

Housing (Cladding Remediation) (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Housing (Cladding Remediation) (Scotland) Bill, introduced in the Scottish Parliament on 1 November 2023.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 36–FM);
 - a Policy Memorandum (SP Bill 36–PM);
 - a Delegated Powers Memorandum (SP Bill 36–DPM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 36–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

The Bill – An overview

5. 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 the external wall cladding systems of buildings that are at least partly residential. 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.

Key concept: Single-building assessments

6. The concept of “single-building assessments” is central to Parts 1 and 2 of the Bill. A building cannot be entered in the cladding assurance register unless a single-building assessment has been carried out in relation to it. In addition, the various powers conferred by Part 2 all relate to the carrying out of single-building assessments or are dependent on such an assessment having been carried out. The concept will also be an essential feature of any responsible developer schemes established under Part 4, for example, in that developers, to be eligible for membership of such a scheme, must have a connection to a building in relation to which a single-building assessment has identified a need to carry out work to eliminate or mitigate a risk to human life created or exacerbated (directly or indirectly) by the building’s external wall cladding system.

7. “Single-building assessment” is defined in section 25 of the Bill. The definition contains a number of elements.

8. First of all, an assessment is only a single-building assessment if it relates to a building which meets certain criteria, as set out in paragraph (a) of section 25. The building must:

- have an external wall cladding system,
- be at least partly residential,
- be “flatted”, as defined in section 16 of the Land Registration etc. (Scotland) Act 2012,
- have a height (measured from the ground) of at least 11 metres,
- have been constructed or refurbished in the 30 year period between 1 June 1992 and 1 June 2022.

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

9. Section 26 confers power on the Scottish Ministers to modify section 25 so as to change the types of buildings in relation to which a single-building assessment may be carried out. This includes power to amend the last three of these criteria. So, for example, regulations could 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 conferred by Part 2 of the Bill are exercisable.

10. Such regulations may not amend section 25 so as to include buildings which are entirely non-residential or which do not have an external wall cladding system. So, for example, assessments of the external wall cladding systems of entirely commercial buildings will never be “single-building assessments” for the purposes of the Bill. 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.

11. Regulations under section 26 are subject to the affirmative procedure (see section 30(2)).

12. The second element of the definition (paragraph (b) of section 25) sets out the things that the assessment has to do in order to count as a “single-building assessment”.

13. The third element of the definition (paragraph (c) of section 25) in effect requires that, to count as a single-building assessment, an assessment must be carried out in accordance with standards specified by the Scottish Ministers and by a person authorised by the Scottish Ministers. Although not required, it is expected that the standards in accordance with which a single-building assessment must be carried out will be published by the Scottish Ministers. Authorisation to carry out single-building assessments may be done on an individual basis or on some other basis, for example, by providing that all persons holding a particular qualification are authorised.

14. It does not matter for the purposes of the definition of “single-building assessment” whether the carrying out of the assessment is arranged by the Scottish Ministers or by someone else (for example, a developer who has an association with a particular building). But whoever arranges the assessment, it must be carried out to the specified standards and by an authorised person in order to count as a “single-building assessment” for the purposes of the Bill.

15. If an assessment is not carried out in accordance with the standards that apply at the time the assessment is carried out, or is done by an unauthorised person, the building will not be able to be entered in the cladding assurance register. And the powers conferred on the Scottish Ministers by Part 2 of the Bill will not be exercisable in these circumstances.

The Bill – Section by section

Part 1 – The cladding assurance register

Section 1 – The register

16. Subsection (1) requires the Scottish Ministers to maintain a new register, known as the “cladding assurance register”. It is anticipated that the register might be used by, for example, solicitors (in connection with the sale and purchase of properties within a building which has an external wall cladding system) or mortgage lenders (to check that a property within a building which has an external wall cladding system provides suitable security for lending). Subsection (5) allows the Scottish Ministers to charge for access to the register.

17. Subsection (2) deals with when an entry for a building is created in the register. A single-building assessment always requires to be carried out prior to the entry being created, with the precise timing of the entry being determined by the outcome of the single-building assessment. If the assessment identifies that work is needed to eliminate or mitigate risks to human life that are (directly or indirectly) created or exacerbated by the building’s external wall cladding system, the building will not be entered in the register until that work is completed. Otherwise, the building will be entered in the register immediately following completion of the single-building assessment.

18. An entry in the register may be created by the Scottish Ministers on their own initiative. This is likely to happen in relation to “orphan” buildings (that is, buildings where the developer who built or refurbished the building has not been identified). But nothing in section 1 prevents an application process being set up for developers to apply for a building with which they are associated being entered in the register – any such application process would necessarily involve the developer showing that they had carried out a single-building assessment within the meaning of section 25 in relation to the building.

