and may make different provision for different purposes. In particular, this allows different sections of the Bill to be commenced on different days

Reason for taking power

34. It is standard for Ministers to have powers over the commencement of Acts. It is considered appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable. Such provisions may require to make transitional or transitory provision, or the saving of repealed or amended provisions

Choice of procedure

35. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions, the substance of which have already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before the Parliament as soon as practicable after being made (and in any event before the legislation is due to come into force).

This document relates to the Housing (Cladding Remediation) (Scotland) Bill (SP Bill 36) as introduced in the Scottish Parliament on 1 November 2023

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