Scottish Law Commission

promoting law reform

(SCOT LAW COM No. 270)

Report on Tenement law: compulsory owners' associations

report

Scottish Law Commission
promoting law reform

Report on Tenement law: compulsory owners' associations

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

December 2025

SCOT LAW COM No. 270
SG/2025/291

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 (as amended) for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Right Honourable Lady Paton, *Chair*
Professor Gillian Black
Professor Frankie McCarthy
Ann Stewart

The Chief Executive of the Commission is Rachel Rayner. Its offices are at Parliament House, 11 Parliament Square, Edinburgh EH1 1RQ.

Tel: 0131 244 6605
Email: info@scotlawcom.gov.uk

Or via our website at https://www.scotlawcom.gov.uk/contact-us/

NOTES

1. Please note that all hyperlinks in this document were checked for accuracy at the time of final draft.

2. If you have any difficulty in reading this document, please contact us and we will do our best to assist. You may wish to note that the pdf version of this document available on our website has been tagged for accessibility.

3.

This publication is available on our website at https://www.scotlawcom.gov.uk/.

Any enquiries regarding this publication should be sent to us at info@scotlawcom.gov.uk.

ISBN: 978-1-0686139-7-5

Produced for the Scottish Law Commission by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA.

SCOTTISH LAW COMMISSION

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Report on Tenement law: compulsory owners' associations

To: Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs

We have the honour to submit to the Scottish Ministers our Report on Tenement law: compulsory owners' associations.

(Signed) ANN PATON, *Chair*
GILLIAN BLACK
FRANKIE McCARTHY
ANN STEWART

Rachel Rayner, *Chief Executive*
11 December 2025

Contents

Abbreviations

1987 Act

Insolvency Act 1987

2000 Act

Adults with Incapacity (Scotland) Act 2000

2003 Act

Title Conditions (Scotland) Act 2003

2004 Act

Tenements (Scotland) Act 2004

2007 Act

Bankruptcy and Diligence etc. (Scotland) Act 2007

2011 Act

Property Factors (Scotland) Act 2011

2012 Act

Land Registration etc. (Scotland) Act 2012

2016 Act

Bankruptcy (Scotland) Act 2016

A1P1

Article 1 of the First Protocol to the European Convention on Human Rights

BEFS

Built Environment Forum Scotland

Default association rules

Tenements (Amendment) Bill Section 3 which inserts Schedule A2 – Tenement Owners' Association Rules: Default Rules into the 2004 Act

Discussion Paper

Scottish Law Commission, Discussion Paper on Tenement law: compulsory owners' associations, (Scot Law Com DP No 176, 2024)

DMS

Development Management Scheme set out in Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order (SI 2009/729) Schedule 1

DMS Order

Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order (SI 2009/729)

EHA

Existing Homes Alliance

Final Recommendations Report

Working Group on the Maintenance of Tenement Scheme Property, *Final Recommendations Report* (2019) available at https://www.befs.org.uk/wp-content/uploads/2019/06/Working-Group-on-Maintenance-of-Tenement-Scheme-Property-Final-Recommendations-Report.pdf

Interim Recommendations Report

Working Group on the Maintenance of Tenement Scheme Property, *Interim Recommendations Report (2019)* available at https://www.befs.org.uk/wp-content/uploads/2019/01/SPWG-Interim-Recommendations.pdf

Housing to 2040

Scottish Government, *Housing to 2040* (2021) available at https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2021/03/housing-2040-2/documents/housing-2040/housing-2040/govscot%3Adocument/housing-2040.pdf

Macgregor, *Agency*

L J Macgregor, *The Law of Agency in Scotland* (2013)

OCR 1993

Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993

PMAS

Property Managers Association Scotland, a member association for property factors or managers in Scotland. In March 2025, PMAS merged with The Property Institute to become TPI Scotland.

Report on Real Burdens

Scottish Law Commission, Report on Real Burdens (Scot Law Com No 181, 2000) available at https://www.scotlawcom.gov.uk/files/8712/7989/7470/rep181.pdf

RIAS

Royal Incorporation of Architects in Scotland

RICS

The Royal Institute of Chartered Surveyors

Short Life Working Group Report

Tenements Short Life Working Group Report – Energy Efficiency and Zero Emissions Heating, *Final Report* (2023), available at https://www.gov.scot/publications/tenements-short-life-working-group-energy-efficiency-zero-emissions-heating-final-report/documents/.

TMS

Tenement Management Scheme set out in the Tenements (Scotland) Act 2004 Schedule 1

Tribunal

Housing and Property Chamber of the First-tier Tribunal for Scotland.

Working Group

Working Group on the Maintenance of Tenement Scheme Property

Glossary

A1P1. This refers to Article 1 of the First Protocol to the European Convention on Human Rights which sets out the right to peaceful enjoyment of possessions. A discussion of this article and how it applies to the project can be found in Chapter 3 of the Discussion Paper.

Appointed day. The date on which a provision of an Act of Parliament enters into force.

Association conditions. Under our recommendations, real burdens inserted into the titles of all flats in a tenement which meet the requirements set out in new section 3D of the Tenements (Scotland) Act 2004. The association conditions will set out the rules on operation of the owners' association. Where no association conditions apply to a tenement, the default *association rules* will instead apply. It will only be possible to create real burdens which are association conditions following the entry into force of the default association rules set out in new Schedule A2 of 2004 Act. Burdens created prior to that time cannot be association conditions.

Association costs. Under our recommendations, costs incurred by the *owners' association*.

Association decision. Under our recommendations, a collective decision taken by owners of flats in a tenement building determining how the *owners' association* should exercise its powers. An association decision must be taken in accordance with the *association rules* applicable to the tenement.

Association funds. Under our recommendations, money held by the *owners' association* to pay for the cost of managing and maintaining *association property,* or to meet any other expenses as may be determined by an a*ssociation decision.*

Association property. Under our recommendations, the parts of a tenement building that are managed and maintained by the *owners' association* for the tenement. Those parts will be defined in para 6(1) of new schedule A1 to the Tenements (Scotland) Act 2004, inserted by section 1 of the draft Bill appended to this Report.

Association rules. Under our recommendations, the rules that direct how an *owners' association* must operate. These can be set out in the *association conditions* which affect the tenement, or where there are no such conditions, the default rules outlined in new Schedule A2 of the Tenements (Scotland) Act 2004. The association rules deal with: (i) association decision making; (ii) liability of flat owners for the costs incurred by the association; and (iii) financial administration including setting the annual budget of the association.

Body corporate. A *legal person* that continues to exist regardless of changes in its membership.

Certificate of temporary occupation. A permission granted by a local authority under section 21 of the Building (Scotland) Act 2003, which allows a newly constructed or renovated building to be occupied before a *completion certificate* is accepted by the authority in relation to the construction or renovation work. It is generally issued for a limited period. It is typically used when construction of a development is ongoing but buildings within the development are ready

for safe occupation. It is an offence to occupy a building without either a completion certificate or a certificate of temporary occupation.

Common ownership. Where the right of ownership in property is shared between two or more persons, for example where a married couple own a house together. In the context of tenements, some parts of the building such as the roof may be in the common ownership of all the flats in the building. In contrast, see *mutual ownership* below.

Common property. Property which is in *common ownership*.

Completion certificate. A certificate, under section 17 of the Building (Scotland) Act 2003 which confirms that building work has been completed in line with an approved building warrant and with building regulations. A completion certificate is generally submitted by the building owner or the builder carrying out the works. It is considered and either accepted or rejected by a verifier, generally a local authority, under section 18 of that Act.

Declarator. A court order that declares the existence (or non-existence) of a legal right.

Deed. A formal, written document which has different legal effects depending on the type of deed. A disposition, for example, is a deed which is used to transfer property ownership.

Deed of conditions. A document imposing title conditions against a group of properties, such as a tenement, housing development or industrial estate.

Development Management Scheme (DMS). The management scheme set out in Schedule 1 of the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 (SI 2009/729). It sets out mandatory and default provisions for land to which the scheme is applied.

Edinburgh colony. A type of tenement property found in Edinburgh. Ten areas of colony houses were constructed from around the middle of the 19th century to the early 20th. They are made up of a small number of back-to-back terraces which originally had upper and lower flats. They are characteristically arranged so that the front door of each flat is on the opposite side of the building to the other front door, and with an outside stair leading to the upper flat. This allowed each flat to have its own front door and front garden.

Factor. See *property factor.*

Four-in-a-block. A type of tenement where four flats are arranged in a single, detached block, with two flats on the ground floor and two directly above. Often each flat will have a separate front door, although in some examples entry is via a common close or stair.

Heritable property. Immoveable property, i.e. land and rights in land. Strictly, the term “heritable property” also applies to other very limited types of property such as pensions.

Land Register. The register of title to land in Scotland. (The Land Register is gradually replacing the *Register of Sasines*, a register of deeds.)

Legal person. An entity or body recognised in law as having independent legal personality akin to natural *persons*, such as a company. Also known as juristic persons.

Management scheme. Under current law, the set of rules governing the management of *scheme property* in a tenement building. These rules are currently found in the *Tenement Management Scheme (TMS)*, the *Development Management Scheme (DMS)* or as the case may be the *title conditions* applicable in the building in question. A statutory definition of "management scheme" is set out in section 27 of the 2004 Act.

Manager. Under our recommendations, a person appointed by the o*wners' association* to exercise the powers of the association on a day-to-day basis. Alternatively, a person appointed to manage a development under rule 4 of the *DMS*.

Moveable property. All property which is not *heritable property*.

Mutual ownership. Describes ownership of, typically, a boundary or a gable wall which divides two separate but connected properties, such as semi-detached or terraced houses. Where the wall straddles the boundary line between properties, the owner of the property on the right-hand side will own the right-hand side of the wall up to the centre point, and the owner of the property on the left-hand side will own the left-hand side of the wall up to the centre point. Each owner has common interest rights against the other in respect of alterations and repairs. In contrast, see *common ownership*.

Mutual property. Property which is in *mutual ownership*.

Owners' Association. Under our recommendations, the legal person to be brought into existence for every tenement in Scotland, whose membership is to be made up of the owners of the relevant tenement and that is to be subject to certain mandatory duties as proposed in this Report.

Person. In law a person is the subject of rights and obligations. So as well as (i) natural persons (in other words, human beings) there are (ii) *legal persons* (also called juristic persons) such as companies.

Pertinent. A right in respect of an area of land or of a building beyond the boundaries of a land owner's principal property. An example may be a share in ownership of a garden or parking space not physically connected to the owner's house or flat. A flat owner will usually also hold a share of ownership in the tenement close or stair. Since this is beyond the boundaries of the principal property (in other words, the flat), the share of ownership of the close is a pertinent of the flat.

Property factor. A person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used in whole or in part for residential purposes. Alternatively, a local authority or housing association undertaking this function.

Real burden. An obligation affecting land, normally of a positive or negative nature. Real burdens are said to "run with the land", meaning that the land continues to be affected by the obligation when the owner of the land changes.

Register of Sasines. The older register of land in Scotland, with the full name the General Register of Sasines. Established by the Registration Act 1617. Is being gradually replaced by the *Land Register*.

Rules of the association. See *association rules*.

Scheme cost. Costs incurred in the maintenance and administration of *scheme property* or in implementing *scheme decisions* under the *TMS* or *DMS*.

Scheme decision. A decision taken in relation to the maintenance or management of *scheme property* under the *TMS*. The content of scheme decisions is defined in TMS rule 1.4.

Scheme property. Generally refers to the parts of a tenement building which are managed and maintained under a particular *management scheme*. As the context requires this may more specifically refer to scheme property under the *TMS* (as defined in rule 1.2 and 1.3), the *DMS* (as defined in the DMS Order, article 20).

Service charge. Under our recommendations, the mechanism by which flat owners make payment in respect of their liability for *association costs*, or otherwise contribute to *association funds*.

Tenement. Defined in section 26(1) of the Tenements (Scotland) Act 2004, a building or part of a building which is divided horizontally into flats.

Title. A person's right of ownership over land or buildings is often referred to as their title to the land or buildings. The word title is also used to refer to the record of their ownership, which will usually be a *title sheet* in the *Land Register*, but in a small number of properties will instead be a *title deed* recorded in the *Register of Sasines*. In the context of litigation, a person's right to initiate proceedings or take part in a case someone else has initiated is known as their title.

Title condition. A condition in the *title* to a property which imposes positive or negative obligations on the owner of that property as to how it is used and maintained, or allows the owner of that property to make a limited use of a neighbouring property for example for access.

Title deed or deeds. A document or documents setting out who owns land or buildings and any *title conditions* affecting that ownership. For most properties in Scotland, information in the title deeds will now have been incorporated into the *title sheet* for the property on the *Land Register*.

Title sheet. The Land Register has a title sheet for each registered property which details the extent of the property (usually plotted on a map), the owner(s) of the property, any securities (sometimes referred to as mortgages or charges) held in the property and any *title conditions* to which the property is subject.

Tenement Management Scheme (TMS). The *management scheme* set out in Schedule 1 of the Tenement (Scotland) Act 2004. It sets out provisions for managing maintenance of *scheme property* in tenements where the *title conditions* are silent or inadequate, and applies in all tenements except those subject to the *Development Management Scheme (DMS)*.

Chapter 1 Introduction

Introduction

1.1 On 10 January 2022, we received a reference from the then Cabinet Secretary for Social Justice, Housing and Local Government (Shona Robison MSP) to carry out a project on creating compulsory owners' associations in tenement properties in Scotland.[1]

1.2 The reference asked us:

> "To review the law of the tenement in Scotland, including the Tenements (Scotland) Act 2004, and make recommendations for reform to implement recommendation 2 (establishing compulsory owners' associations) of the Final Recommendations Report dated 4 June 2019 of the Working Group on Maintenance of Tenement Scheme Property.
>
> Your recommendations should include proposals on the establishment, formation and operation of compulsory owners' associations and the rights and responsibilities to be imposed on them, including, insofar as you consider appropriate and desirable, such rights and responsibilities in relation to recommendations 1 (building inspections) and 3 (establishment of building reserve funds) of the Report."

1.3 The reference letter clarifies that we are not expected to address the substantive content of recommendations 1 or 3 of the Working Group's report. The letter also notes that the Scottish Government will be taking forward work on decarbonising heating and energy use in homes in line with their commitment to achieving net zero emissions, and asks us to keep in mind the feasibility of owners' associations being given power to carry out energy efficiency and heating improvements in tenement buildings as part of this work in future. Similarly, the letter asks us to keep in mind that the Scottish Government may wish to place rights and responsibilities in respect of fire safety matters pertaining to tenement buildings on owners' associations in future.

1.4 This Report sets out our recommendations following from the project we have undertaken in response to this reference. The recommendations are reflected in the draft Tenements (Amendment) (Scotland) Bill contained in Appendix A. The draft Bill is designed to implement the recommendation of the Working Group in relation to owners' associations. In line with the terms of the reference, our project did not seek to conduct a more comprehensive review of the law of the tenement, or of management structures which could be employed in connection with tenement property.[2] An overview of the current law of the tenement can be found in Chapter 2 of the Discussion Paper which preceded this Report.[3]

---

[1] This is a reference under section 3(1)(e) of the Law Commissions Act 1965. A copy of the reference letter is available at: https://www.scotlawcom.gov.uk/index.php/download_file/view/2305/1687/.

[2] Some consultees expressed views on these issues, which we record in Chapter 2.

[3] Scottish Law Commission, Discussion Paper on Tenement law: compulsory owners' associations (Scot Law Com DP No 176, 2024), available at https://www.scotlawcom.gov.uk/files/9417/1388/6160/Discussion_Paper_-_Tenement_law_compulsory_owners_associations_-_No_176.pdf.