19. Subsection (3) sets out the information that is to be included in a building’s entry in the register. Subsection (4) allows any inaccurate information to be corrected.

Section 2 – Offence of providing false or misleading information for the register

20. Subsection (1) provides that it is an offence to give information which the person giving the information knows (or ought to know) is false or misleading to the Scottish Ministers or a person carrying out a single-building assessment if the person knows that (or is reckless as to whether) the giving of the information is likely to result in material inaccuracy in the register or to an entry not being created in the register when it otherwise would have been.

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

21. Subsection (2) provides that a person who commits this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale (currently £1000).

Part 2 – Powers to assess and address danger

Chapter 1 – Scottish Ministers’ powers

Section 3 – Power to arrange single-building assessment

22. Subsection (1) gives the Scottish Ministers power to arrange for a single-building assessment to be carried out in relation to a building. This power will be used to arrange the carrying out of single-building assessments on “orphan” buildings. But it may also be used in other circumstances, for example, where a developer has arranged the carrying out a single-building assessment in relation to a building with which the developer has an association but the assessment has not been able to be completed due to the developer being unable to gain the necessary consent to all the work involved in the assessment. Even where arranged by the Scottish Ministers, the assessment will normally be carried out by another person under contract (the contractor will require to be authorised under section 25(c)(ii)).

23. The work involved in carrying out a single-building assessment in accordance with the standards specified under section 25(c)(i) might vary. In some cases, an external visual inspection might be sufficient to determine whether the building’s external wall cladding system creates or exacerbates a risk to human life. In other cases, the single-building assessment might involve significant work to the common parts of a building or within individual properties within the building (or both). Or it might be necessary to access premises which do not form part of the building in order to carry out the single-building assessment (for example, to erect scaffolding to facilitate external inspection of the building’s external wall cladding system).

24. Some of the things that might require to be done as part of a single-building assessment (for example, entering on certain premises or removing or damaging property) might normally be unlawful if done without a proper legal basis. One such legal basis is owner consent. Although not mandated by the Bill, it is expected the Scottish Ministers will engage with the owners and occupiers of a building in relation to the carrying out of a single-building assessment arranged under subsection (1). Developers may also follow a similar process where they are arranging a single-building assessment. This may result in owner consent being given for whatever work is necessary as part of the assessment (whether the assessment itself is arranged by the Scottish Ministers under subsection (1) or by the developer), and where this is the case, the legal basis on which the work will proceed will be that owner consent.

25. But obtaining owner consent may not always be straightforward – for example, some owners may be difficult to locate and contact. This can be an issue not just where access is required to the premises of a non-contactable owner, but also where (as will be common) a single-building assessment necessitates work to parts of the building which are the common property of one or more owners of premises within the building.

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

What constitutes owner consent in relation to works affecting common property will vary according to the rules that apply in relation to the particular building – those rules might be set out in the title deeds for the various properties within the building or the Tenement Management Scheme set out in schedule 1 of the Tenements (Scotland) Act 2004 might apply. In some cases, the consent of a majority of the owners will be sufficient for the works to be carried out on the common property; in others, the consent of all of the owners may be necessary. In the latter case, even one owner being non-contactable would prevent the work proceeding on the basis of consent.

26. Subsections (2) and (3), in conjunction with sections 11 and 12, provide a mechanism under which a lack of consent to the carrying out of work that is necessary as part of a single-building assessment may be overcome.

27. Section 11(1) entitles a person carrying out a single-building assessment under section 3(1) to do anything reasonably required to carry out that assessment (such as entering premises). This provides an alternative legal basis to owner consent for the doing of things that might otherwise be unlawful. Section 11(1) does not by itself authorise the use of force to enter premises – but a warrant under section 12 can authorise the use of reasonable force for this purpose.

28. Importantly, though, section 3(2) prevents the power conferred by section 11(1) being used prior to the expiry of a 7 day notice period. As the power to grant a warrant under section 12 depends on the person carrying out the single-building assessment being entitled to enter premises under section 11(1), it follows that a warrant also cannot be granted prior to the expiry of that 7 day notice period. Until this point, owner consent is required in relation to anything that needs to be done on premises for the purposes of carrying out the single-building assessment (and the legal basis for the work would be that consent, not section 11(1)).

29. Section 3 does not necessarily require the giving of formal notice in all cases, or to all owners of premises in a building. If, for example, a single-building assessment requires access to a number of individual premises within the building and some of the owners of those individual premises have consented (as a result of the informal engagement process described above) and others have not, a notice under section 3(2) may only need to be given to the owners who have not consented. This will make the section 11(1) power exercisable in relation to those premises at the end of the 7 day notice period. The power conferred by section 11(1) may not be needed in relation to the premises where the owners have consented (as that consent provides a legal basis for access in that case), and so there may be no reason to give formal notice under section 3(2). The case where the power conferred by section 11(1) might be necessary despite the owner having consented to the work is where there is a practical barrier to the exercise of the entitlement to access the premises provided by the owner consent – such as an occupier refusing entry. Where the work relates to the common parts of the building, however, all of the owners of those common parts will require to be given notice under section 3(2) in order to make the section 11(1) power exercisable in relation to the common parts (even if some of the owners have already consented as a result of informal engagement).

