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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated powers in the Housing (Cladding Remediation) (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 9 January 2024, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Housing \(Cladding Remediation\) \(Scotland\) Bill](#) ("the Bill") at Stage 1.
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

Overview of the Bill

3. This Bill was introduced by the Scottish Government on 1 November 2023. The lead committee is the Local Government, Housing and Planning Committee.
4. The Scottish Government explains in the Bill [Policy Memorandum](#) that the focus of this Bill is to facilitate the delivery of the Cladding Remediation Programme in Scotland.
5. The Cladding Remediation Programme was established to identify and address the safety risks in multi-residential domestic buildings over 11 metres in height and incorporating a form of external wall cladding system.
6. As the initial work in assessing and remediating buildings within the scope of the Cladding Remediation Programme progressed, issues impacting on the delivery of the overall programme were identified and these were causing delays. The aim of this Bill is to address these thereby facilitating and accelerating the delivery of the Cladding Remediation Programme by moving away from providing grants to homeowners for commissioning a single-building assessment to the Scottish Government taking on the role of arranging for an assessment and remediation works.
7. The Bill also confers a power on Scottish Ministers to establish a Responsible Developers Scheme by regulations and this power is discussed further, later in the report.
8. The Bill comprises 32 sections in five parts together with a schedule:
 - **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 developer's scheme – see paragraphs 11 to 16 later in the report.
 - **Part 5** contains interpretation provisions and other usual final provisions.

Delegated powers

9. The Bill confers four powers to make subordinate legislation on the Scottish Ministers.
10. The Scottish Government has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and the procedure chosen.

Review of relevant powers

Section 20 – To Establish a Responsible Developers Scheme

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

11. Section 20 gives Scottish Ministers the power to establish one or more Responsible Developers Schemes to secure that developers in the building industry address, or contribute towards the costs of addressing, threats to human life created or exacerbated (directly or indirectly) by the external wall cladding systems of buildings that are wholly or partly residential. Regulations are to include who is eligible, the conditions of membership, loss of membership and the consequences of a person who is eligible not being a member.
12. Sections 21 to 24 give further details about what may, or must, be included in regulations made under section 20.
13. Section 21 provides that regulations must make being eligible for scheme membership dependant on a person being a developer and having a connection to a building of a kind described by the regulations that has problematic cladding. Regulations are also to specify the kind of connection that a developer must have to the building and may specify additional eligibility criteria for membership.
14. Section 22 provides non-exhaustive details on what regulations on conditions of membership may include, such as conditions relating to carrying out Single Building Assessments and the work identified as needed, making financial contributions to meeting costs, providing information to Ministers or any other person, and the right of appeal to a court if membership is refused.
15. Section 23 provides details on what regulations may include in relation to loss of membership including enabling a member to choose to stop being a member; and for a right of appeal to a court against a decision of the scheme operator to stop a developer's membership on the grounds that they have not met the conditions for becoming or remaining a member.
16. Section 24 provides details on what regulations may include in relation to the consequences for those who are eligible to be a member not being a member. This includes the publication of "a prohibited developers list." Regulations may make provisions to prohibit those on the list carrying out developments, preventing them from applying for a building warrant and rejecting their completion certificates. Regulations may modify any enactment, in particular 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. Further regulations may create offences in connection with breaching a prohibition or carrying out a development, and the maximum penalties; and may provide for a

right of appeal to a court against a decision to include the developer on the prohibited developers list.

Committee consideration

17. The Scottish Government explains in the DPM (paragraphs 18-23) that the reasons for taking the power are that:
- A regulation making power is necessary to create a fit for purpose scheme and to take a flexible approach. This is required as work to identify buildings across Scotland with problematic external cladding systems is ongoing and the number and nature of developers connected to such buildings is still to be fully understood. Further, a number of property developers have agreed to the principle of developer remediation but engagement is ongoing regarding the detail of membership conditions.
 - To enforce a prohibition on development, regulations may 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 is a breach of planning control. This will require 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. By doing so by regulations, this allows further adjustment to be more easily made, should this become necessary.
 - A regulation making power to create offences is needed to set out the precise circumstances in which an offence or offences may be committed and this is interdependent on the scope of regulations to be made to prohibit development. The possible penalties for such offences must be appropriate to the scope of the prohibition regulations once made.
 - The regulation making powers include the power to make provision for appeals to court. 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 a 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.
18. The Scottish Government further explains in the DPM (paragraph 24) that the reasons for making this power subject to the affirmative procedure are that it considers this provides the appropriate level of scrutiny given the importance of creating one or more schemes that are fit for purpose. The Scottish Government sets out in the DPM, and the Committee considers that, 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, so they are not introduced without the active approval of the Parliament.
19. The Committee finds the power acceptable. It considers that there is sufficient detail in sections 20 to 24 and in the DPM as to how this power is likely to be exercised; that this power is sufficiently delineated, and allows for an element of flexibility

because of a number of matters which, as the Scottish Government has explained, are yet to be worked through as the Cladding Remediation Programme and the Responsible Developers Schemes evolve. Further, the Committee considers that the power will be moderated by the ongoing engagement with developers including ongoing discussions on how a developers remediation contract will interface with the scheme; and the need to consult with local authorities and stakeholders on the interaction with Part 6 of the Town and Country Planning (Scotland) Act 1997.