Tenements and tenement maintenance

1.5 A tenement is any building comprising two or more related flats which are, or are designed to be, in separate ownership and are divided from each other horizontally.[4] This definition covers the classic Victorian sandstone tenement buildings found in the streets of Edinburgh and much of the West of Scotland, but also covers any other building made up of flats, including high-rise blocks, modern apartment buildings, post-war "four-in-a-block" housing,[5] Edinburgh colonies[6] and larger houses or buildings which have been converted into flats. The word "flat" as used in the Act includes non-residential as well as residential properties,[7] so in a tenement with shop units or a pub at the ground floor level and residential units above, all the units will be considered flats.

1.6 The title deeds for the properties[8] which make up the tenement will set out who owns which parts of the building.[9] Ownership of a flat will usually carry with it a share in ownership of the main door and the close, stairwell or lift.[10] It will often also include a share in ownership of the roof, foundations and any garden ground attached to the building. Areas of the building which are in shared ownership are sometimes referred to as the "common parts". Owners of any part of a tenement have a duty towards their fellow owners to maintain their property to a level sufficient to ensure it continues to provide support and/or shelter to other parts of the tenement.[11] Flat owners will usually also share responsibility for maintaining structurally important parts of the building – known as "scheme property" – whether they share in the ownership of those parts or not.[12] It is the maintenance of these structurally important parts of the building which forms the primary focus of the Working Group's recommendations.

1.7 Maintenance responsibilities arise regardless of whether a flat owner is a natural or legal person. They will apply whether the owner is resident in the flat or not. Occupiers of tenement flats who are not owners, such as tenants or family members whom an owner allows to live with them, or business tenants of commercial tenement units, are therefore not the primary focus of this project.

---

[4] Tenements (Scotland) Act 2004 s 26. Properties divided from one another vertically, such as semi-detached houses or terraces, are not tenements.

[5] A type of tenement where four flats are arranged in a single, detached block, with two flats on the ground floor and two directly above. Often each flat will have a separate front door, although in some examples entry is via a common close or stair.

[6] Ten areas of colony houses were constructed in Edinburgh from around the middle of the 19th century to the early 20th century. They are made up of a small number of back-to-back terraces which originally had upper and lower flats. They are characteristically arranged so that the front door of each flat is on the opposite side of the building to the other front door, and with an outside stair leading to the upper flat. This allowed each flat to have its own front door and front garden.

[7] 2004 Act s 29(1).

[8] It is not necessarily the case that each flat will have its own title. Where multiple flats in a tenement are owned by the same person – for example, a local authority or registered social landlord – all the flats may be held on a single title.

[9] Where the titles are not clear, or are silent, default rules of ownership are set out in the 2004 Act ss 1 – 3.

[10] "Main door" flats, meaning those on the ground floor of a building which do not take access through the close or stairwell, may not share in ownership of those parts of the building.

[11] 2004 Act s 8. Owners are also prohibited from doing anything to or with their property which might interfere with the support or shelter it provides to other parts of the building: 2004 Act s 9. See the Discussion Paper at paras 11.5 – 11.15 for further detail.

[12] This is the effect of the Tenement Management Scheme (TMS) set out in the first Schedule to the 2004 Act, discussed in detail in the Discussion Paper at paras 2.13 – 2.36. The rules of the Scheme will, however, apply only to the extent that provision on relevant matters is not made by way of title conditions in the tenement title deeds: 2004 Act s 4.

Background to the Scottish Government's reference

1.8 The condition of Scotland's tenements has been in decline for many years. Tenements make up around 37% of all housing stock in Scotland. Addressing disrepair in these properties has presented a particular challenge due to legal, technical and cultural obstacles not present in the case of single dwellings.[13] Improving the state of the tenement stock is essential, however, not only to ensure a continuing supply of adequate housing but also to reduce the emissions generated by heating these buildings.

1.9 In March 2018, the Scottish Parliamentary Working Group on Maintenance of Tenement Scheme Property was convened to explore ways in which the barriers to tenement maintenance could be overcome.[14] In June 2019, the Group published its Final Recommendations Report.[15] The Report contained three interconnected recommendations:

1. Tenement buildings should be subject to a **building condition inspection** every five years with a report prepared in light of that inspection. The Working Group's vision of the report was that it would be "…a live document, updated on a regular basis by the owners' association (acting as a log book), and will be held on a national, online register, and publicly accessible without charge."[16]

2. An **owners' association** in the form of an entity with legal personality should be established for every tenement building. The association should provide "…leadership, effective decision-making processes and the ability of groups to enter into contracts."[17]

3. A **building reserve fund**, to be administered by the owners' association, should be established for every tenement building. Each owner should be required to contribute to the fund at a level set by statute in relation to repair risk as assessed under a statutory, points-based system.[18]

1.10 The Report noted that the recommendations would help to address disrepair, and also to facilitate building improvements to enhance the energy efficiency of the tenement stock in line with the Scottish Government's energy efficiency and climate change targets.[19] The

---

[13] For a detailed analysis see D Robertson, "Why Flats Fall Down" (2019), available at https://www.befs.org.uk/resources/publications/why-flats-fall-down/.

[14] The Working Group is composed of MSPs drawn from all parties represented in Holyrood, alongside key stakeholders including the Royal Institute of Chartered Surveyors (RICS), the Royal Incorporation of Architects in Scotland, the Tenement Action Group, the Scottish Association of Landlords, the Property Managers Association Scotland (now part of The Property Institute) and representatives of various housing associations, amongst others. Built Environment Forum Scotland and RICS provide the secretariat. An extensive record of the work of the Group is set out at https://www.befs.org.uk/policy-topics/buildings-maintenance-2/.

[15] Working Group on the Maintenance of Tenement Scheme Property, *Final Recommendations Report* (2019), available at https://www.scotlawcom.gov.uk/index.php/download_file/view/2306/1687/. Prior to this, interim recommendations were published in January 2019 (available at https://www.befs.org.uk/wp-content/uploads/2019/01/SPWG-Interim-Recommendations.pdf) and were open for public consultation until March 2019.

[16] Final Recommendations Report, p 4.

[17] Final Recommendations Report, p 6 and 8. (The pages of the Working Group's Final Report do not run sequentially at this point.)

[18] Final Recommendations Report, p 7 – 8. (The pages of the Working Group's Final Report do not run sequentially at this point. The proposals for reserve funds therefore begin on page 8 and continue on page 7).

[19] Final Recommendations Report, p 3.

Working Group's recommendations were broadly accepted by the Scottish Government, subject to the need for further research and development in various areas.[20]

Housing and buildings policy beyond the project

1.11 Implementation of the Working Group's recommendations is one aspect of a significant programme of work being taken forward by the Scottish Government in relation to disrepair and energy inefficiency in Scotland's buildings, with a particular focus on Scotland's housing stock. A brief summary of the work being progressed elsewhere is necessary to situate our project within its broader context.

Housing to 2040

1.12 Published in March 2021, the *Housing to 2040* strategy document[21] outlines the Scottish Government's plans to take forward housing policy in the medium to long term. The central ambition underlying the strategy is that "…everyone ha[s] access to a warm, safe, affordable and energy-efficient home that meets their needs, in a community they feel part of and proud of."[22]

1.13 Two parts of this strategy document are of particular note in the context of our project: the proposed new housing standard[23] and the proposals on affordable warmth and zero emissions homes.[24]

New Housing Standard

1.14 *Housing to 2040* sets out a high level policy objective for the Scottish Government to "…take action so that all homes, no matter their tenure, are required to meet the same standards."[25] The document envisages that a new unitary housing standard will be put in place, and existing exceptions to relevant standards will be swept away, such that there will be "…no margins of tolerance, no exemptions and no "acceptable levels" of sub-standard homes in urban, rural or island communities, deprived communities or in tenements."[26]

1.15 This new housing standard will be aligned to the new regulatory standard for energy efficiency and heating in all buildings,[27] to be introduced as part of the Heat in Buildings strategy discussed further below.[28] It is suggested that the new housing standard will "…move beyond traditional models of fitness for human habitation to a new model that meets expectations for housing as a human right and delivers homes that underpin health and wellbeing."[29]

---

[20] Scottish Government, *Tenement maintenance group: Scottish Government response* (2019, updated in 2021), available at https://www.gov.scot/publications/tenement-maintenance-report-scottish-government-response/. Some details of the further work required can be found in the Scottish Government's Tenement Condition Workplan for 2021, available at the same link.
[21] Scottish Government, *Housing to 2040,* available at https://www.gov.scot/publications/housing-2040-2/.
[22] Housing to 2040, p 8.
[23] Housing to 2040, Chapter 3 Part 4A.
[24] Housing to 2040, Chapter 3 Part 3.
[25] Housing to 2040, p 52.
[26] *Ibid*.
[27] Housing to 2040, p 52.
[28] See paras 1.20 – 1.23 below.
[29] *Ibid.*

1.16 Part 4A of *Housing to 2040* also discusses matters relating to repairs and maintenance. While recognising that these are a homeowner's responsibility, the document suggests that the Scottish Government wants to take action to support proactive approaches to repairs and maintenance. The first step in that will be research on the costs of maintenance and current incentives and disincentives to maintenance investment.[30] The particular challenges facing tenement properties in respect of repairs and maintenance are noted with recognition that the Scottish Government will "act on the recommendations of the Parliamentary Working Group on Tenement Maintenance, and will investigate ways to encourage behaviour change, which is most cost-effective for owners in the longer term."[31]

1.17 Government support in relation to repairs and maintenance is to be aligned with support being developed to deliver heat decarbonisation, with a "Help to Improve" policy approach being proposed.[32] *Housing to 2040* suggests that that support might be available to help pay for improvement work by the time the new housing standard is introduced.[33]

1.18 The new housing standard, when introduced, may have implications for owners' associations and, perhaps separately, for owners of tenement flats. As suggested in the letter from the Scottish Government setting out our reference for this project, owners' associations may be subject to duties in relation to compliance with the new housing standard in future.[34] In Chapter 6 of this Report, we recommend that every owners' association should be subject to four "key duties" intended to ensure the association functions at a minimum level. In Chapter 7, we recommend that these duties should be enforceable by any person with an interest in the effective operation of the association through appointment to the association of a remedial manager. The key duties we recommend are not connected to the new housing standard, or any existing building standard. Should government wish to impose standards-related duties on associations in future, however, it may be possible to do so by adding to the list of key duties we recommend. Recognition that the government may wish to take this approach has informed our recommendations elsewhere in the Report, most notably in relation to the treatment of categories of tenement where the benefits of compliance with the key duties may be considered disproportionate to the administrative burden involved.[35]

1.19 Separately, we note that the new housing standard could potentially be tied in future to the duty on an owner of any part of a tenement to maintain that part so that it continues to provide support and shelter to other parts of the building. This duty, set out in section 8 of the Tenements (Scotland) Act 2004, is enforceable by owners of other parts of the tenement building, and is not explicitly tied to any housing or building standard at present. We discuss the section 8 duty, our recommendation to extend it to include maintenance work necessary in the interests of health and safety, and our proposal that the duty should be enforceable by the association, in Chapter 3.

Affordable warmth, zero emissions homes and the Heat in Buildings Strategy

1.20 Part 3 of the *Housing to 2040* document outlines the Scottish Government's vision for its affordable warmth and net zero emissions homes policy. The overall aim here is "…for

---

[30] Housing to 2040, p 53.
[31] *Ibid.*
[32] Housing to 2040, p 53.
[33] *Ibid.*
[34] See para 1.3 above.
[35] See paras 6.46 – 6.60 below for discussion.

housing to contribute to tackling climate change by 2045 by delivering homes that are warm and affordable to heat and reducing the emissions caused by housing and housing construction."[36] The document discusses this aim in the context of both the regulation of new build homes[37] and the adaptation of existing homes,[38] outlining some of the considerable preparatory work which needs to be done.

1.21 The document notes plans for investment in support of existing homes, envisaging among other things the expansion of schemes funding works such as whole house retrofits for fuel poor households.[39] There is also discussion of continuing support via interest-free loans to householders for investment in heat and energy-efficiency technologies.[40]

1.22 This aspect of housing policy connects with a second area of Scottish Government policy focus concerning the energy efficiency of all buildings in Scotland. The Heat in Buildings Strategy[41] envisions the introduction of new mandatory legal standards for zero emissions heating and energy efficiency in all domestic and non-domestic buildings.[42] A public consultation on a Heat in Buildings Bill, designed to implement many of the recommendations in the strategy document, was opened in November 2023 and closed in March 2024.[43] Amongst other things, the consultation sought views on the introduction of an obligation on homeowners to ensure their home meets a minimum energy efficiency standard by 2033,[44] and a requirement that building owners end their use of polluting heating by 2045.[45] The consultation was accompanied by a report from a short-life working group tasked with considering the challenges of adhering to the intended new heat in buildings legislation in the tenement context.[46] The recommendations of the short-life working group included a phased introduction of the new standards for tenements[47] and potential amendment of the Tenements (Scotland) Act 2004 to categorise all work required to adhere to the new standards as maintenance rather than improvement to the building.[48]

1.23 Scottish Government have indicated an intention to introduce a Heat in Buildings Bill into Parliament by the end of 2025.[49] The detail of the Bill was not yet available as at the date

---

[36] Housing to 2040, p 43.
[37] Housing to 2040, Chapter 3 Part 3A.
[38] Housing to 2040, Chapter 3 Part 3B.
[39] Housing to 2040, p 45 – 46.
[40] Housing to 2040, p 46.
[41] Scottish Government, *Heat in Buildings Strategy: Achieving Net Zero Emissions in Scotland's Buildings* (2021), available at https://www.gov.scot/publications/heat-buildings-strategy-achieving-net-zero-emissions-scotlands-buildings/.
[42] Heat in Buildings Strategy, p 89.
[43] Scottish Government, *Delivering Net Zero for Scotland's Buildings: A Consultation on proposals for a Heat in Buildings Bill* (2023), available at https://www.gov.scot/publications/delivering-net-zero-scotlands-buildings-consultation-proposals-heat-buildings-bill/documents/.
[44] Consultation on proposals for a Heat in Buildings Bill, paras 2.20 – 2.40.
[45] Consultation on proposals for a Heat in Buildings Bill, paras 2.10 – 2.19.
[46] Tenements Short Life Working Group – Energy Efficiency and Zero Emissions Heating, *Final Report* (2023), available at https://www.gov.scot/publications/tenements-short-life-working-group-energy-efficiency-zero-emissions-heating-final-report/documents/.
[47] Short Life Working Group Report, para 5.2.
[48] Short Life Working Group Report, para 5.5. Under current law, maintenance work to scheme property can generally be carried out where a simple majority of tenement flat owners vote in favour of undertaking it, whereas improvements generally require unanimous support. We set out our proposals on voting thresholds for decisions on the types of work the owners' association may undertake in Chapter 9. In particular, we suggest improvement works may be carried out by the association where a special majority of owners is in favour: see paras 9.31 – 9.36 below.
[49] See the statement by the Acting Minister for Climate Action: *Official Report,* Scottish Parliament, col 60 – 63 (3 April 2025), available at https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=16359.

on which this Report was finalised for publication. As with the intended new housing standard, any new statutory duties imposed in connection with the heat in buildings work may have implications for owners' associations along the lines discussed in para 1.18 above.