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

30. If notice is never given under section 3 in relation to particular premises, the power conferred by section 11(1) will never become exercisable in relation to those premises (as, if notice is never given, there will never be a notice period to expire, and the prohibition on doing things without owner consent set out in section 3(2) will apply indefinitely).

31. Subsection (3) sets out that the 7 day notice period starts on the day that the Scottish Ministers give written notice, to the owner of the premises involved, explaining what the carrying out of the single-building assessment may entail.

32. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”) sets out a number of methods by which notice may be given – personal delivery, sending by registered post or other form of recorded delivery to the proper address (defined in section 26(4) of ILRA) of the person or (with the agreement of the recipient) sending using electronic communication. Section 26(5) of ILRA establishes a rebuttable presumption that, in these last two cases, notice is received 48 hours after it is sent. Section 17 of the Bill makes alternative provision to section 26(5) of ILRA – in the case of notices under Part 2 of the Bill sent using the last two methods mentioned above, the presumption that notice is received 48 hours after being sent is non-rebuttable.

33. The effect of this in relation to section 3 is that, if notice under section 3 is sent using one of those two methods, the 7 day notice period starts (in all cases) on the second day after the day on which notice is sent – including where an owner has not received the notice at that point (and where an owner receives notice in less than the 48 hours stated in section 17). As noted above, expiry of the 7 day notice period then automatically leads to the power conferred by section 11 becoming exercisable, subject to the limits provided in that section, including as to the use of force to enter – so if, for example, an owner then refused entry to the premises, despite the person seeking entry to carry out the single-building assessment having the legal basis to do so under section 11(1), a warrant to authorise the use of reasonable force to enter the premises would need to be applied for under section 12.

34. In addition, section 16 of the Bill sets out a further case in which notice is to be regarded as having been given for the purposes of Part 2 of the Bill (that is, where the notice is displayed on or near the premises in connection with which the notice is given, following the Scottish Ministers having been unable, despite making reasonable inquiries, to establish the proper address of the person to whom the notice is being given). In this case, the 7 day notice period under section 3 will start, in relation to an owner whose address cannot be ascertained, on the day on which the notice is displayed as described above.

35. Again, expiry of the 7 day notice period automatically leads to the power conferred by section 11 becoming exercisable. The person carrying out the single-building assessment would then, using the legal basis provided by section 11(1), be entitled to enter the premises and do anything required for the purposes of carrying out the single-building assessment arranged under section 3(1) (again, subject to the limits

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

provided for in section 11 – so if, for example, the premises are unoccupied, a warrant under section 12 would need to be sought to authorise the use of reasonable force to secure entry).

36. Section 3(4) requires that the notice be given to any occupier of the premises at the same time as it is given to the owner. “Occupier” is defined in section 28. Occupier consent to the carrying out of the work involved in the single-building assessment will never be a sufficient legal basis for the work involved in a single-building assessment to be carried out – only owner consent, or section 11(1) applying, is sufficient. An occupier might still refuse entry to a person who seeks to enter the premises using one of these legal bases (but where the legal basis on which entry is sought is section 11(1), a warrant under section 12 to authorise the use of reasonable force to enter the premises can be applied for).

37. Where a developer arranges for a single-building assessment to be carried out in relation to a building with which they are associated but does not succeed in obtaining all of the consent necessary for the work involved in the assessment to be carried out, the Scottish Ministers may instead exercise the power conferred on them by section 3 to arrange the single-building assessment. As in cases where the carrying-out of the single-building assessment is arranged from the outset by the Scottish Ministers, this will mean that the power conferred by section 11(1) will be able to be used following the expiry of the 7 day notice period.

Section 4 – Power to require information for single-building assessment and the register

38. Subsection (1) gives the Scottish Ministers power to require others to provide them with information which is reasonably required by someone for the purpose of carrying out a single-building assessment, or by them for the purpose of maintaining the cladding assurance register. A requirement is imposed by the giving of a written notice containing the information set out in paragraphs (a) to (d) of subsection (2). The power does not extend to requiring the provision of information which the person could refuse to provide in court proceedings in Scotland (subsection (3)). Subsection (4) allows a requirement to be cancelled by the giving of a further written notice.

Section 5 – Offence of failing to comply with requirement under section 4

39. Subsection (1) makes it an offence to fail, without reasonable excuse, to provide information required by a notice under section 4(1) in the required form or by the required time. Subsection (2) provides that a person who commits this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale (currently £1000).