20. The power is limited by its purpose as set out in section 20(2) of the Bill which states that this is to secure that developers in the building industry address, or contribute towards the costs of addressing, threats to human life created or exacerbated (directly or indirectly) by the external wall cladding systems of buildings that are wholly or partly residential; and by what can be included in the regulations, namely who is eligible, the conditions of membership, loss of membership and the consequences of a person who is eligible not being a member.
21. The Bill provides the Scottish Ministers with a power to establish a scheme or schemes and then sets out parameters for how such a scheme might be established. The Committee considers it is appropriate that the Scottish Ministers are also given the flexibility to decide how best to ensure compliance with such a scheme, the penalties for non-compliance and appropriate offences as this will be dependent on how the scheme is designed and who is responsible for operating it.
22. The Committee also considers that the affirmative procedure is appropriate given the scope of the scheme, the impact on developers and developments; the potential sharing of information with the public and third parties; the consequences for non-compliance; and the creation of offences. The affirmative procedure is therefore appropriate given the potential significance of the measures such regulations could introduce and will give the Parliament an opportunity to ensure it is content with such regulations.

23. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.

Section 26 - Power to modify meaning of single-building assessment.

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

24. Section 25 defines a “single-building assessment” as an assessment carried out in relation to a building that meets certain criteria, namely 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, and been constructed or refurbished in the 30-year period between 1 June 1992 and 1 June 2022.
25. Section 26 gives Scottish Ministers the power by regulations to modify section 25 to

change the types of building in relation to which a single-building assessment may be carried out. This section makes clear that the modifications cannot result in single-building assessments being carried out in relation to buildings that do not contain any premises that are a dwelling or intended to be used as a dwelling and which do not have an external wall cladding system.

Committee consideration

26. The Scottish Government explains in the DPM (paragraph 26) that the reasons for taking the power are that 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 apply.
27. The Scottish Government further explains in the DPM (paragraph 27) that the reasons for making this power subject to the affirmative procedure are that this is an important power as, if exercised, it will affect and could expand the scope of properties which can be assessed or remediated without owner consent, and it would also have an effect on eligibility for membership of the Responsible Developer Schemes. The Scottish Government therefore considers that the affirmative procedure provides the appropriate level of scrutiny given the importance of these issues.
28. The Committee finds the power acceptable. It considers that there is sufficient detail in section 26 and in the DPM to explain why this power is necessary as the programme for identifying buildings with problematic cladding is ongoing, that this power is contained by the conditions outlined but allows for an element of flexibility, and that it enables the types of building to which a single-building assessment may be carried out to be updated more easily than by primary legislation. The Committee also considers that the affirmative procedure will ensure the appropriate level of parliamentary scrutiny if a change is proposed to the types of building in relation to which a single-building assessment may be carried out.

29. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.

Section 29 – Ancillary Provisions

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure if add to, replace or omit any part of the text of an Act, otherwise subject to the negative procedure

Provision

30. 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 or any provision

made under it; and may modify any enactment (including this Bill when it becomes an Act)

Committee consideration

31. The Scottish Government explains in the DPM (paragraph 29) that the reasons for taking the power are that 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.
32. The Scottish Government further explains in the DPM ((paragraphs 30 to 31) that the reasons for making this power subject to a combination of procedures are that this formulation is standard in connection with ancillary powers.
33. The power to make standalone ancillary provision by regulations is common in modern primary legislation. The power is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it.
34. The power allows issues of an ancillary nature which may arise to be dealt with effectively by the Scottish Ministers. Without such a power, any changes would require to be made by primary legislation, which would not be an effective use of the Parliament's resources.
35. The approach taken 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, operational or implementation matters within the scope and policy intention of the Bill and so merit a lesser degree of parliamentary scrutiny. This is standard for an ancillary provision.
36. For these reasons, Committee is content that the power is appropriate in principle.
37. The Committee is also content that the affirmative procedure applies to any provision made which modifies primary legislation and that otherwise the negative procedure applies.
38. **The Committee finds the power acceptable in principle and is content with the specified parliamentary procedures which are dependent on whether or not the power is exercised to amend primary legislation.**

Section 31 - Commencement

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

39. Section 31 provides that sections 25 to 32 come into force on the day after Royal Assent; and that the other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint. This allows different sections of the Bill to be commenced on different days.
40. These commencement regulations will be laid before the Scottish Parliament but will not otherwise be subject to any parliamentary procedure. In addition, this section provides that commencement regulations may include transitional, transitory or saving provision and may make different provision for different purposes.

Committee consideration

41. The Scottish Government explains in the DPM (paragraph 34) that the reasons for taking the power are that it is standard for Ministers to have powers over the commencement of Acts and 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.
42. The Scottish Government further explains in the DPM (paragraph 35) that the reasons for making this power subject to the regulations being laid only is standard for commencement regulations. Commencement regulations bring into force provisions, the substance of which have already been considered by the Parliament. Any regulations under this section will be laid before the Parliament as soon as practicable after being made and before the legislation is due to come into force.
43. It is standard to take a power at the end of a Bill to commence those sections of the bill where provision has not been made in the Bill for commencement. It is also standard that commencement regulations are laid before the Parliament but not subject to further parliamentary procedure. The Committee is therefore content with the power in principle and that the no parliamentary procedure is appropriate.

44. **The Committee finds the power acceptable in principle and is content that it is not subject to any parliamentary procedure.**