History of the project

1.24 Work on the project began immediately following receipt of the reference from the Scottish Government in 2024. We completed a period of research and consultation, including a number of scoping meetings with key stakeholders and a series of public webinars in which we considered aspects of tenement law (or its equivalent) in other jurisdictions.[50] Drawing on this early work, we developed a detailed set of proposals for implementation of owners' associations, which we set out in a Discussion Paper published on 25 April 2024.[51] The Discussion Paper sought views on 79 consultation questions covering all aspects of our proposals. The consultation was open to all, and ran until 1 August 2024. During the consultation period, we hosted a series of events designed to raise awareness of the Discussion Paper and encourage responses. These included two open-access webinars and a number of more targeted events with specific stakeholder audiences including legal practitioners and local authorities. In addition, the tenement advice charity Under One Roof[52] ran a survey via their website incorporating some key questions from the Discussion Paper and seeking comment from their users.

1.25 We received 60 responses to the Discussion Paper from a mix of private individuals, legal practitioners and academics, local authorities and various stakeholder bodies. Around 40 of the responses addressed the bulk of the questions in the paper, with the remaining 20 focusing on a smaller number of issues or sometimes a single question. Under One Roof also kindly shared with us the results of their survey. We are extremely grateful to those who took the time to respond.

Analysis of responses

1.26 Following the conclusion of the consultation period, the project team undertook a detailed analysis of the responses received. This helped to inform the final recommendations for reform which are set out in this Report and reflected in the accompanying draft Bill. In explaining each of our recommendations, we outline the related consultation question (or questions) in the Discussion Paper and set out the response received from consultees. Generally, we will indicate how many responses the question received, and note how many of those were in support of our proposed approach, and how many were against it. For most questions, we also received some responses which we categorised as neutral or unclear. Usually, these were responses in which the consultee stated that they had no view or did not

---

[50] Details of the webinar series and links to recordings of the sessions can be found on the project webpage, available at https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/tenement-law-compulsory-owners-associations/.

[51] Scottish Law Commission, Discussion Paper on Tenement law: compulsory owners' associations (Scot Law Com DP No 176, 2024), available at https://www.scotlawcom.gov.uk/files/9417/1388/6160/Discussion_Paper_-_Tenement_law_compulsory_owners_associations_-_No_176.pdf. An executive summary of the Discussion Paper is available at https://www.scotlawcom.gov.uk/publications/archive/discussion-papers-and-consultative-memoranda/. For a discussion of the methodology employed in producing the Discussion Paper see paras 1.23 – 1.26 of the Discussion Paper.

[52] Information on the charity can be found on its website: https://underoneroof.scot/.

wish to make a comment, or where the comment made did not express a view on the question asked.

Structure of the Report

1.27 This Report is composed of 11 Chapters. Following this introductory chapter, Chapter 2 discusses issues raised by consultees which lay beyond the scope of the project, but which are likely to be useful to government in taking forward work in this area. Consideration of these issues is likely to be essential for the successful implementation of legislation relating to owners' associations.

1.28 Chapter 3 provides an overview of the revised tenement maintenance framework which will result from the introduction of owners' associations and the enactment of other reforms recommended in our Report.

1.29 Chapters 4 to 7 deal with the essential elements of the new legislation. Chapter 4 sets out our recommendations on the owners' association itself. It considers how and when an association should be created for each tenement by virtue of statute, outlines our recommendations on the extent of the association's capacity, and looks at provisions for the insolvency, winding up and dissolution of the association in relevant circumstances. Chapter 5 considers the role of the association manager and the members of the association. It sets out recommendations on the manager's general powers and duties, and considers when a manager might be subject to the Property Factors (Scotland) Act 2011. It also looks at the membership of the association and how details of the membership can be recorded and, where appropriate, shared.

1.30 Chapter 6 proposes four key duties to which an owners' association should be subject. These duties aim to ensure the association functions at a basic level, rather than existing in name only. This Chapter also considers whether compliance with the key duties should be suspended in relation to associations for certain categories of tenement, for example where the tenement is made up of only two or three flats, or where all the flats in the tenement are owned by the same person. Chapter 7 sets out a mechanism for enforcement of the key duties by any person with an interest in the effective operation of the owners' association through an application to the First-tier Tribunal for Scotland for appointment of a "remedial manager."

1.31 Chapters 8 to 10 deal with the rules on operation of the association. Chapter 8 recommends that it should be possible for association rules to be created in future by way of real burdens in the tenement titles, but only where those burdens meet certain statutory requirements. Burdens which meet the relevant requirements are referred to as "association conditions". This Chapter also recommends that existing tenement title conditions on relevant matters should be read as providing association rules for a transitional of period of 20 years following the enactment of owners' association legislation, following which they should cease to have effect.

1.32 Chapters 9 and 10 propose a set of default association rules to be provided for in legislation. These rules will apply in full to an association in any tenement in which the titles do not contain "association conditions" as discussed in Chapter 8. Chapter 9 sets out default rules on association decision making, including how votes are allocated to owners, the voting thresholds required for decisions in relation to certain actions by the association, and how decisions can be made at meetings or otherwise. Chapter 10 sets out default rules on the

liability of owners for costs incurred by the association, the preparation of the annual budget, and the calculation of the service charge by which payment will be gathered from owners in respect of those liabilities.

1.33 Finally, Chapter 11 considers how tenement maintenance obligations might be enforced following the introduction of owners' associations. It looks at dispute resolution mechanisms, recommending that tenement maintenance disputes are in future dealt with principally by the Housing and Property Chamber of the First-tier Tribunal for Scotland. It recommends that the Tribunal should have the power to approve an annual budget for an owners' association in certain circumstances, and to grant a new form of debt enforcement order in relation to debts owed to the association, namely tenement-specific land attachment. It also looks at how third parties can enforce payment of debts owed to them by the association, including by seeking payment directly from association members in certain circumstances.

1.34 Chapter 12 is a list of our recommendations in this Report.

Business and Regulatory Impact Assessment

1.35 The Scottish Government requires a BRIA to accompany proposed legislation, and we have prepared a draft BRIA to accompany this Report. We asked consultees for information or data on the possible economic impacts of our proposed reforms, and are grateful for their responses.

1.36 The principal conclusions of the BRIA are that:

- The Bill will have widespread impact on both businesses and individuals in all parts of Scotland;
- Introduction of the Bill will give rise to a period of adaptation for those directly affected. Costs for tenement flat owners may increase. In some cases, where long-overdue repairs are prompted by the establishment of an association, those costs may be significant. In the longer term, regular maintenance facilitated by the association may enhance property values and lead to safer tenement buildings. The proactive management of tenements may also mean that maintenance costs are more predictable and manageable;
- Businesses, such as tradespeople and property managers, may also experience short-term costs in retraining staff and adapting to new ways of working. However, this may be countered with an increase in demand for services;
- Costs for both central and local government are likely to increase. Central government will require to raise the profile of these changes and help owners to adapt to them. Local authorities will have increased responsibilities, both as an owner of tenement flats and in relation to the remedial management functions provided for in the Bill;[53]

[53] See Ch 7 below.

- Provisions which transfer jurisdiction for the majority of tenement disputes to the Housing Chamber of the First-tier Tribunal for Scotland will help to ensure that those disputes are resolved in a more accessible and cost effective way albeit that this transfer may have cost and administrative implications for the Scottish Courts and Tribunals Service.

1.37 Overall, we note that the draft Bill which accompanies this Report is a response to the Scottish Government's reference to us. The Bill, if implemented, provides a scheme which would meet the Working Group's second recommendation should that be government's policy.

Legislative competence

1.38 Our Discussion Paper identified two matters which might impact on the competence of the Scottish Parliament to pass legislation establishing and regulating owners' associations. The first is the compliance of the legislation with international human rights obligations. An Act of the Scottish Parliament is not law in so far as any provision is contrary to the rights set out in the European Convention on Human Rights.[54] Article 1 of the First Protocol to the ECHR (A1P1), which provides a right to peaceful enjoyment of possessions, is of particular significance in connection with tenement law reform. We discussed this in detail in Chapter 3 of the Discussion Paper and we address particular points relating to ECHR compliance in the chapters of this Report which follow. In summary, our view is that the provisions in the draft Bill which accompanies this Report are compatible with the ECHR. We would further note, however, that steps can be taken by government in the implementation of these provisions in order to minimise the risk of successful challenge to the legislation on this basis. We discuss some of those steps in Chapter 2.

1.39 Separately, legislation enacted by the Scottish Parliament which is found by a court not to be compatible with the rights and obligations set out in the United Nations Convention on the Right of the Child may be subject to a strike-down declarator[55] or an incompatibility declarator.[56] The Discussion Paper set out our view that rights under the UNCRC were likely to have less immediate significance for the project than those under the ECHR, in the sense that children do not generally own flats or have responsibility for maintenance decisions or costs. However, we noted that improved tenement maintenance may support the right of the child to the highest standard of health. We also noted that the child's right to protection from arbitrary interference with their home should be taken into account in relation to debt enforcement measures which could involve the forced sale of the tenement flats,[57] a point touched on in Chapter 11. In summary, however, our view is that the provisions of the draft Bill which accompanies this Report are compatible with the UNCRC requirements.[58]

1.40 Second, competence to legislate for Scotland in certain subject areas is reserved to the Westminster Parliament. We discussed this aspect of legislative competence in detail in Chapter 1 of the Discussion Paper.[59] As we noted there, the critical question for legislation

[54] Scotland Act 1998 s 29(1) and (2)(d).
[55] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 s 25. The effect is that the words specified in the declarator cease to be law.
[56] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 s 26. The effect is that the Scottish Ministers must report to the Parliament on the steps they intend to take in relation to the incompatibility within six months of the declarator: UNCRC Incorporation (Scotland) Act 2024 s 28.
[57] See Discussion Paper, paras 3.18 and 3.19.
[58] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 s 1(2).
[59] See Discussion Paper, paras 1.37 – 1.48.

following from this project is whether the introduction of owners' associations is caught by the reservation in Section C1 of Schedule 5 to the Scotland Act 1998.[60] Section C1 provides that "[t]he creation, operation, regulation, and dissolution of types of business association" is a reserved matter.[61]

1.41 We noted in the Discussion Paper that it was not possible to recommend a legislative scheme implementing the Working Group's recommendation that would fall unambiguously within the competence of the Scottish Parliament, and that remains true. The reference which initiated this project requires us to propose legislation creating owners' associations, and it is the creation of those entities which calls into question the competence of the Scottish Parliament to legislate. Put simply, the legislative competence issue cannot be avoided if owners' associations are to exist.

1.42 Our Discussion Paper set out arguments as to whether the provisions of any legislation stemming from this project might be considered to relate to a reserved or devolved matter.[62] We do not rehearse those arguments again here. Our position remains that arguments can be made either way on this question. However, bearing in mind that relevant legislation will impact solely on Scottish tenement property and Scots tenement law, it seems reasonable to suggest that the Scottish Parliament may be better placed than Westminster to make provision in this regard. For that reason, the draft Bill which accompanies this Report is in the style of a Scottish Parliament Bill. Should the Scottish Government or others consider that the provisions of the Bill relate to reserved matters or that there is sufficient uncertainty about this then the competence of the Holyrood Parliament to legislate in this area might sensibly be put beyond doubt by way of an Order in Counsel under section 30 of the Scotland Act 1998. Alternatively, consideration could be given to enacting framework legislation at Holyrood with the detail of our recommended provisions to follow by way of consequential subordinate legislation made in the Westminster Parliament under section 104 of the Scotland Act 1998.[63] A final alternative, should the view be taken that the matter is and should remain reserved, would be for primary legislation modelled on our draft Bill to be enacted by Westminster.

1.43 One further point in relation to legislative competence arises. In Chapter 4, we recommend that an owners' association should have capacity to take out an insurance policy in its own name in relation to the parts of the tenement which are managed by the association.[64] Since the association does not own these (or any) parts of the tenement, its capacity to take out insurance will be exercisable in practice only if the association is deemed to have an insurable interest in the parts of the tenement in question. Our Bill contains provision to that effect.[65] Competence to legislate for Scotland in relation to "financial services, including…insurance" is reserved to Westminster under section A3 of Schedule 5 of the

---

[60] We recommend in Ch 4 that the insolvency process which should be available to an owners' association is sequestration. On that basis, and given that our recommendations do not cover any of the other matters referred to (i.e. preferred debts, regulation of insolvency practitioners and co-operation of insolvency courts) it would appear that the reservation in Section C2 of Schedule 5 (Insolvency) would not be engaged.

[61] The words in quotes are the terms of the C1 reservation, albeit that two types of association are later excluded from its scope: public bodies and charities.

[62] Discussion Paper, paras 1.36 – 1.49.

[63] This was the approach taken to legislating for the Development Management Scheme. (The DMS is set out in the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order (SSI 2009/729) Schedule 1.)

[64] See para 4.50. The Bill refers to the parts of the tenement to be managed by the association as "association property", defined in paragraph 6 of new schedule A1 of the 2004 Act (to be introduced by section 1(3) of the Bill) to include the ground on which the tenement is built, its foundations, its external walls and its roof, amongst other things: see the discussion of "association property" at paras 3.31 – 3.38.

[65] Paragraph 4(3)(c) and (5) of new schedule A1 of the 2004 Act, to be introduced by section 1(3) of the Bill.

Scotland Act 1998. A question may arise as to whether this reservation relates to the provision on insurance in the Bill.[66] Any doubt over the competence of Holyrood to legislate in this respect could be resolved alongside the larger legislative competence question affecting the Bill outlined above, using one of the same mechanisms.

1.44 We recognise that ultimately the decision on whether or how to introduce legislation is a matter for the Scottish and UK Governments. We would note, however, that the two latter routes suggested above may result in a longer time frame for the introduction of relevant provisions in Scotland.

Acknowledgements

1.45 We noted above our gratitude to those who took the time to provide responses to our Discussion Paper, and it bears repeating. Public consultation forms a crucial part of all SLC projects, and we are extremely grateful for the responses we received. A list of consultees is provided at Appendix D.

1.46 In 2022 we established an advisory group of legal experts to support our work on the project. The advisory group provided invaluable input into both the development of our initial proposals for consultation and on aspects of this Report and the draft Bill. The members of the advisory group are noted in Appendix E, and we record our grateful thanks for all of their assistance. It should be noted however that ultimately responsibility for the content of this Report and draft Bill rests with us.

1.47 We would also note our thanks to the numerous stakeholders who have generously given their time to help us with the project. We consulted with and were contacted by a number of individuals, organisations and stakeholder representative bodies throughout the life of the project, and we are very grateful for the input which we received.

1.48 Finally, we are very grateful to Registers of Scotland for their help with the project. Notably they provided us with the data from which we were able to carry out a survey of tenement title conditions,[67] and they generously gave their time to assist with queries relating to registration requirements.[68]

[66] We note that the Scottish Parliament has legislated in relation to contracts of insurance previously: see, for example, 2004 Act s 18.
[67] See Discussion Paper, Annex B.
[68] Particular thanks are due to Claire Canning, Anne Godfrey, Jonathan Hodge, Christopher Muir and Harry Murray.

Chapter 2 Consultees' views: the broader context

Introduction

2.1 The project which we were asked to undertake by the Scottish Government was limited in its scope to the introduction of owners' associations in tenements.[1] This work forms one strand of a much larger programme of housing law and policy reform being taken forward by the Scottish Government.[2] The consultation responses we received to our Discussion Paper often included comments on aspects of this larger programme, which is understandable taking into account the extent to which the various strands of the programme overlap. This Report naturally does not seek to make recommendations on matters falling outside the scope of the project we were asked to undertake. However, we recognise that the issues raised by consultees here are important, and are likely to be of considerable assistance to the government in moving towards successful implementation of reforming legislation in this area of law. Accordingly, we have considered it appropriate to set out a summary of those comments here.