Section 6 – Power to arrange remediation work

40. Subsection (1) gives the Scottish Ministers power to arrange for the carrying out of work that is identified by a single-building assessment as necessary to eliminate or

mitigate risks to human life that are (directly or indirectly) created or exacerbated by the building's external wall cladding system.

41. As with section 3, subsections (2) and (3) then, in conjunction with sections 11 and 12, provide a mechanism under which a lack of consent to the carrying out of work that is identified as necessary by a single-building assessment may be overcome. Much of the discussion in paragraphs 22 to 37 above in relation to single-building assessments is therefore also relevant here. But there are some differences between section 3 and section 6.

42. Firstly, the notice period last 21 days rather than 7 days. Section 6(2)(a) prevents work starting prior to the expiry of this period, except where the owner gives consent. That is, the power conferred by section 11(1) to do work cannot be used prior to expiry of the 21 day notice period.

43. Secondly, an owner of premises who is given notice can appeal to the sheriff against the Scottish Minister's decision to arrange for work identified as necessary by a single-building assessment to be carried out under section 10(1). The appeal can be brought without permission during the 21 day notice period, or with the sheriff's permission (on cause shown) after that (section 10(2)). The powers of the sheriff on an appeal are set out in section 10(3). The sheriff's decision is final (section 10(4)). Under section 10(5), the appeal must be determined within 21 days of being brought, otherwise it is deemed to be dismissed.

44. Where an appeal is made under section 10(1), section 6(2)(b) prevents work starting (except with owner consent) before the appeal is finally determined or withdrawn. So where an appeal is made, the power conferred by section 11(1) cannot be used until that point. An appeal being deemed to be dismissed under section 10(5) would mean that the appeal had been determined for the purpose of section 6(2)(b).

45. A written notice under section 6(1) must contain the information set out in section 6(3). As well as containing information about what work is to be carried out and the effect of section 11, the notice must explain the owner's right to appeal under section 10(1).

46. Section 6(4) requires that written notice also be given to any occupier of the premises to which the notice relates. But occupiers have no right to appeal. And, as in section 3, occupier consent is not sufficient to allow work to begin before expiry of the 21 day notice period (or while an owner appeal is being determined).

Section 7 – Power to arrange urgent remediation work

47. A need for urgent work to be carried out in order to eliminate or mitigate a risk to human life that is (directly or indirectly) created or exacerbated by a building's external wall cladding system may be identified in a single-building assessment report – or may even be raised with the Scottish Ministers while the assessment is still ongoing. Where such a risk is so immediate that it would be inappropriate to delay work to address it by

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

arranging for it to be carried out under section 6, the Scottish Ministers are empowered to arrange for the work to be carried out under this section instead.

48. In this case, there is no specified notice period which must expire in order for the power conferred by section 11(1) to do anything reasonably required to carry out the arranged work to be exercisable – instead, that power becomes available immediately the arrangement under section 7 is made. Subsection (2) does require the Scottish Ministers to give owners and occupiers such notice of the carrying out of the work as the circumstances permit (while also recognising the possibility that there may be circumstances where it is not possible to give any notice). But such notice is purely for information. There is no appeal against an arrangement for work to be carried out under section 7.

Section 8 – Power to evacuate

49. Subsection (1) gives the Scottish Ministers power to require the occupants (a term which is not defined in the Bill and therefore takes its ordinary meaning) of premises to remove from the premises. The power is exercisable in two circumstances.

50. The first circumstance is where the Scottish Ministers consider that there is a substantial risk to the occupants' lives which is due (directly or indirectly) to the external wall cladding system of a building that is undergoing or has undergone a single-building assessment (subsection (1)(a)). An arrangement for work to be carried out to eliminate or mitigate the risk need not have been made at the time the occupants are required to remove from the premises. It also does not matter in this case whether the single-building assessment which identified the risk was arranged by the Scottish Ministers or a developer. Under subsection (2)(b), immediate removal may be required. The requirement to remove from the premises may be made verbally or by the giving of written notice (subsection (2)(a)).

51. The second circumstance is where the carrying out of work has been arranged under section 6 or 7 and the Scottish Ministers consider that the occupants may be endangered by the carrying of the work (subsection (1)(b)). A developer carrying out remediation work could ask, but not require, occupants to remove from the building if the occupants might be endangered by the carrying out of the work. If occupants refused to remove, the developer would need to ask the Scottish Ministers to arrange the work under section 6 or 7 in order for the occupants to be required to remove.

52. In the section 8(1)(b) case, the requirement to remove must be made by the giving of written notice, which must specify a date by which the occupants must have removed from the premises (subsection (3)(a)). Under subsection (3)(b), that date must be at least two weeks after the day on which notice is given.

53. In either case, the Scottish Ministers may, if the occupants of the premises to which the requirement to remove relates fail to remove as required, apply to the sheriff under paragraph 1(1) of the Bill's schedule for a warrant for the ejection of the occupants from the premises.

54. In the first circumstance set out above, the sheriff must, under paragraph 3(1) of the schedule, grant the warrant for ejection, subject only to being satisfied that it is reasonable to do so. Further, the sheriff must do so within the period of 7 days beginning with the day on which the application for the warrant was made (except where the sheriff requires that an occupant be given written notice under paragraph 2 of the schedule, in which case the period of 7 days begins only when that additional notice is given).

55. In the second circumstance set out above, an application for a warrant for ejection may be made only after the date specified in the notice under section 8(3)(a) (paragraph 1(2) of the schedule). In such a case, the sheriff may (but need not) grant a warrant for ejection if satisfied that it is reasonable to do so (paragraph 3(2) of the schedule). The sheriff is also not required to grant the warrant within a particular timeframe in this case.

56. In both circumstances, a warrant for ejection may include conditions which the sheriff considers just and equitable (paragraph 3(3) of the schedule). The conditions may include conditions about the payment of rent (for example, a condition that an ejected tenant is not to be liable for rent in respect of any period during which they are forbidden from occupying the premises (see section 9(2) and paragraph 59 below for when occupation is forbidden)).

57. Removal from premises in accordance with a requirement under section 8 or ejection by virtue of a warrant granted under the schedule is not, where the occupants who are removed or ejected are tenants, to be taken to have the effect of terminating, varying or altering the tenancy (section 8(5)).

58. Regardless of whether occupants were originally required to remove under section 8(1(a) or (b), section 8(4) requires the Scottish Ministers, once they are satisfied that occupants would not be endangered by occupying the premises, to take all reasonable steps to notify the occupants who removed or were ejected of that fact. They must also arrange for notice of this fact to be displayed on or near the premises for a period of at least 14 days (section 8(4)(a)).

Section 9 – Offence of occupying evacuated premises

59. Subsection (1) makes it an offence for a person to occupy premises when forbidden to do so. Subsection (2) defines the period when occupation is forbidden. The period starts when the person removes from the premises in accordance with a requirement imposed under section 8 or when they are ejected by virtue of a warrant for ejection granted under paragraph 3 of the schedule. It ends on the first day on which notice is displayed on or near the premises, as required by section 8(4)(a). Subsection (3) provides that a person who commits this offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £5000), a term of imprisonment not exceeding 3 months, or both.

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

Section 10 – Appeal against arranged remediation work

60. This section is fully discussed in the context of section 6 – see paragraphs 43 and 44 above.

Chapter 2 – Carrying out assessments and work

Section 11 – Authority for carrying out assessment or work

61. As already discussed, section 11(1) entitles a person carrying out a single-building assessment or work identified by such an assessment as being needed to eliminate or mitigate risks to human life that are (directly or indirectly) created or exacerbated by a building’s external wall cladding system to do anything reasonably required carry out the assessment or work. But the entitlement only arises where the assessment or work is being carried out under Chapter 1 of the Bill (that is, where the assessment has been arranged by the Scottish Ministers under section 3 or work has been arranged by the Scottish Ministers under section 6 or section 7 – whether such an arrangement arises from the building being an “orphan” building or due to a developer asking the Scottish Ministers to arrange an assessment or work in relation to a building which with the developer is associated). In addition, the relevant notice period (7 days in the case of a single-building assessment, 21 days in the case of work arranged under section 6) must have expired in order for the entitlement under section 11(1) to arise (see section 3(2) and 6(2) and also section 11(7)(a)). There is no notice period in relation to work arranged under section 7, meaning that the entitlement under section 11(1) to do things reasonably required to carry out that work arises immediately the arrangement is made.

62. Subsection (1) includes a non-exhaustive list of things that a person is entitled to do under that subsection (provided always that the thing is reasonably required to carry out the assessment or work in question). The examples given are entering premises, taking other persons and equipment onto premises, removing things from premises (and retaining them until reclaimed by their owner), and carrying out reasonable tests to determine the properties of any material.

63. Subsection (2) provides that subsection (1) does not, of itself, entitle a person to use force to enter premises. The use of reasonable force can only be authorised by a warrant under section 12. A warrant under section 12 is not needed where premises can be entered without force – in that case, section 11 provides the legal basis to enter the premises and do anything required for the purposes of the single-building assessment or work arranged under section 3, 6 or 7.

64. By virtue of subsection (3), subsection (1) also does not entitle a person to enter on Crown premises without the owner’s consent (section 27 sets out who the “owner” is in relation to various types of Crown premises).