2.2 We would emphasise that many of the issues covered in this Chapter were not matters on which we had asked specific questions in the Discussion Paper, but were included by consultees in their more general comments on the project. There is no intention to suggest that our record of these comments can equate to meaningful consultation on the issues raised. No doubt such consultation will, if necessary, be undertaken by the government where appropriate as the broader housing programme moves forward.

2.3 The Chapter looks first at comments in relation to tenement management arrangements in general, and then at the relationship between the introduction of owners' associations and the other two recommendations of the Working Group. It goes on to deal with concerns as to how the implementation of owners' association legislation may be made effective, including questions around funding and other resource implications for local authorities and other flat owners, and the need for education and support in relation to tenement maintenance responsibilities, amongst other things.

Tenement management: the options

2.4 The recommendation of the Working Group, endorsed by the Scottish Government, was that tenement buildings should have owners' associations.[3] Some consultees made the point that they did not accept this to be the most appropriate mechanism for managing maintenance in tenement buildings. Concerns were expressed by consultees about the level of formality required by the owners' association structure and the administrative burden imposed by the need for an annual meeting and an annual budget. It was suggested that

[1] The terms of the reference and the scope of the project are discussed at paras 1.2 – 1.3 above.
[2] An overview of the housing programme as a whole is given at paras 1.12 – 1.23 above.
[3] Working Group on the Maintenance of Tenement Scheme Property, *Final Recommendations Report* (2019), available at https://www.scotlawcom.gov.uk/index.php/download_file/view/2306/1687/.

tenement flat owners might generally lack the skills necessary to run an association effectively, with the result that the expense of engaging a professional factor to act as a property manager became more likely. One or two consultees took the view that an association should be imposed on any specific tenement only where the informal processes in place at present had been shown to be ineffective at maintaining that tenement to the appropriate level.

2.5 It was noted that there had been no public consultation on the desirability of introducing owners' associations, and disappointment was sometimes expressed that other potential governance arrangements had not been given more consideration. Given the terms of the project reference, our Discussion Paper did not ask for views on the suitability or otherwise of owners' associations. Under One Roof did include a relevant question in their user survey,[4] however, asking whether associations should be made compulsory. Sixty-six per cent of respondents to that survey "strongly agreed" that associations should be made compulsory, while a further 9% "agreed". Fifteen per cent of respondents disagreed or strongly disagreed.

2.6 Several consultees offered suggestions on alternative management structures which could be put in place. We set out a snapshot of the arguments we have heard below.

Status quo?

2.7 Some consultees did not accept that any significant change in tenement law was required. Instead, they suggested that the existing tenement law system should remain largely in place, with owners making informal arrangements for maintenance and repair with or without the assistance of a factor as at present. It was suggested that compulsory measures – whether the imposition of an owners' association, the appointment of a compulsory factor, or intervention by the local authority – might be used only where a tenement fell into a state of disrepair.

Compulsory factoring?

2.8 Some consultees considered that a requirement to appoint a professional factor or property manager in all tenements would provide a more straightforward solution to the challenges of tenement maintenance than the introduction of owners' associations. It was suggested by some that tenement buildings with a factor in place at present are generally maintained to an appropriate standard, and that a requirement to appoint a factor would be far less of an imposition on flat owners than the introduction of an association.

2.9 By contrast, some consultees expressed a degree of scepticism about the level of service that might be provided by factors, particularly in relation to the value for money available within the professional property management sector and the quality of work carried out by factor-appointed contractors. Other consultees noted that there may not be sufficient capacity in the commercial property management sector to support a legal requirement for appointment of a factor in every tenement, particularly in rural areas. There was also doubt as to whether a commercial factor could be compelled to act in relation to a tenement where relationships between owners were dysfunctional and/or owners were unwilling or unable to pay the factor's fees as they fell due.

[4] See para 1.24 above for an explanation of this survey.

Greater local authority involvement?

2.10 Some consultees commented on the perceived potential for local authorities to play a greater role in tenement management than under current law. It was suggested that the powers currently available to local authorities in this respect[5] could be made stronger, and coupled with further duties on the local authority. The overall picture created was one in which local authorities had obligations to monitor maintenance of tenement buildings in their area, assist owners to resolve disputes where they arose, and provide funding for "missing shares"[6] of the cost of works required to maintain tenements in line with relevant standards. It was suggested that this could keep costs and bureaucracy lower for owners, and might provide a more efficient system overall than individual owners' associations for each tenement.

2.11 By contrast, some consultees were wary of greater local authority involvement. Doubt was cast on the consultation processes and quality of work carried out by the local authority or their contractors when they did become involved in tenement management under current rules. Concern was expressed about how local authorities in this role could be held accountable.

2.12 Separately, concern was repeatedly and emphatically expressed by many of our consultees, both within and outwith the local authority sector, about the resource implications of greater local authority involvement in tenement management. It was made abundantly clear that local authorities do not currently have capacity to take on even the more limited role in tenement management recommended elsewhere in our Report and draft Bill. Proposals which imposed more extensive burdens on local authorities would be likely to face significant opposition within the sector. It was also suggested by some consultees that the use of local authority resources to manage privately owned tenement property would be inappropriate as a matter of principle, particularly when the need for local authority resources is so significant in many other areas. Private owners might instead be expected to take responsibility for managing their own property maintenance, whether by undertaking the work of management personally or by paying a factor to do so.

A new public body for tenements?

2.13 A final suggestion made by some consultees was that a new public body, perhaps in the form of a Commission or Ombudsperson, should be created to deal with tenement governance issues. This body could take responsibility for monitoring and enforcing evolving building and housing standards in tenements, managing tenements (whether directly or through the appointment of factors) where standards were not being met, assisting with the resolution of disputes amongst owners including through informal processes such as mediation, and generally providing advice and support to tenement owners on compliance with their legal obligations. Public bodies performing at least some of these functions can be found in some other jurisdictions including the Community Schemes Ombud Service in South Africa[7] and the Condominium Authority of Ontario, Canada.[8]

---

[5] We summarise these in the Discussion Paper at paras 2.49 – 2.52.
[6] Local authorities currently have a power, but not a duty, to pay missing shares of the cost of common repair works in tenements in certain circumstances: see section 4A of the Tenements (Scotland) Act 2004 and also section 50 of the Housing (Scotland) Act 2006. A report prepared for the Scottish Government in 2016 suggests most authorities do not offer a missing shares scheme: see Discussion Paper, para 2.52.
[7] More information about this service can be found on its website: https://csos.org.za/.
[8] More information about this service can be found on its website: https://www.condoauthorityontario.ca/.

Relationship between owners' associations and the broader housing programme

The three recommendations of the Working Group

2.14 The Working Group made three primary recommendations.[9] Our project focuses on the second recommendation, namely the introduction of owners' associations for all tenements. Alongside owners' associations, the Group also recommended mandatory condition inspections of tenement buildings to be undertaken every five years, and the establishment of a building reserve fund for every tenement. Many respondents to our Discussion Paper emphasised their view that all three recommendations must be implemented in order for the outcomes anticipated by the Working Group to be achieved. It was noted that the three recommendations came as a package, which together could produce an effect greater than the sum of their parts.

2.15 Support from consultees for the other Working Group recommendations was set out not only in consultees' general comments on the project, but also raised in connection with specific aspects of the owners' association legislation on which we consulted. For example, flat owners have a statutory duty to maintain the parts of the tenement which they own.[10] Under our draft Bill, a simple majority of flat owners will have power to instruct the association to carry out maintenance work to parts of the tenement,[11] with maintenance given a non-exhaustive definition connected to the statutory maintenance duty.[12] In the event of owner apathy, under our draft Bill the association manager would have the power to seek approval from the First-tier Tribunal for an annual budget covering the works required to adhere to the statutory maintenance duty.[13] Our Discussion Paper consulted on each of these aspects of the proposed scheme, and in response to each, consultees noted the benefits that mandatory maintenance inspections could provide in terms of setting a base line for required work and assisting owners' associations with budget setting and future planning.

2.16 Our proposed scheme also includes an annual budgeting process for owners' associations,[14] and the Discussion Paper consulted on the content of that budget and treatment of funds held by the association. Consultees here noted support for reserve funds as a mechanism for planning further ahead than one year, looking towards "future proofing" of buildings rather than basic maintenance on a year-by-year basis. It was noted that reserve funds could also provide a mechanism by which the cost of large-scale maintenance works (such as roof replacement) which may be required only every 50 years or so can be effectively shared over the whole period of time before the works become necessary.

2.17 Consultees who commented on the other recommendations of the Working Group generally took the view that these recommendations should be implemented alongside, or within a short period after, the implementation of owners' associations. Some suggested that the transformative effects envisioned by the Working Group would not be realised if owners' associations are introduced on a standalone basis.

---

[9] Final Recommendations Report, p 4 – 8.
[10] 2004 Act s 8. We recommend some amendment in relation to the detail of this duty in our draft Bill: see paras 3.21 - 3.26 below.
[11] See para 9.30 below.
[12] See paras 3.40 – 3.50 below.
[13] See paras 11.27 – 11.28 below.
[14] See paras 6.22 – 6.26 below for the key duty to approve an annual budget, and paras 10.15 – 10.25 for the default rules on the content of the budget.

Proposed new housing and building standards

2.18 Separately, some consultees noted other work being taken forward by the government in relation to building standards, in particular the proposed legislation on heat in buildings[15] and the proposed tenure-neutral housing standard.[16] These consultees generally expressed support for rapid progress with these changes, particularly where required to facilitate environmentally-focused alterations to tenement buildings. Some consultees were keen to see the meaning of "maintenance" within the tenements legislation revised to include such works, which would, under our draft Bill, usually allow such works to proceed where a simple majority of owners were in favour. As discussed later in the Report where we consider the definition of maintenance, we do not think such works can be included unless owners and the association are under an obligation to carry them out.[17] Should the obligations on owners change as a result of the work being taken forward on housing standards and heat in buildings, consideration might be given to whether changes should follow to any legislation enacted in relation to owners' associations.

Making the owners' association legislation effective

2.19 A broad theme which emerged from consultees who commented on issues beyond the scope of the project concerned the non-legislative measures required to allow the new owners' association legislation to function effectively. It was recognised that the introduction of new legislation would not, in itself, transform established patterns of behaviour in relation to maintenance of the common parts of tenements. It was suggested that additional measures are needed to ensure flat owners are supported – or compelled – to make use of the association as intended. We note in broad terms that non-legislative measures of the kind under discussion in this section are also likely to be relevant to an assessment by the court of whether the legislation is proportionate in terms of its engagement with the human rights of flat owners.[18]

The critical role of local authorities and the necessity of adequate resources

2.20 Local authorities play a key role in our recommendations in this Report. In our public engagement work raising awareness of our Discussion Paper and in the written responses we received, it was repeatedly emphasised to us that it is simply not possible for local authorities to take on the additional responsibilities that would be placed on them by our draft Bill under current funding arrangements. Acute anxiety was expressed on several occasions by local authority employees and other representatives about the extent of the burden to be placed on them by the owners' association scheme. We would urge the Scottish Government to address these concerns in early course. The effective involvement of local authorities will be critical to the success of the legislation.

2.21 Local authorities are essential to the operation of owners' associations in two main ways. First, it should be recognised that many local authorities will be impacted by the new law in their capacity as owners of tenement flats. The Working Group recommended that every tenement should have an owners' association, with members meeting once per year to (at a minimum) approve an annual maintenance budget. For local authorities with significant

[15] See paras 1.20 – 1.23 above for an overview.
[16] See paras 1.14 – 1.19 above for an overview.
[17] See paras 3.45 – 3.47 below.
[18] Consideration of this issue can be found in the Discussion Paper at paras 3.13 – 3.16.

housing stock, this could result in a requirement to prepare for and attend hundreds of association meetings each year, the staffing implications of which are obviously significant. The operation of an annual budget for each tenement is likely to conflict with the broader approach to budgeting generally required of local authorities, with necessary adaptations giving rise to resource implications. In addition, local authority representatives sometimes expressed the view that private owners of flats in mixed tenure blocks[19] would be likely to expect the local authority to take on the role of association manager, in the same way that the local authority often has to lead on management of maintenance within mixed tenure blocks at present. Acting as the association manager would again impose an additional burden on resources. We note that many of these concerns will also apply in relation to Housing Associations as Registered Social Landlords.

2.22 It was suggested to us that exemptions from the scheme might be put in place for tenements which are wholly or mainly in local authority ownership. Our draft Bill already suspends the key duties on associations to appoint a manager, hold an annual meeting and approve an annual budget in tenements where all the flats are owned by the same person.[20] Extending these exemptions to tenements in majority local authority ownership would run contrary to the recommendations of the Working Group, and whether local authority housing should be treated differently than other tenement housing in this respect is a policy issue lying beyond our remit. However, we recognise that this is a matter which the government may wish to consider further given the resource implications.

2.23 The second essential role played by local authorities in our draft Bill relates to management of owners' associations which are failing to comply with their key duties. In these circumstances, we recommend that the First-tier Tribunal should have the power to appoint a remedial manager to the association.[21] Our draft Bill provides that, where it has not been possible to identify a commercial property factor willing to take on this role, the local authority in which the tenement is located should be appointed by the Tribunal as "remedial manager of last resort".[22] The local authority may employ staff to carry out these duties directly, or contract with commercial factors to carry out the work. Although flat owners will be liable to pay for the costs of management, it might be anticipated that obtaining payment of these costs will not be straightforward, and in some cases will prove impossible. The resourcing implications for local authorities are obvious, and may be significant. The challenges may be particularly acute in the early stages of the new legislation, while flat owners adjust to the new responsibilities placed upon them and the scheme takes time to "bed in".

2.24 As explained in Chapter 7, we consider provision for appointment of a remedial manager to be essential to the success of the legislation.[23] We cannot see another body better suited than the local authority to be given the role of remedial manager of last resort – though as we noted above, it was suggested to us that a new public body should be established for this and potentially other aspects of tenement regulation.[24] It is hoped that the need for remedial management can be reduced through a programme of education for flat owners and the provision of strong support for them putting in place their own arrangements, as discussed

[19] We use this term to denote tenements in which some flats are owned by the local authority and some by private persons, usually as a result of the exercise of "right to buy" provisions.
[20] See para 6.52 and 6.57 – 6.60 below.
[21] See generally Chapter 7 in relation to the appointment of a remedial manager.
[22] See paras 7.16 – 7.24 below.
[23] See paras 7.1 – 7.2 below.
[24] See para 2.13 above.

below.[25] However, it is inevitable that there will be some need for remedial provision in circumstances where a willing manager cannot be found, and if local authorities are not funded appropriately to perform this role, the legislation as a whole will fail. We would urge the government to give this early, and serious, consideration in consultation with relevant local authority stakeholders.

Support for owners: capacity building

2.25 Another issue repeatedly stressed by consultees in their comments related to the need to build capacity amongst owners of tenement flats to allow them to comply with the demands of any new legislation. Of course, any change in the law generally requires some degree of public education to inform affected parties of new responsibilities. However, some consultees took the view that measures intended simply to raise awareness amongst the public of the owners' association legislation are unlikely to be sufficient to bring about the change in tenement culture which the recommendations of the Working Group aimed to achieve.

2.26 The introduction of owners' associations is intended to provide a framework for systematic collaboration amongst owners in relation to maintenance of their shared building. However, making use of this framework requires certain skills. At a minimum, a flat owner must understand the process of attending meetings and reviewing budgets, in addition to the softer skills of negotiating with neighbours over potentially sensitive issues such as money or disruption to a person's home. At a more advanced level, an owner who acts as manager of their association will need skills in administration, record keeping, reporting, preparing a budget and taking action (including legal action) where costs are not paid – or recognising when professional assistance should be engaged to deal with any of these issues.

2.27 In some cases, flat owners will have developed these skills in other areas of life. Consultees sometimes emphasised the importance to them of being able to continue "self-factoring" (or "self-managing") under new legislation, and our impression is that owners who wish to take on this role have often developed the relevant skills as part of their employment, trade or profession.

2.28 Other consultees have suggested that few owners will have capacity to take on the responsibilities of the association manager, and worry that owners are effectively being compelled to incur the costs of a professional factor as a result. For these consultees, it is important that resources should be made available to enable owners to acquire the relevant skills, through training opportunities, user-friendly guidance and examples of good practice. Capacity building of this kind is viewed by these consultees as essential to creating a culture in which current owners and prospective purchasers of tenement flats recognise that collaboration with neighbours is a responsibility that comes with owning a property of this type, distinguishing flat ownership from ownership, for example, of a single family home.

2.29 At present, there are few bodies available to provide advice and guidance to flat owners. Those who do – generally local authorities or charitable organisations, with the most prominent example being Under One Roof – have very limited resources for this type of work. We noted above the suggestion made by some consultees that a new public body should be established to regulate tenements.[26] A body of that kind could also take on this capacity-

[25] See paras 2.25 – 2.32 below.
[26] See para 2.13 above.

building role. Alternatively, it was suggested that greater resources should be made available to existing bodies to expand their capacity in this respect. No doubt further models for education and training could be explored.

Support for owners: funding and financial products

2.30 The introduction of owners' associations is intended to increase the amount of work being undertaken to maintain, and perhaps improve, the tenement stock. In moving from a "reactive" to a "proactive" system of tenement maintenance, it obviously follows that flat owners will incur costs that may arise much earlier than anticipated, or which owners may not have anticipated at all. In some cases, these will be costs that owners simply are not able to afford. A number of consultees suggested that thought must be given to how funding can be made available in such cases. It was suggested that there is a strong case for public funds, in the form of grants or loans, being made available for tenement repairs since a single "missing share" of costs is likely to prevent essential work being undertaken even where all the other owners in the building have contributed appropriately. It was noted that, although a missing share can potentially be recouped from the owner who has not paid it on the sale of their flat, many years may pass before that sale takes place, during which time the share must be covered by someone else. It was suggested that the public purse may be able to bear such a delay in repayment more readily than other owners in the tenement.

2.31 A further financial concern was raised regarding the interests of tenants. Where tenement flats are let to tenants, any unanticipated maintenance costs incurred by landlords following the introduction of owners' associations might, it was suggested, simply be passed on to tenants in the form of increased rent. It was suggested that the government should consider appropriate safeguards for tenants in this respect.

2.32 Separately, several respondents noted that engagement must be undertaken with banks and other financial institutions to ensure they are willing to offer appropriate financial products to owners' associations on their introduction. Under current law, it is often very difficult for a group of owners to open a bank account for the tenement, for example, but the owners' association will require to do so under our draft Bill.[27] Similarly, our draft Bill confers capacity on the association to take out an insurance policy in its own name in respect of the common parts of the tenement,[28] but this will be ineffective if insurance companies are reluctant to offer such policies. Concern was expressed that issues of this kind should be addressed *prior* to the legislation coming into force.

Embedding owners' associations within the conveyancing infrastructure: a tenement register?

2.33 A final issue raised by a number of consultees concerned "joining up" owners' associations with the existing residential and commercial property infrastructure. Concerns were raised particularly in connection with the transparency of associations and their place in the process of buying and selling flats in future.

2.34 In their recommendation on the introduction of mandatory building condition inspection reports, the Working Group had suggested that the reports should be made available on a publicly accessible register, and updated regularly with proof that necessary works had been

[27] See para 10.60 below.
[28] See para 4.50 below.

undertaken.[29] Some consultees suggested that the register should also contain other information on the association, including particularly the names and contact details of the association manager and of owners of flats in the tenement. It was suggested that information on the association budget and/or reserve fund could be made available through a digital register. One or two consultees suggested an even broader approach, merging the prospective owners' association or tenement register with the Scottish Property Factor Register and the Landlord Register to provide a more complete picture of the legal rights and relationships surrounding the ownership, management and use of any particular tenement.

2.35 The question of access to information about the association was also raised in connection with the conveyancing process. It was suggested that mechanisms must be put in place, perhaps through revision to the Home Report, to allow prospective purchasers of a flat to assess the state of health of the association for the connected tenement. Again, it was suggested that the existence of a digital register would be the best mechanism to deal with this need.

2.36 Our draft Bill includes a duty on the association to record tenement identification details against relevant titles in the Land Register and/or Register of Sasines. The details will include the name and address of the association, and the addresses of the flats in the tenement to which the association relates.[30] Should a tenement-specific register be introduced, it might be considered appropriate to amend this requirement so that the relevant information would be included in the tenement register rather than the property registers.

Miscellaneous issues

2.37 Consultees also raised some miscellaneous issues which we note below for completeness.

2.38 First, the introduction of owners' association legislation is likely to produce an increase in demand in two key sectors – building and construction, and property management. Concern was expressed by some consultees about whether there is capacity within these sectors to cope with the increase in demand (though some within the property management sector took the view that the sector would expand to meet demand should it be the case that capacity was currently insufficient). Particular concern was expressed about the availability of tradespersons with the skills appropriate to work on listed or historically significant tenement buildings, and about the availability of property management services in areas of the country without a high density of tenement buildings. It was suggested that **potential skills shortages** should be addressed.

2.39 Second, several consultees noted that VAT is not chargeable on services provided by builders and other contractors in relation to the construction of new homes. It was suggested that a similar **VAT exemption in relation to work on tenements** – whether all maintenance work, or perhaps work targeted towards energy retrofit – should be put in place to incentivise associations to take action. We note that a change of this kind would fall outwith the competence of the Scottish Parliament.[31]

---

[29] Final Recommendations Report, p 4.
[30] See paras 6.27 – 6.36 below.
[31] In relation to taxation matters more generally, our *Report on the Law of the Tenement* (Scot Law Com No 162, 1998) (paras 6.68 to 6.70) and *Report on Real Burdens* (Scot Law Com No 181, 2000) (paras 8.82 to 8.84)

2.40 Third, it was suggested that **regulation of tradespersons** within the building sector should be reviewed. Some consultees took the view that maintenance was not always undertaken in tenements because owners did not have confidence in the standard of the work that would be carried out. Some professionals were concerned in particular about inappropriate work being undertaken in listed or historically significant tenement buildings.

2.41 A separate issue raised concerned the **regulation of factors**, and particularly the Property Factors (Scotland) Act 2011. It was suggested this legislation and the associated Code of Conduct should be reviewed to ensure it aligned with the responsibilities undertaken by factors who are association managers. Separately, it was questioned by one or two consultees whether it remains appropriate for local authorities who act as factors to be subject to these regulations.

2.42 Finally, some consultees raised the issue of tenement title conditions in which costs are split between owners on the basis of the **rateable values** of the relevant flats, or on the basis of **feuduty payments**. It was suggested that the inappropriateness of such provisions in the present day contributes to the overall difficulty of understanding title conditions for persons without legal training. It was suggested that a systematic review and replacement of such conditions would be appropriate. We note that this would also affect title conditions in properties which are not tenement flats.

considered the tax position of the owners' associations which we had proposed in those Reports. We described those proposals as tax neutral, in that they did not give rise to liabilities which are not already encountered in the management of tenements and developments respectively. For similar reasons, we think this is also the case for the proposals set out in this Report, albeit that the provisions of the relevant tax legislation and applicable rates have changed. The broader tax treatment of owners' associations is not something which has been raised with us as a matter of particular concern, however, Government will no doubt wish to consider that should our proposals progress to implementation.

Chapter 3 A new framework for tenement maintenance

Introduction

3.1 This Chapter provides an overview of the new framework for tenement maintenance that will be put into place should our draft Bill be enacted. It summarises key amendments to the Tenements (Scotland) Act 2004, and sets out the central features of the owners' association legislation which we recommend. The Chapter also explains the detail of four specific recommendations which provide building blocks for the operation of the new framework. First, we recommend an extension of the duty on owners to maintain parts of the building which they own under section 8 of the 2004 Act. Then, we recommend definitions of the parts of tenement in relation to which the association will have responsibility, the works that fall within the meaning of "maintenance" for the purposes of the 2004 Act, and what it means to "send" a document or other information where required to do so by the legislation.

A new framework

Current law: default rules for voluntary maintenance

3.2 Chapter 2 of our Discussion Paper provided a summary of the current law of the tenement. From that summary, a sketch can be drawn of the broad approach taken under current law to maintenance of common parts of a tenement. We offer that sketch here, before setting out how the approach will change should our draft Bill be enacted.

3.3 Under current law, the rules governing maintenance of any particular tenement are set out primarily in the titles to the flats[1] which make up the building. The titles will usually include conditions, known as real burdens, which may specify how responsibility for maintenance work to different parts of the building is to be divided amongst the flats. The content of these burdens will vary from tenement to tenement, and there is no requirement or expectation of uniformity even amongst tenements of similar size, age and construction. The way in which the conditions are written will also vary from tenement to tenement. Drafters of title deeds have taken different approaches over different periods of time, in different geographical areas and in relation to different types of tenement building. Accordingly, while the titles in some tenements will make complete and detailed provision in relation to maintenance of the common parts, in others the titles will have significant ambiguities or omissions.

3.4 The Tenements (Scotland) Act 2004 does not, in general terms, override or supplant provision on maintenance made in the titles. Instead, it offers a series of default rules which

[1] Strictly a tenement is composed of "sectors", with a sector defined in section 29 of the 2004 Act to mean a flat, any close or lift, and any other three dimensional space not forming part of a flat, close or lift. An example of the latter category may be a cellar owned separately from the flat above it, or a pend owned separately from the flats above it as seen in *Hunter v Tindale* 2011 SLT (Sh Ct) 11; 2012 SLT (Sh Ct) 2. In the interests of simplicity in the broad overview of the law we are providing in this section of the Report, we refer simply to "flats" here.

will apply where the titles are silent or incomplete.[2] These rules are set out primarily in the Tenement Management Scheme ("TMS") contained in schedule 1 to the Act.

3.5 The TMS makes provision as to how maintenance can be carried out in relation to certain parts of a tenement building. These parts are referred to as "scheme property", since they are areas of property in respect of which maintenance can be undertaken in line with the rules of the scheme. Scheme property includes any part of the building in shared ownership of two or more of the flats, along with a list of specific parts of the building (the roof, the foundations and the external walls, amongst others) which can be maintained under the scheme even where they are not in shared ownership.[3]

3.6 In general terms, the TMS entitles each flat in the building to a single vote on whether maintenance work to scheme property should be undertaken, with a simple majority sufficient to allow the work to go ahead in most cases.[4] The costs of the work are then divided amongst all the flats, regardless of how they voted.[5] Costs will generally be divided equally amongst the flats, although there are certain exceptions – most importantly, maintenance costs (though not running costs) will be divided proportionately based on floor area where there are significant disparities between the sizes of the flats in the building.

3.7 It should be reiterated that the TMS applies only to the extent that the tenement titles do not make provision in relation to maintenance of the parts of the building covered by the scheme. Where the titles are clear, the provisions of the TMS will have no application.[6]

3.8 Separately, it should be noted that the 2004 Act places no obligation on owners to carry out maintenance to scheme property. Instead, it provides a set of rules which will apply should owners choose to pursue maintenance work, and where their flat titles are not clear on how they may do so. There is one exception to this rule, however. Section 8 of the 2004 Act places a duty on flat owners to maintain any part of the tenement which they own so as to ensure that it continues to provide support and/or shelter to other parts of the tenement. This duty is enforceable by the owners of any other flat in the building which would be directly affected should the duty be breached. We return to this duty below.[7]

Reformed law: owners' associations and a new statutory minimum

3.9 Our proposed legislation on owners' associations continues to focus on maintenance of shared or structurally important parts of the tenement building, with the term "association property" in our Bill defined in the same way as "scheme property" in the TMS.[8] If enacted, the legislation will bring about some important changes to the framework within which maintenance to these parts of a tenement is undertaken.

---

[2] In broad terms, default rules on ownership are set out in the 2004 Act ss 1 – 3. Default rules on maintenance are set out in ss 4 – 4A and Schedule 1. Certain provisions in relation to liability for costs incurred in undertaking maintenance are set out in ss 11 – 16.
[3] Scheme property is defined in TMS rule 1.2, and also includes any part of the tenement in respect of which the responsibility for maintenance, or the cost of maintenance, is shared between two or more flats. TMS rule 1.3 excludes from the definition certain parts of a tenement which serve only one flat including doors and windows.
[4] See generally TMS rule 2.
[5] See generally TMS rule 4.
[6] Section 4 of the 2004 Act provides for the circumstances in which the TMS will apply.
[7] See paras 3.21 – 3.26 below.
[8] This is discussed further below: see paras 3.32 – 3.39.

3.10 As discussed above, under current law the tenement titles may provide a more or less complete picture of the rules by which maintenance can be carried out. If our draft Bill is enacted, it will no longer be possible for maintenance to be governed entirely by the titles. The legislation will establish an owners' association for every tenement, and provide for flat owners to be members of that association. It will define the powers of the association in relation to the management and maintenance of association property. It will require a manager to be appointed to the association, define the basic relationship between the manager and the association, and confer on the manager a minimum set of powers which the manager may exercise on the association's behalf. These aspects of the legislation will apply to every tenement and cannot be supplanted or overridden by conditions in the tenement titles. This is an unavoidable consequence of the Working Group's recommendation. The legislative provision is of universal application in that respect.[9]

3.11 Current law also places little compulsion on owners to carry out maintenance to scheme property. In most cases, owners may avoid taking any decisions, and in effect can simply do nothing.[10] If our draft Bill is enacted, this will change. Although the legislation does not place any new duty on owners to carry out maintenance, the association itself will be subject to a duty to approve an annual budget covering works to be carried out to association property over the course of the year. The budget, including the programme of works it contains, can be acted on only if approved by a majority of owners, and in that sense, the power to decide to undertake works remains with owners. However, the fact that a budget must necessarily be prepared each year removes from owners the freedom simply to do nothing. Apathy is no longer an option.

3.12 In addition, if no budget is approved because owners do not vote, the association will have the power to seek approval instead from the First-tier Tribunal.[11] Approval can be obtained only for a budget covering the works necessary to ensure flat owners comply with their respective duties under section 8 of the 2004 Act to maintain the association property which they own. This is a duty to which owners are already subject under the current law. However, the existence of the association, and the duty of the association to approve an annual budget, will produce the result that owners' obligations under section 8 are much more likely to be enforced in future than at present, at least where those obligations relate to association property.

3.13 Finally, it should be recognised that the introduction of a new legal person will change the way in which maintenance to association property is contracted for and liability for costs incurred. Under current law, owners act for themselves.[12] Where owners vote to carry out work in line with provision in the titles or the rules of the TMS, they are voting to contract for that

---

[9] Later, we recommend that these provisions should not apply to a tenement which is subject to a Development Management Scheme: see paras 4.8 – 4.17 below. The requirement to appoint a manager will also be disapplied in small tenements or tenements in which all the flats are owned by the same person or persons: see paras 6.46 – 6.60 below.