65. Subsection (4) sets out further conditions in relation to the entitlement to enter premises created by subsection (1). The premises may be entered only at a reasonable time of day, and only if the occupants of the premises have been given at

least 24 hours' notice (except that such notice is not required where the situation is urgent (subsection (5))). If requested, the person carrying out the assessment or work must provide written evidence of the legal basis of their entitlement to enter the premises. Finally, the person must leave the premises no less effectually secured against unauthorised entry than they found them. These conditions apply only where the legal basis on which (for example) premises are entered is the entitlement conferred by subsection (1) – they do not apply if the legal basis for the entry to the premises is owner consent (whether the entry is in pursuance of a single-building assessment or work arranged by the Scottish Ministers or an assessment or work arranged by a developer).

66. Subsection (6) implicitly provides that, where a warrant authorises the person carrying out the assessment or work to use reasonable force to enter premises, the warrant may also make provision about the things that the person can do once on the premises. Any such provision takes precedence over an entitlement to do something under subsection (1).

67. Subsection (7)(a) makes clear (as discussed above) that section 11 does not entitle a person to do things in breach of section 3(2) or 6(2) – that is, the notice period provided for in those sections must have expired in order for section 11(1) to be used as a legal basis for any action which might be unlawful if done without a proper legal basis (otherwise, owner consent is required to provide a legal basis for such actions).

68. Subsection (7)(b) makes clear that an entitlement to do things under subsection (1) does not amount to an entitlement to do things in relation to which some other type of warrant, permission, consent or other approval is required without that other type of approval. For example, if work being carried out under an arrangement made under section 6 also requires a building warrant, subsection (1) does not remove the need for that warrant.

Section 12 – Warrant authorising use of force to effect entry

69. Section 11(2) provides that a warrant under section 12 is required to authorise the use of force to enter premises under section 11(1). A warrant can only authorise the use of reasonable force, and authority to use force does not amount to a requirement to use force if force turns out not to be required following the granting of the warrant.

70. Section 12(1) provides that such a warrant may be granted by a sheriff, a summary sheriff or a justice of the peace, on an application made by the Scottish Ministers (subsection (2)). The authorisation provided by a warrant is authorisation to use reasonable force in accordance with the terms of the warrant (subsection (1)). Subsection (3) sets out the matters as to which the sheriff, summary sheriff or justice of the peace requires to be satisfied in order to grant the warrant, while subsection (4) also requires notice of intention to apply for a warrant to have been given to the occupier of the premises in order for the warrant to be granted in certain types of case. Circumstances in which a warrant authorising the use of force to enter premises might be granted include entry having been refused or the premises being unoccupied (subsection (3)(b)).

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

71. Under subsection (5), a warrant ceases to have effect on the earlier of two events occurring – either the purpose for which the warrant was granted being fulfilled, or an expiry date specified in the warrant being reached.

Section 13 – Offence of obstructing assessment or work

72. Subsection (1) makes it an offence for a person (without reasonable excuse) to intentionally obstruct a person carrying out a single-building assessment or work arranged under section 6 or 7 from doing something that they are entitled to do by section 11(1) – but only if, in addition to the person being entitled to do the thing under that section, the use of reasonable force to do the thing was authorised by a warrant under section 12 at the time the obstruction took place. Subsection (2) provides that a person who commits this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale (currently £1000).

Section 14 – Offence of failing to assist with assessment or work

73. Subsection (1) makes it an offence for a person who is on premises when a single-building assessment arranged under section 3 or work arranged under section 6 or 7 is being carried out on the premises, or who is the owner or occupier of the premises, to fail (without reasonable excuse) to provide information or assistance reasonably requested by the person carrying out the assessment or work for the purposes of the assessment or work – but only if the use of reasonable force is authorised by a warrant under section 12 in connection with the carrying out of the single-building assessment or work at the time the request is made. Subsection (2) provides that a person who commits this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale (currently £1000).

Chapter 3 – Notices

Section 15 – Power to require information to give notice

74. Various provisions in Part 2 of the Bill require the giving of notice to people by the Scottish Ministers (for example, if the power conferred by section 11 is needed to enable a single-building assessment to be carried out on premises, the Scottish Ministers are required to give notice to the owner of the premises under section 3. See also, in particular, sections 6 and 8). To assist in the giving of such notices, subsection (1) gives the Scottish Ministers power to require owners, occupiers and persons receiving rent (directly or indirectly) in respect of premises in relation to which notice under Part 2 needs to be given to provide information in writing about the nature of the person's interest in the premises and the name and address of any other persons known by the person on whom the requirement is imposed to have an interest in the premises. For example, an occupier of premises might be required to provide details of the premises' owner. Under subsection (3), a requirement under subsection (1) is imposed by the Scottish Ministers giving the person notice of the information required and the deadline for providing it. The power under subsection (1) does not extend to requiring the provision of information which the person could refuse to provide in court proceedings in Scotland (subsection (4)). Subsection (5) allows a requirement to be cancelled by the giving of a further written notice.