[10] There are exceptions to this rule. One owner could seek to enforce the duty of another to maintain a part of the tenement under section 8 of the 2004 Act. Separately, the owner or owners of a neighbouring property may be able to obtain a court decree ordering a flat owner or owners to carry out specific maintenance works under the doctrines of common interest or nuisance. Alternatively, the local authority can require certain works to be carried out under statutory powers. Any of these actions would be relatively rare in practice, however.

[11] As discussed further in Chapter 11, we recommend that tenement maintenance disputes, including disputes in relation to the operation of the owners' association, should generally fall within the jurisdiction of the Housing and Property Chamber of the First-tier Tribunal for Scotland in future.

[12] Owners may engage a factor to instruct work, but the factor is an agent for the owners, and contracts on their behalf.

work themselves, and to incur relevant costs in their own names. If our Bill is enacted, owners will vote to decide what another person – the owners' association – can or must do. The owners' association will contract in its own name with tradespersons for the work. The owners' association will be liable for payments due under those contracts. Owners will, in turn, be liable to the pay the costs incurred by the association in carrying out its work, which will include the costs the association has paid or is due to pay to contractors. In a broad sense, owners are therefore ultimately liable to pay for the work in the same way they are at present, but the position in relation to rights held by different parties is more complex, particularly in terms of enforcement of those payments.[13]

3.14 We should note here that our draft Bill does not remove from an owner the power to instruct work, in their own name, to a part of the tenement which they own. This power is an inherent aspect of ownership. A person who is the sole owner of the roof of the building is free to instruct work to the roof, so long as it does not compromise the support or shelter the roof provides to the rest of the tenement.[14] The establishment of owners' associations would seem likely to disincentivise the taking forward of maintenance in this way, however. Maintenance should be easier to organise through the person of the association than amongst owners as individuals – indeed, the difficulty of organising work in this way is one reason why the Working Group recommended the introduction of associations in the first place. In addition, the association must necessarily operate to a certain minimum level in line with key statutory duties discussed later in the Report,[15] with the costs of that operation to be paid for by owners. There would accordingly seem little point to owners undertaking a parallel process to organise maintenance outside the association.

3.15 If enacted, our draft Bill will also make it more difficult for owners to organise maintenance outside the association in another way: it will repeal the TMS. Owners who wish to act outside the association will therefore be required to comply with the general principles of property law, together with relevant provision in their property titles, when organising maintenance. As under the law prior to the 2004 Act, this means maintenance of parts of the tenement held in single ownership cannot be undertaken on the basis of a majority vote (unless the tenement titles provide otherwise). Only the owner has power to instruct work, albeit that they may be ordered to do so where their duty under section 8 is enforced by other owners in the building. For parts of the tenement held in common ownership, one co-owner may instruct necessary work, but improvements will require unanimity amongst all co-owners. We anticipate that it will be unusual for an owner or owners to proceed in this way in relation to association property, but it should be clear that owners will retain these powers notwithstanding enactment of our reform recommendations.

---

[13] We consider how the association may enforce payment of debts owed to it by owners at paras 11.29 – 11.36 below. We consider how third parties, such as contractors, may enforce payment of debts owed to them by the association at paras 11.48 – 11.53 below. One point of note is our recommendation that, where debt enforcement proceedings against the association ultimately prove unsuccessful (for example, where the association has become insolvent), a contractor may seek recovery directly from each owner for their share of liability.

[14] 2004 Act ss 8 and 9. Work may also need to comply with other legal requirements, for example planning permission may need to be obtained. The point here is that the power of a flat owner to carry out work to their own property continues to exist alongside the power of the association to carry out work to that owner's property.

[15] See Chapter 6.

Retaining the 2004 Act

3.16 In addition to introducing the TMS, the Tenements (Scotland) Act 2004 codified much of the law in this area, which had previously been distributed through case law and institutional writings. Many of these principles are unaffected by the issues dealt with in our project, with the result that a wholesale repeal of the 2004 Act would be inappropriate. There are also obvious benefits to retaining legislation with which users of the legislation and others with an interest in this area may be familiar.

3.17 Against that background, the approach we have taken in the Bill is to amend the 2004 Act in such a way that its readability and accessibility are retained to the greatest extent possible. More specifically, the Bill will introduce a total of nine new sections and three new schedules to the 2004 Act:

- Sections 3A to 3G will appear immediately following section 3, under a new crossheading of "tenement owners' associations".
    - **Section 3A** will provide for the creation of owners' associations. It will also introduce **schedule A1**, which makes detailed provision on the person of the association, the key duties to which it is subject, the manager's role and duties and certain administrative matters. These provisions cannot be disapplied or modified.
    - **Section 3B** will provide for the circumstances in which associations will be dissolved and the winding up process.
    - **Section 3C** will confer on the First-tier Tribunal power to determine, if necessary, the dates on which a tenement or an owners' association exists or ceases to exist.
    - **Section 3D** will introduce **schedule A2**, which sets out the default rules on the operation of the association, including voting rights and liability for costs.
        - This section will also set out how the default rules can be disapplied by the creation of "association conditions", meaning real burdens which apply to every flat in the tenement, and which cover the same content as the default association rules subject only to permitted modifications.
        - This section will also introduce **schedule A3**, which governs how existing tenement title conditions on relevant matters will disapply the default association rules during a transitional period of twenty years following the introduction of the legislation. After the conclusion of the transitional period, existing tenement title conditions will cease to have that effect.
    - **Section 3E** will make provision as to the circumstances in which real burdens which are "association conditions" can be discharged.
    - **Section 3F** will confer on the First-tier Tribunal the power to appoint a remedial manager to an owners' association where, amongst other things, it has failed

to meet its key statutory duties.[16] Anyone with an interest can apply to have a remedial manager appointed to an association.

- **Section 3G** will make provision as to the functions of a remedial manager.

- **Section 6A** will appear after section 6. It provides for the manager of an association to apply to the First-tier Tribunal for Scotland for an order approving an annual maintenance budget in certain circumstances.

- **Section 13A** will appear after section 13. It provides for third parties who have contracted with the association to seek recovery of association debts directly from owners in certain circumstances.

3.18 In addition, the Bill will amend certain sections of the 2004 Act. Section 4A, which deals with the power of a local authority to register a notice of potential liability for costs, is amended to reflect the fact that such costs will now be owed to the association, rather than owed under the TMS. Sections 5 and 6 are amended to reflect our recommendation that disputes under the legislation should be dealt with in future by the First-tier Tribunal rather than the sheriff court. Sections 8, 9, 17, and 18 of the 2004 Act are amended to reflect our policy that the duties on owners set out in these sections should be enforceable not only by other owners, but also by the association. Sections 10 to 14, which make provision for the liability of owners to one another in relation to costs, are also amended to reflect the role of the association. Various smaller changes are made. All the amendments referred to are considered in detail in later Chapters of the Report.

3.19 The Bill also contains two further sets of amendments to the 2004 Act which we consider in detail in the remainder of this Chapter. First, the duty on owners in section 8 of the 2004 Act to maintain parts of the tenement which they own so as to continue to provide support and shelter is extended. Second, the Bill makes provision for three issues central to the new legislation as a whole, namely the definition of "association property", the definition of "maintenance", and the rules by which information can be given to members of the association where required by the new legislative regime.

3.20 Appendix C to this Report sets out how the 2004 Act will look should our draft Bill be enacted.

Amending the section 8 duty to maintain

3.21 Section 8 of the 2004 Act imposes a duty on an owner of any part of a tenement which provides support and shelter to other parts of the tenement to maintain that part so as to ensure that it continues to do so. This duty relates to parts of the tenement in the sole ownership of that person (for example, internal flat walls which may be load-bearing) and to parts of the tenement in respect of which the owner may share ownership with others (for example, the close or stairwell).[17] This duty is enforceable by owners of other flats in the building who are or would be affected by breach of the duty. Under current law, if the part of

[16] The key duties, set out in paragraph 8 of Schedule A1, are to appoint a manager, hold an annual general meeting of members, approve an annual maintenance budget and make an application for tenement identification information to be entered on the property registers.
[17] Where ownership of a part of the tenement is shared, every co-owner is subject to the section 8 duty in respect of that part.

the tenement in question is "scheme property", liability for the cost of the maintenance work will be divided amongst flat owners on the basis of the rules of the management scheme applicable in the tenement.[18] Our recommended reforms will make equivalent provision to the effect that if the part of the tenement in question is "association property", the association will be liable to reimburse any owner for the cost of the maintenance work. That payment then becomes an "association cost", liability for which is divided amongst flat owners on the basis of the association rules.[19]

3.22 Under current law, in a tenement where most owners are apathetic or absent, the section 8 duty is the only route by which an engaged owner can enforce maintenance of property to a minimum standard.[20] As noted above, our Bill will allow for the association itself to enforce this duty against all owners, most significantly by conferring power on the Tribunal to approve an annual budget for the works necessary to ensure that association property continues to adhere to this standard. Section 8 will accordingly play an important role in the overall framework for maintenance of association property.

3.23 The Discussion Paper noted that the current framing of the duty has given rise to some confusion in practice. Section 8 was a statutory restatement of a duty on flat owners which had previously arisen under the common law doctrine of common interest.[21] Duties on flat owners in relation to maintenance also arise under other common law rules. In particular, a duty to take reasonable care to maintain property so as to avoid damage to others arises under the common law of delict. The doctrine of nuisance may also result in an obligation to maintain. Placing some of these duties on a statutory footing whilst others remain at common law makes it less straightforward to ascertain the extent of the duties to which owners are subject. In addition, different court procedures must be followed in relation to enforcement depending on where the duty is set out.[22]

3.24 We suggested, to streamline matters, that section 8 might be expanded to cover maintenance matters currently dealt with at common law. Specifically, we provisionally proposed that section 8 should be amended to include a duty on owners to maintain any part of the building which they own so as to prevent damage to any part of the tenement, or in the interests of health and safety. Expanding the statutory duty in this way would mean, for example, that enforcement action could be taken to remedy poorly maintained render on the exterior of a tenement which might otherwise fall and injure a passerby on the street. As currently drafted, the section 8 duty would not cover this circumstance unless and until the render was sufficiently defective that the building was no longer watertight. We suggested that the expanded version of the section 8 duty to maintain should be owed, as under current law, only in so far as it is reasonable to do so having regard to all the circumstances, including in particular the age of the tenement building, its condition and the likely cost of any maintenance.

3.25 35 consultees responded to our question in the Discussion Paper on this issue.[23] The proposal to extend the section 8 duty received universal support. Some consultees expressed

---

[18] 2004 Act s 10.
[19] Draft Bill, Schedule paragraph 8, amending 2004 Act s 10.
[20] As noted in the Discussion Paper, an engaged owner could also seek assistance from the local authority, which has certain powers to compel owners to take action in relation to maintenance: see paras 2.49 – 2.52.
[21] This doctrine was abolished in relation to tenements by section 7 of the 2004 Act.
[22] The section 8 duty is enforced by way of summary application under section 6 of the 2004 Act. Duties arising at common law must be enforced by way of an alternate civil court procedure, with the relevant procedure dependent on matters including the value of any claim for damages.
[23] Discussion Paper, para 11.12.

concern about the term “health and safety”, suggesting that it may be preferable to clarify which types of risk are at issue here, such as the safety of neighbouring property and persons, and maintenance of access to essential services. While we recognise these concerns, we consider it preferable to retain a broad and flexible definition to provide scope to cover the range of scenarios that may arise, and which may be difficult to predict in advance.

3.26 We recommend:

1. **Section 8 of the 2004 Act should be amended to include a duty on owners to maintain any part of the tenement which they own so as to prevent damage to any part of the tenement, or in the interests of health and safety.**

(2004 Act, s 8 as amended by Draft Bill, s 7 and Schedule para 6)

3.27 The Discussion Paper also considered the potential for uncertainty as to which forms of work might be required in order to ensure parts of the building continue to provide support and shelter, and otherwise to adhere to the duty under section 8. Arguments can arise as to whether certain types of work go beyond what is required to keep a building wind and watertight, for example. This was an issue which had been raised with us in early consultation for the project. We asked whether the legislation should include a non-exhaustive list of relevant works, perhaps focused on areas of uncertainty rather than works which more obviously fall within the duty.[24]

3.28 Of the 34 consultees who responded to this question, 19 supported the introduction of a list, while seven were opposed. Support was generally expressed on the basis that a list would aid clarity and certainty and reduce disputes. Consultees who opposed a list generally noted the concern highlighted in the Discussion Paper that, given the heterogeneity of the tenement stock, it would be impossible to create a list of universal application. Consultees also noted the risk that a non-exhaustive list might nevertheless tend to lead to the interpretation that works not specifically listed were excluded. Nineteen consultees also responded to our follow-up question on what works might be included in such a list, but little consensus emerged from the responses.

3.29 We recognise the weight of consultee support in favour of a non-exhaustive list, and agree that clarity is important where possible. However, the difficulty becomes clear when considering what works might be included on the list in light of the consultee responses to our request for input. The development of a universally applicable list is likely to be impossible. We note in particular the concern that measures which may be necessary to keep some tenements wind and watertight, or retain their structural integrity, may be actively harmful to others depending on the construction of the building in question.

3.30 We note the suggestion of some consultees that consultation with building professionals is necessary here. We think a better approach to increasing certainty for flat owners may be the development of guidance by the government, in consultation with building professionals, on the works necessary to maintain tenements of different constructions in line with the duty set out in section 8. This would seem to fit well with the work the government has proposed to take forward on a new tenure-neutral housing standard and the introduction of five-yearly inspection reports for tenements. We note in that respect the recent consultation

[24] Discussion Paper, para 11.15.

by the government on the development of a Heat and Energy Efficiency Technical Suitability Assessment.[25] Against that background, and notwithstanding the support of a majority of consultees, we do not recommend the introduction of a non-exhaustive list of works covered by the duty under section 8.

New definitions: property and maintenance

3.31 The purpose of introducing owners' associations is to facilitate maintenance of tenement property. Our draft Bill provides definitions of relevant terms which adapt similar provision under the current law.

Association property

3.32 The concern of the Working Group was with maintenance of "common parts" of a tenement, meaning roughly those parts of the building which are in shared ownership of the flat owners or in respect of which responsibility for maintenance is shared. As noted above, this concept is captured under current law by the term "scheme property", which refers to the parts of the building in respect of which maintenance decisions can be taken under the rules of the TMS.[26] In the Discussion Paper, our provisional view was that owners' associations should have power to manage the same areas of the tenement as currently covered by the rules of the TMS.[27] This seemed consistent with the intentions of the Working Group, and with the rights of owners under A1P1.

3.33 "Scheme property" is defined in rules 1.2 and 1.3 of the TMS. It includes, first, any part of the building which is common property of two or more owners of separate flats. Second, it includes any part of the building in respect of which responsibility for maintenance is shared by two or more owners by virtue of provision in the titles. Third, it includes the following parts of the building, even where they are not in common ownership or subject to shared maintenance obligations in the titles:

- The ground on which the tenement is built;
- Its foundations;
- Its external walls;
- Its roof (including rafters and supporting structures);
- Part of a mutual gable wall which separates it from a neighbouring building;
- Any load bearing wall, beam or column.

There are, however, specific exclusions from this list, namely:

- Any extension which forms part of only one flat;
- Any door, window, skylight, vent or other opening which serves only one flat;

---

[25] Scottish Government, *Heat and Energy Efficiency Technical Suitability Assessment (HEETSA): Scoping Consultation* (2025), available at https://www.gov.scot/publications/heat-energy-efficiency-technical-suitability-assessment-heetsa-scoping-consultation/.
[26] See paras 3.5 – 3.6 above.
[27] Discussion Paper, para 6.34.

- Any chimney stack or chimney flue.

3.34 It follows that, where the titles provide that an external wall is common property, a window included in that wall will also be common property, and so both the wall and the window will be scheme property. This is because all common property is scheme property. Where the titles provide that an external wall including a window is in the sole ownership of the adjacent flat, the wall will be scheme property, since the wall is included in the list of strategically important parts of the building which overrides the titles. However, the window will not be scheme property, since windows are expressly excluded from that list.[28]

3.35 The Discussion Paper noted suggestions in early consultation for the project that it was unclear whether some parts of a tenement fell within the definition of scheme property or not. Our conclusion was that the position of each of these parts in relation to the definition could be determined with some certainty.[29] To assist understanding of the draft Bill, we think it may useful to recap that analysis here. Concerns were brought to our attention in relation to the following parts of a tenement:

- *Dormers*: it seems clear that the roof and walls of a dormer, like all parts of the roof or walls of a tenement building, are scheme property by virtue of being included in the list of specific building parts set out in para 3.33 above. Windows (including the window of a dormer) are not included in the list of specific building parts. However, windows will nevertheless be scheme property where they are in common ownership of two or more flats in the tenement, or where responsibility for maintenance of that part is shared by two or more owners by virtue of provision in the titles. A window (including a window in a dormer) which fulfils either of those two criteria will therefore be scheme property.

- *Skylights*: a skylight which lights only one flat is excluded from the list of specific building parts which are scheme property. A skylight which formerly served multiple flats may, through renovation, come to serve only a single flat. Whilst serving multiple flats, the skylight will be scheme property by virtue of the list. At the point at which it ceases to serve more than one flat, the exclusion from the list will apply, and the skylight will no longer be scheme property by virtue of the list. As with a dormer, however, a skylight which serves only one property may nevertheless be scheme property where it is in common ownership, or where responsibility for maintenance of it is shared by two or more owners by virtue of provision in the titles.

- *Cupolas*: a cupola is a rounded dome forming part of a roof. In some cases, it will provide light or ventilation. In others, it will be purely decorative. Cupolas are not explicitly mentioned in the current definition of scheme property. However, a cupola which provides light or ventilation would seem to be a "window, skylight, vent or

[28] Case law suggests that a window installed in a commonly owned roof or wall becomes common property by virtue of acceding to that roof or wall, and as common property, the window is therefore scheme property: see *Waelde v Ulloa* 2016 GWD 11-221 (Sh Ct); *Mehrabadi v Hough,* Aberdeen Sheriff Court, June 2009, unreported.
[29] Discussion Paper, para 6.35.

other opening" and treated accordingly. A cupola which does neither is simply part of the roof, and should be treated accordingly.

- *Floor beams*: floor beams are included in the list of specific building parts which are scheme property only where they are load bearing. It has been suggested that even beams which are not load bearing should be scheme property, since they can provide a structural function in tying walls to a building. In our Report on Tenement Law which preceded the introduction of the 2004 Act, we took the view that the definition of scheme property could not cover every potentially structurally significant part of a building. This was because owners could not be expected to easily identify what would meet that test, particularly in light of the fact that experts might reasonably disagree about the structural significance of certain building parts.[30] Accordingly, the definition of scheme property limits itself to parts of the building where structural significance is not in question. This justification for the exclusion of non-load bearing beams from the definition of scheme property continues, in our view, to be sound.

3.36 We asked consultees whether the parts of the tenement to be managed by the owners' association should be the same parts of the tenement which are currently subject to the TMS, namely the "scheme property". Of the 35 consultees who responded to this question, 26 agreed that the same definition should be used, though a small number of respondents gave minor qualifications to this view, mainly focusing on dormers, skylights, cupolas or floor beams as discussed above. As noted there, we do not consider any change to the legislative definition to be required to address these areas of the building.

3.37 Two consultees suggested broader changes, including provision for the mutual walls of two or more tenements to be considered a form of "super-tenement" property which could be managed by a majority of the owners concerned. If flat owners in Tenement B universally reject a proposal for maintenance work, we think providing for that work to proceed nevertheless on the basis of a majority achieved from the votes of Tenements A and C would represent a significant change to the rights of those owners. It would also seem to fall outwith the scope of our project. We recognise that coordination of work amongst a group of adjacent tenements is often a sensible means, and sometimes the only possible means, of carrying out effective structural maintenance. We anticipate that such coordination will in, future, be facilitated by the existence of an owners' association for each of those tenements. This can be achieved without a more fundamental alteration to the rights of flat owners in such tenements.

3.38 Following from the above, we consider that the parts of the tenement to be managed by the owners' association should be the same as the parts of the tenement covered by the TMS under current law. In the Bill, the term "association property" is used to denote these parts of the building.

[30] Scottish Law Commission, Report on the Law of the Tenement (Scot Law Com No 162, 1998), available at https://www.scotlawcom.gov.uk/files/4512/7989/7476/rep162.pdf, para 5.7.

3.39 We recommend:

2. The "association property" to be managed by the owners' association should be defined in the same way as "scheme property" under the TMS.

(2004 Act, s 3A(4) and Schedule A1 para 6, inserted by Draft Bill, s 1)

Maintenance

3.40 Maintenance of association property will, under the draft Bill, fall within the powers of the owners' association. As under current law, we recommend later in this Report a default rule that a decision to undertake maintenance should generally be possible where a simple majority of owners are in favour.[31] However, uncertainty may arise as to which works can be categorised as "maintenance", and which should instead be deemed to go beyond that, becoming improvements.

3.41 Maintenance is referenced in the 2004 Act in two separate contexts, which can cause confusion. As discussed above, section 8 of the 2004 Act places a duty on an owner of any part of the tenement building which provides support or shelter to maintain that part so as to continue to provide support and shelter.[32] Separately, the TMS provides that scheme decisions can be taken in respect of maintenance of scheme property,[33] and rule 1.5 sets out the following definition of "maintenance" for this purpose:

> ""maintenance" includes repairs and replacement, the installation of insulation, cleaning, painting and other routine works, gardening, the day to day running of a tenement and the reinstatement of part (but not most) of the tenement building, but does not include demolition, alteration or improvement unless reasonably incidental to maintenance."

3.42 The maintenance required by the section 8 duty is explicitly limited to that which is required to continue providing support and shelter. The definition in the TMS obviously encompasses works which could not possibly be required in that context. Gardening, to use a somewhat flippant example, seems unlikely to be necessary to keep a building wind and watertight. A more difficult example is the installation of insulation, which is probably unnecessary to meet the section 8 duty in most tenements, at least under current law. It seems that this relationship between the definition of maintenance in the TMS and the maintenance required by section 8 is not always well understood. Flat owners may instead have the impression that the section 8 duty extends to all the routine works covered by the TMS definition. Conversely, work required for compliance with the section 8 duty may not be explicitly listed within the definition in the TMS.

3.43 The Discussion Paper suggested that the introduction of owners' associations may provide an opportunity to clarify matters. We suggested that maintenance could be defined to include: (i) any work required to ensure the compliance of scheme property with the duty in

---

[31] See paras 9.24 – 9.30 below. We also suggest a default rule that improvements should generally require a special majority of 75% of owners to be in favour: see paras 9.31 – 9.36 below. Alternative percentages could be specified where, rather than relying on the default rules, association conditions are created to regulate the operation of the association, on which see Chapter 8.

[32] See para 3.21 above.

[33] TMS rule 3.1.

section 8 of the 2004 Act; and (ii) other routine works of maintenance as set out in the existing TMS definition.

3.44 We sought views from consultees.[34] Of the 35 consultees who responded to this question, 33 agreed with the approach suggested above. We also asked consultees whether any further changes to "maintenance" as defined in the TMS were required. Thirty four consultees provided a response. Sixteen suggested that some change to the definition of maintenance was either required or desirable. Fourteen suggested that there should be no change to the definition.[35]

3.45 A few consultees took the view that improvements should be included within the definition of maintenance, since identifying the dividing line between repairing or replacing like-for-like and improving part of the building is impractical or unworkable. By contrast, one consultee came out strongly against this suggestion on the basis that maintenance costs might be in the contemplation of a flat buyer, but comprehensive upgrading would not be. We agree that the line between repairs and improvement can sometimes be difficult to draw. However, to suggest that there is no difference between these two categories is illogical. Absent any obligation on owners to improve the condition of their tenements beyond the duty in section 8, collapsing the distinction between maintenance and improvements seems unjustified.

3.46 A large number of consultees suggested that maintenance should be redefined to encompass environmental-type improvements to tenement buildings, for example, the installation of communal heating systems, solar panels, energy efficiency measures or rainwater drainage systems. We noted in the Discussion Paper that under current legislation, owners have no obligation to improve the energy efficiency of their building, meaning that there is no clear basis on which to recategorise works of this kind.[36] This reservation was shared by some consultees, with the suggestion made that the government's ongoing work in relation to the Heat in Buildings Bill might more appropriately tackle what is required of flat owners in this respect.[37] We remain of the view that an extension of the definition of maintenance to cover energy efficiency works cannot be justified until legal obligations in that respect are introduced.

3.47 Consultees also suggested that the definition of maintenance should be broadened to cover various different types of work as follows:

- to ensure accessibility for all building users;
- to meet health and safety standards;
- to deal with fire safety matters;
- to upgrade essential services where technological advances have made infrastructure (such as pipes and water tanks) outdated; and

[34] Discussion Paper, para 7.19.
[35] The remaining four responses took a neutral position or were unclear as to their position.
[36] Discussion Paper, para 7.18.
[37] The Bill is discussed at paras 1.22 and 1.23 above.

- to ensure the lifecycle of the building and its components last to, or past, their expected lifecycle.

3.48 Although we recognise the benefits of the types of work listed above, owners of private housing are not generally under any legal obligation to meet these standards at present. As with climate change-related improvements, we accordingly do not consider that it would be justified at present to extend the definition of maintenance to include them. We note again that the government is currently committed to the introduction of Heat in Buildings legislation and to progressing work on a tenure-neutral housing standard. Where these lines of work do produce changes in building standards, we would expect that amendment to the definition of maintenance in the 2004 Act might follow.

3.49 Finally, one further change was suggested that we consider might usefully be made to the definition, namely that maintenance should include work required to deal with vermin, mould, invasive plants and similar pests. There seems no difficulty with suggesting matters such as these would be considered maintenance, and clarification in the definition may prevent disputes in future.

3.50 We recommend:

3. In the 2004 Act, maintenance should be defined to include:

(i) any work to association property required to comply with the duty set out in section 8 of the 2004 Act;

(ii) routine maintenance as per the definition in TMS rule 1.5, with that definition expanded to include work to remove, deter or control vermin or other pests, mould, harmful plants or any similar potentially harmful thing.

(2004 Act, s 3A(4) and Schedule A1 para 7, inserted by Draft Bill, s 1)

Provision of information

3.51 The operation of the owners' association will sometimes require written documents or other forms of information to be sent or otherwise given to the manager of the association or its members. The manager will be required to send a draft of the annual budget to members,[38] for example, and a member may need to give information to other members on a planned meeting date in some circumstances.[39] In the interests of certainty, provision should be made in the legislation about how such information can be provided.

3.52 In the Discussion Paper, we suggested that legislative provision in this respect should operate as a default, applicable only where alternative provision is not made in the rules on operation of the association.[40] This suggestion was influenced in part by our survey of title conditions, in which we found provision for notification was unusual in older titles but showed signs of becoming more common in deeds from the 1980s onwards.[41] On reflection, however,

[38] See paras 10.31 – 10.35 below.
[39] See paras 9.45 – 9.46, and also paras 9.40 – 9.44 below.
[40] Discussion Paper, paras 6.42 – 6.45.
[41] Discussion Paper, Appendix B at para 28.

we no longer consider this the best approach. A uniform set of rules on the provision of information applicable across all associations creates simplicity for members and managers, and increases the accessibility of the regime as a whole. Although this limits the extent to which the legislative provision can be disapplied by the flat titles, we note a further change below which provides members with greater individual control than at present over which forms of communication can be used to contact them.

3.53 The Discussion Paper provisionally proposed that the DMS rules on provision of information should be mirrored in the owners' association legislation.[42] First, we suggested that it should be possible to send information by post, by delivery or through transmission by any reasonable electronic means. We specified that "delivery" should include any of the forms of service available under the Ordinary Cause Rules,[43] namely delivery into the hands of a recipient who is a natural person,[44] leaving the notice in the hands of a resident at the recipient's dwelling[45] or in the hands of an employee at the recipient's place of business,[46] making letterbox delivery following diligent enquiry[47] or by leaving the notice at the recipient's dwelling place or place of business in such a way that it is likely to come to their attention following diligent enquiry.[48] We suggested that "electronic means" should be construed as reasonable where the intended recipient had used that method of communication in connection with the business of the association during the previous year.

3.54 Thirty two consultees responded to our question on this issue, and 26 agreed with our provisional proposals. Accordingly, the Bill makes provision along these lines, but subject to an important change. Under current law, there is no specific obligation on flat owners to share contact information with one another. This creates an obstacle to shared maintenance, since the owner of one flat may struggle to contact the owner of another, particularly where that owner is not resident in the building. Later in this Report, we address that concern by recommending that the manager of the owners' association should be under a duty to keep a record of members' names and contact details,[49] and that members should be under a counterpart duty to provide the manager with their names and contact details, including details of how they might be contacted in writing where required.[50] It seems sensible to connect these new duties in relation to contact details to the legislative provisions on provision of information, by specifying that information must be provided using the contact details given by the member to the manager. Connecting the provisions in this way may encourage members to comply with the duty to provide contact details, since doing so will allow them to ensure that they receive information by their preferred means. Where a member has not provided contact details in line with the duty, however, information may instead be provided by any of the means available under the DMS, as discussed above.

3.55 The second rule on sending information in the DMS which we suggested should be replicated is that sending information to a member's agent will meet the requirement to send

---

[42] Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order (SSI 2009/729), art 19(2).
[43] Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 ("OCR 1993"), rule 5.4.
[44] *Ibid* rule 5.4(1)(a). See *Rae v Calor Gas Ltd* 1995 SC 214 (CSIH) at 219; A M Cubie (ed), *Macphail's Sheriff Court Practice* (4th edn, 2022) at para 6.25.
[45] OCR 1993 rule 5.4(1)(b).
[46] *Ibid*.
[47] OCR 1993 rule 5.4(3)(a).
[48] OCR 1993 rule 5.4(3)(b).
[49] See paras 5.76 – 5.81 below.
[50] *Ibid*.

it to the member.[51] Of the 31 consultees who responded to our question on this issue, 28 agreed.

3.56 Finally, we suggested that where a member cannot by reasonable inquiry be identified or found, it should be sufficient to send relevant information to the flat in the tenement which they own addressed to "the owner" or an equivalent term.[52] Of the 30 consultees who responded to the question on this matter, 27 agreed. Some consultees suggested this rule should also apply where an owner has died and their executor cannot be identified, which we agree is a sensible addition to the rules.

3.57 Taking all of the above into account, we recommend:

4. Where the association rules require information to be provided:

(a) To a member, and that member has given contact details to the manager, then information must be provided using those contact details by post, by delivery or by any reasonable electronic means;

(b) To a member, and that member has not given contact details to the manager, or to any other person, then information may be provided by post, by delivery or by any reasonable electronic means;

(c) Providing information to the agent of a person should be deemed to meet any requirement to provide it to that person;

(d) Where a member (or their executor, if the member has died) cannot be identified or found after reasonable enquiry, it should suffice to send information to the flat they own in the tenement addressed to "the owner" or equivalent term.