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

75. Subsection (6)(a) makes it an offence for a person on whom a requirement to provide information under subsection (1) is imposed to fail (without reasonable excuse) to provide the information required. It is also an offence for such a person to knowingly or recklessly provide information that is false or misleading in a material particular in response to a requirement imposed under subsection (1) (subsection (6)(b)). Subsection (7) provides that a person who commits an offence under subsection (6) is liable on summary conviction to a fine not exceeding level 2 on the standard scale (currently £500).

Section 16 – Giving notice where recipient’s address is unknown

76. This section also relates to provisions in Part 2 which might involve the giving of notice (such as sections 3, 6 and 8). Subsection (1) applies where the Scottish Ministers are required to give notice to a person under Part 2 of the Bill to a person but, despite having made reasonable inquiries, have been unable to establish the person’s proper address (as defined in section 26(4) of ILRA). In such a case, the person to whom notice requires to be given is to be taken to have been given notice if the Scottish Ministers arrange for the notice to be displayed on or near the premises in connection with which the notice is given.

77. An example of where this provision will be of use is where the Scottish Ministers need to carry out work involved in a single-building assessment on premises. If the owner’s address is not known, it will not be possible to obtain owner consent. But to overcome the lack of consent and make the power conferred by section 11(1) exercisable, Ministers require to give the owner notice – which requires the owner’s address. This section overcomes this last problem – the alternative way of giving notice provided for in subsection (1) means that an owner’s address being unknown does not prevent notice being given to that owner under section 3(2). And that means that the power conferred by section 11(1) will become exercisable in relation to the owner’s premises after a notice has been displayed as provided for in subsection (1) for the period required by section 3(2).

Section 17 – Deemed receipt of notice

78. This section again relates to provisions in Part 2 which may involve the giving of notice (such as sections 3, 6 and 8). It provides that notices given as mentioned in section 26(2)(b) or (c) of ILRA (that is, sent to a person’s proper address (as defined in section 26(4) of ILRA) by registered post or other form of recorded delivery or sent (with the agreement of the recipient) using electronic communication) are to be taken to have been received 48 hours after being sent. This presumption cannot be rebutted. This means, for example, that an owner of premises cannot argue that the notice period set out in sections 3(2) and 6(2) has not begun, due to the notice not yet having been received (it follows that the notice not having been received will also not prevent the notice period expiring and the power conferred by section 11(1) in relation to those premises becoming exercisable in relation to the premises). See also the discussion in paragraphs 32 and 33 above.

Part 3 – Offences under Parts 1 and 2

Section 18 – Individual culpability where organisation commits offence

79. This section deals with cases where an offence under Part 1 or Part 2 of the Bill (that is, offences under section 2, 5, 9, 13, 14 or 15(6)) is committed by an organisation. Under subsection (2), a person who is (or is purporting to act as) an individual of a type listed in the table in subsection (3) commits the offence (in addition to the organisation committing the offence) if the offence involved consent or connivance, or is attributable to neglect, on their part.

Section 19 – Crown application: criminal offences

80. Section 20(1) of ILRA provides that Acts of the Scottish Parliament bind the Crown except in so far as the Act provides otherwise. This Bill will generally bind the Crown. But subsection (1) provides that nothing in Part 1 or Part 2 makes the Crown criminally liable (although the Court of Session may, on an application made by the Lord Advocate, declare any action or omission for which the Crown would be criminally liable but for the rule established by subsection (1) to be unlawful (subsection (2))). Subsection (1) does not extend to persons in the service of the Crown – such persons can therefore be held criminally liable for failures or omissions where the Bill provides for such liability.

Part 4 – Responsible developers scheme

Section 20 – Power to establish scheme

81. Subsection (1) gives the Scottish Ministers power to make regulations establishing one or more responsible developers schemes. Such regulations are subject to the affirmative procedure (section (30(2))).

82. Subsection (2) sets out that the purpose of such a scheme is to secure that persons in the building industry address, or contribute towards the costs of addressing, risks to human life created or exacerbated (directly or indirectly) by the external wall cladding systems of buildings that are at least partly residential.

83. Subsection (3) sets out a number of matters which must be provided for when a responsible developers scheme is made. The matters mentioned in paragraphs (a) to (d) are expanded upon in sections 21 to 24 respectively. Subsection (4) then sets out a non-exhaustive list of other matters that regulations under subsection (1) may cover, including who is to operate the scheme being established, and the payment of fees.

Section 21 – Eligibility for membership

84. Section 20(3)(a) requires regulations under section 20(1) establishing a responsible developers scheme to include provision about who is eligible to be a member of the scheme. Section 21 expands on this requirement.

85. Subsection (2) provides that regulations must restrict eligibility for membership to persons who are “developers” who have a connection (of a type described in the regulations) to buildings that are of a type described in the regulations and have problematic cladding (that is, buildings which have an external wall cladding system which has been found by a single-building assessment to create or exacerbate (directly or indirectly) a risk to human life and in relation to which work is needed to eliminate or mitigate that risk). Regulations may provide for the developer’s connection to a building to be indirect (subsection (4)). Subsection (5) makes clear that the regulations may specify eligibility criteria additional to those set out in subsection (2).

86. Subsection (6) defines “developer” as a person carrying on, for business purposes, activities connected with the construction of buildings.

Section 22 – Conditions of membership

87. Section 20(3)(b) requires regulations under section 20(1) establishing a responsible developers scheme to include provision about the conditions of becoming, and remaining, a member of the scheme. Section 22 expands on this requirement.

88. Subsection (2) provides a non-exhaustive list of matters to which conditions for becoming, and remaining, a member of a responsible developers scheme may relate. The examples given are conditions relating to the carrying out of single-building assessments (and work identified as necessary by such assessments), to the making of financial contributions towards the costs of such assessments and work, to the provision of information, and to abiding by the terms of agreements.

89. A decision by the operator of a responsible developers scheme to refuse membership of the scheme on the ground that the developer in question does not meet the conditions for being a member may, if the regulations establishing the scheme so provide, be appealed to a court or tribunal (subsection (3)).

Section 23 – Loss of membership

90. Section 20(3)(c) requires regulations under section 20(1) establishing a responsible developers scheme to include provision about loss of membership of the scheme. Section 23 expands on this requirement.

91. Subsection (2) requires the regulations to enable members of the scheme to choose to leave the scheme.

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

92. 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 (as set out in the regulations by virtue of section 20(3)(b) and section 22). If the regulations so provide, such decisions may be appealed to a court or tribunal.

Section 24 – Consequences of not being a member

93. Section 20(3)(d) requires regulations under section 20(1) establishing a responsible developers scheme to include provision about the consequences of a person who is eligible to be a member of a responsible developers scheme not being a member of the scheme. Section 24 expands on this requirement.

94. Subsection (2) requires the regulations to require the person operating a responsible developers scheme to publish a list of developers who are eligible to be members of the scheme but who are not. 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 at all (or development of a kind described in the regulations); preventing an application by the developer for a building warrant (or for an amendment to such a warrant) being granted; and requiring a verifier to reject any completion certificate submitted by the developer. Subsections (9) defines “development” (with reference to section 26 of the Town and Country Planning (Scotland) Act 1997) and “building warrant”, “completion certificate” and “verifier” (with reference to the Building (Scotland) Act 2003).

95. 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 things 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. The steps which can be taken under Part 6 in response to a breach of planning control include, for example, the issuing of enforcement notices or stop notices.

96. Subsection (6) provides for another way in 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.

97. 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.

Part 5 – Interpretation and final provisions

Chapter 1 – Interpretation

98. Section 25, which defines the term “single-building assessment”, and section 26, which enables the Scottish Ministers to make regulations modifying certain aspects of that definition, are fully discussed in paragraphs 6 to 15 above.

99. Section 27(1) sets out the meaning of “owner” in relation to Crown premises. Various provisions in the Bill refer to the owner of premises, including sections 3, 6, 7 and 10. If, for example, the carrying out of a single-building assessment requires access to premises an interest in which belongs to a government department, any notice given to the owner of the premises under section 3 must be given to that government department. In addition, section 11(3) contains special provision in relation to entry on Crown premises under section 11(1) – such entry is only permitted if the owner (determined in accordance with section 27(1)) consents.

100. Section 28 defines certain other terms used in the Bill, including “occupier” (used in sections 3, 6, 7, 12, 14 and 15).

Chapter 2 – Final provisions

101. Section 29 empowers the Scottish Ministers to make regulations making various types of ancillary provision for the purposes of, in connection with, or for giving full effect to the Bill (or any provision made under it). Such regulations may modify enactments (including the Bill). Where they do so, they are subject to the affirmative procedure; otherwise, they are subject to the negative procedure (section 30(3)).

102. Section 30 provides that the powers to make regulations conferred by the Bill (in sections 20, 26, 29 and 31) all include power to make different provision for different purposes. It also sets out the procedure to which the various regulation-making powers are subject.

103. Section 31 provides for Part 5 itself to come into force on the day after Royal Assent. All other provisions of the Bill come into force on such day as the Scottish Ministers may by regulations appoint. By virtue of section 30 not mentioning section 31, commencement regulations are not subject to any Parliamentary procedure.

104. Section 32 sets out the Bill’s short title.

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Housing (Cladding Remediation) (Scotland) Bill

Explanatory Notes

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