(2004 Act, s 3A(4) and Schedule A1 para 23, inserted by Draft Bill, s 1)

[51] DMS Order, art 19(1)(a).
[52] DMS Order, art 19(1)(b).

Chapter 4 The Owners' Association

Introduction

4.1 The Working Group recommended that maintenance of the common parts of a tenement should be organised through an owners' association. In this Chapter, we set out our recommendations for this new form of legal person. We consider how an association can be created for each tenement by way of legislation. We make recommendations as to the legal capacity of the association and the limitations which should be placed on that capacity. We consider which insolvency procedure should be available to an association. We also discuss the process by which an association can be dissolved and its affairs wound up in circumstances where a tenement ceases to exist.

4.2 In the next Chapter, we consider the membership of the association, and the role of the association manager. Later in this Report, we recommend default rules on the operation of the association, detailing how members can take decisions about the association's actions and how they should share liability for the costs the association incurs.[1]

4.3 Our recommendations in this Chapter follow from consultation in Chapters 4 to 6, 8 and 11 of the Discussion Paper.

A new form of legal person

4.4 The Working Group recommended that every tenement should have an owners' association: an entity with legal personality, capable of taking action such as opening a bank account or entering a contract in its own name.[2] Under current law, it is unusual for tenement owners to operate as an organised collective in relation to maintenance of the common parts of the building. Decisions on specific maintenance problems might instead be taken as they arise, with one owner acting on behalf of all to implement any particular decision. Alternatively, owners may collectively contract with a factor to manage maintenance on their behalf, with the extent of the factor's powers determined by the contract. Should owners wish to operate collectively in a more systematic way, there is little option but to come together as an unincorporated association. This is an entity *without* legal personality – essentially a contractual agreement entered into by a group of people, in which one or more parties take on certain responsibilities to represent the others in defined circumstances.[3] The Working Group referred to such arrangements as "informal" owners' associations.[4]

---

[1] Chapter 8 of this Report recommends that the rules on the operation of the association can be set out in real burdens inserted into the titles of the flats which comply with certain statutory requirements. Where relevant burdens have not been created, a default set of statutory rules will apply. The default rules are explained in Chapters 9 and 10.

[2] Final Recommendations Report, p 6.

[3] For further discussion on the definition of an unincorporated association, see Scottish Law Commission, Report on Unincorporated Associations (Scot Law Com No 172, 2009), available at https://www.scotlawcom.gov.uk/files/3312/7989/7412/rep217.pdf, paras 2.1 – 2.2.

[4] Interim Recommendations Report, p 6.

4.5 The Group considered it essential that an owners' association under any new legislation should have legal personality.[5] This was thought to offer two key advantages over current "informal" arrangements.[6] First, an association with legal personality could enter into contracts, for example with tradespersons, rather than one or two owners having to do so on behalf of the rest. Second, were a dispute to arise, legal proceedings could be raised against the association directly, rather than a contractor proceeding against one owner who would be left seeking redress from the others. Similarly, the association could take action against a contractor directly if necessary. An association with legal personality could carry out a range of other actions that might streamline collective maintenance of the common parts of the tenement, such as opening a bank account and owning items of property like cleaning or gardening equipment. In short, it was thought that an association with legal personality would simplify the management of collective tenement maintenance for owners, and simplify the undertaking of collective tenement work for contractors and other third parties.

4.6 In law, the term used for an entity with legal personality is a "legal person".[7] A legal person is made up of members who have control over its actions, such as the partners in a partnership or the shareholders in a company. The membership of an owners' association will be the owners of flats in the relevant tenement.[8] Where a legal person continues to exist regardless of changes in its membership, it can be described as a "body corporate."[9] Since the membership of the owners' association will need to change as flats in the tenement are bought and sold, the association must accordingly be a body corporate.

4.7 In the Discussion Paper, we considered the different types of body corporate currently recognised in Scots law, including companies, limited liability partnerships and Scottish Charitable Incorporated Organisations.[10] We concluded that none of the existing forms of body corporate provides an appropriate vehicle for a tenement owners' association. Our preliminary view was therefore that the association should be a new, bespoke form of body corporate to be created in legislation following from the project. We asked consultees for their views,[11] and of the 30 consultees who responded, 28 agreed with our proposed approach. Accordingly, we recommend:

5. The owners' association should be a bespoke body corporate.

(2004 Act, s 3A(4) and Schedule A1 para 1, inserted by Draft Bill, s 1)

An owners' association for <u>every</u> tenement?

4.8 Although the Working Group considered that, as a general rule, a tenement should have an owners' association, it recognised that there may be circumstances in which an association is not desirable or necessary. The Group noted that, where a tenement consists of only two flats, an exception to the requirement for an association may be appropriate.[12] It

[5] Final Recommendations Report, p 6.
[6] See the table specifying the impact of the owners' association proposal set out in the Final Recommendations Report, p 6.
[7] Legal persons, also sometimes known as juristic persons, may be contrasted with natural persons, meaning human beings.
[8] See Chapter 5 below.
[9] This is sometimes referred to as "perpetual succession": see R G Anderson and C Smith, "Introduction to Juristic Persons" in R G Anderson (ed), *Scots Commercial Law* (2nd edn, 2022) at para 1.23.
[10] Discussion Paper, paras 6.10 – 6.15.
[11] Discussion Paper, para 6.16.
[12] Interim Recommendations Report, p 7.

was similarly suggested that a tenement forming part of a housing estate or development regulated by way of the Development Management Scheme may not require an association, since the flat owners would already be members of the development-wide owners' association.[13]

4.9 In the Discussion Paper, we considered whether there were circumstances which should prevent an association being established for certain tenements.[14] We looked at the position of small tenements,[15] tenements in single ownership, tenements managed as part of a wider development and tenements subject to a DMS. Our preliminary view was that an association should be established for all tenements other than those subject to a DMS. However, for small tenements or tenements in single ownership, we thought a case could be made for disapplying certain key statutory duties which would otherwise by owed by the related owners' associations. The paragraphs which follow summarise our consultation and final recommendations in relation to the circumstances which should prevent an association being established for a tenement. Consideration of the key statutory duties applicable to owners' associations, and our recommendations as to the circumstances in which these duties should be disapplied, are set out in Chapter 6.

Policy motivations for the introduction of owners' associations

4.10 In considering whether there are circumstances which should prevent an owners' association being established for certain tenements, our preliminary view was formed in light of the policy ambitions underlying the recommendation of the Working Group. An association is intended to provide a mechanism by which effective maintenance of the common parts or "scheme property" of a tenement can be coordinated, monitored and, if necessary, compelled. The current law has no such mechanism, and the Group considered this absence to have contributed to the ongoing degradation of the tenement stock. In circumstances where coordination of maintenance amongst owners is less complicated (for example, where there are only two flats in the tenement), or where that coordination is already dealt with as part of a larger system (for example, where the tenement is managed as part of a wider development), an association may not be needed to fulfil that purpose. However, even in such cases, a mechanism is still required to allow for collective action by flat owners to be monitored and, if necessary, compelled.

4.11 These purposes of an association, taken together with the other two recommendations of the Working Group, form the foundations of the transition from reactive to proactive tenement maintenance which the Group aimed to catalyse.[16] Without an association, it is difficult to envisage how flat owners might be compelled to acquire a building inspection report periodically or establish a reserve fund as the Working Group recommended, or how a collective obligation might be imposed on them to take action emerging from the Scottish

---

[13] *Ibid*. The Development Management Scheme is a set of rules which can be applied to a housing estate or a mixed residential and commercial development to govern management of that estate or development. Where an estate or development is subject to the DMS, it will have an owners' association, the members of which are the owners of every house, flat or other unit in the estate or development. An overview of the DMS can be found in the Discussion Paper at paras 2.37 – 2.48.

[14] Discussion Paper, paras 5.24 – 5.45.

[15] We suggested a small tenement should be defined as a tenement consisting of two or three flats, a definition with which most consultees agreed: see para 5.33 of the Discussion Paper. The key duties imposed on the owners' association under our draft Bill will be disapplied in the case of small tenements: see paras 6.46 – 6.60 below.

[16] The Working Group's recommendations are discussed at para 1.9 above.

Government's work in relation to heat in buildings or housing standards.[17] We are reluctant to recommend provision which might limit the development of the Government's broader housing programme in this way.

4.12 In addition, if some tenements do not have an owners' association, this will necessarily result in the existence of two separate legal regimes in relation to the maintenance of common parts. Maintenance in a tenement with an association would be regulated under legislation following from this project. Maintenance in a tenement without an association would, however, continue to be regulated by the current legislation, including the TMS. Such an outcome seems obviously undesirable from the perspective of legal clarity and accessibility.

4.13 Taking these concerns into account, we suggested that an association should be established for every tenement, unless that tenement was part of a development subject to the Development Management Scheme. Owners of flats in these tenements are already members of the owners' association established for the development as a whole. The DMS owners' association provides a mechanism by which collective maintenance of the tenement can be coordinated, monitored and, if necessary, compelled. In addition, regulation of maintenance in tenements subject to a DMS is governed by the rules of that scheme, which already forms part of our law separately from the existing law of tenement maintenance. Accordingly, the concerns we outline above in relation to excepting certain tenements from the owners' association regime are adequately addressed in the case of tenements subject to a DMS.

Consultation

4.14 We asked for consultees' views on whether there are circumstances which should prevent an owners' association being established for certain tenements, looking specifically at the circumstances of small tenements, tenements in single ownership, tenements managed as part of a wider development, and tenements subject to a DMS. Generally, we asked consultees to indicate whether the relevant circumstances should prevent an association being established, or whether the association for a tenement in relevant circumstances should benefit from a modified application of key statutory duties. The views of consultees were as follows:

[17] See paras 1.12 – 1.23 above for discussion.

Type of tenement	**Total responses**	No owners' association	Modify key duties	Neutral or unclear
Small tenement	34	9	**21**	4
Single ownership	32	11	**15**	6
Wider development	34	3	**21**	10
DMS	32	**25**	4	3

4.15 As shown in the table above, the only circumstances which a majority of consultees considered should prevent an association being established are where a tenement is part of a development subject to the Development Management Scheme. Twenty-five out of 32 respondents took the view that no association should be established in this situation. Consultees who gave reasons for their view broadly cited the arguments which we set out in the Discussion Paper and recapped above.

4.16 In relation to small tenements, tenements in single ownership and tenements managed as part of a wider development, the majority view in each case was that an association should be established subject to modification of the key statutory duties on the association. We set out our recommendations on this issue in Chapter 6.

4.17 In light of the response from consultees, and taking into account the policy arguments outlined above, we accordingly adhere to our preliminary view in the Discussion Paper as to the circumstances in which an association should be established. We recommend:

> **6. (a) An owners' association should be established for every tenement, subject to the exception in part (b) below.**
>
> **(b) An owners' association should not be established for a tenement subject to a DMS.**[18]
>
> (2004 Act, s 3A(1) - (3), inserted by Draft Bill, s 1)

Tenements wholly owned by local authorities or RSLs

4.18 The Discussion Paper also asked consultees whether there were any circumstances other than those mentioned above which should prevent an owners' association being established for a tenement, or where the key statutory duties applicable to an association should be modified.[19] Of the 28 consultees who responded to this question, 19 said there were no other relevant circumstances, and two gave neutral responses.

---

[18] At paras 4.77 – 4.83 below, we recommend that where an owners' association has been established for a tenement which subsequently becomes subject to a DMS, registration of a DMS deed of application should trigger the termination and winding up of the association. Similarly, where the DMS is disapplied from a tenement, a new owners' association will be established.

[19] Discussion Paper, para 5.45.

4.19 Amongst the seven remaining consultees, three suggested that owners' associations should not be established for tenements wholly owned by local authorities or Registered Social Landlords (RSLs). In broad terms, we think there is a stronger case for suggesting that an exception should be made to the establishment of an owners' association for tenements in the sole ownership of a local authority or RSL than for tenements in the sole ownership of other types of person. Local authorities and RSLs are already subject to extensive housing regulation, including a sector-specific housing quality standard.[20] There are existing political and legal mechanisms for monitoring and, if necessary, compelling local authorities and RSLs to carry out maintenance works. If the broader Scottish Government housing programme results in the imposition of new collective maintenance obligations in relation to, for example, energy efficiency in tenement buildings, these obligations could be imposed and enforced directly against local authorities and RSLs more readily than against other types of owners. In short, since this is a circumstance in which it is relatively straightforward to regulate the tenement *owner*, there is less need for the tenement to have an owners' *association*.

4.20 Notwithstanding the strength of these arguments, however, we have stopped short of recommending that associations should not be established in such circumstances. Our approach here is cautious. Work by the Scottish Government on the broader housing programme is ongoing and it is unclear at the time of writing whether or how new duties in relation to collective tenement maintenance might be imposed. Although we suggest an association might not be necessary for the imposition of duties in relation to a tenement solely owned by a local authority, until the detail of any such duties emerges, the position remains uncertain. In Chapter 2, we urged the government to give the position of local authorities in relation to the owners' association legislation further consideration as a matter of housing policy.[21] We reiterate that call here. Should the government be minded to make an exception to the usual rules for tenements solely owned by local authorities or RSLs, provision could be made to that effect by a relatively simple amendment to our draft Bill. In the meantime, we note that our draft Bill disapplies most of the key statutory duties from associations which relate to tenements in single ownership, including those owned solely by a local authority or RSL.[22]

Other exceptions?

4.21 Four consultees suggested other circumstances which should prevent an owners' association being established. Two suggested there should be no association where a tenement is a retirement property. One suggested there should be no association in a tenement where the "beneficial" owner of all the flats is the same, notwithstanding the fact that the "legal" owners are different.[23] Finally, one suggested that no association should be established where owners vote against the application of the legislation. Bearing in mind the reasons why associations were considered necessary by the Working Group, we do not think any of these circumstances can justify an exception to the general rule.

---

[20] Scottish Government, *Social Housing: Improving Housing Standards,* available at https://www.gov.scot/policies/social-housing/improving-standards/.
[21] See paras 2.20 – 2.24 above.
[22] See paras 6.46 – 6.61 below.
[23] It is difficult to say whether these terms have an accepted meaning in Scots law, but what is being described here is, roughly speaking, a situation in which the holder of the legal title to a property cannot use it for their own benefit, for example because they hold it as a trustee for the benefit of another person or persons (who might then be termed the beneficial owner or owners).

When is an owners' association established?

4.22 The Working Group intended the owners' association for any individual tenement to be brought into existence by legislation, rather than requiring flat owners to undertake a conveyancing or registration process.[24] The Discussion Paper explored how legislation might achieve this outcome.[25]

4.23 In relation to tenements which are in existence when legislation introducing owners' associations is enacted, we gave the view that the association should be established on the date when the relevant provisions are brought into force. Twenty-nine of the 31 consultees who responded to this question agreed.

4.24 In relation to tenements created after the legislation is in force, the position is more complicated. In the Discussion Paper, we proposed that the association should be established at the point at which a completion certificate for a new tenement is accepted,[26] since that would indicate that the construction of the tenement, or the conversion of an existing building into a tenement, is substantially complete. Of the 31 consultees who responded to this question, 20 agreed with this approach.[27] However, some consultees pointed out that flats in a tenement may be sold or occupied prior to acceptance of the completion certificate. This is possible where a certificate of temporary occupation has been issued in respect of the flat or flats in question.[28] Since the association will be necessary once flats in the building are occupied, it was suggested that issue of a certificate of temporary occupation for a flat in the building should also operate as a trigger for the association to be established.

4.25 Five consultees disagreed with our proposed approach, generally on the basis that the association should not be established until parts of the tenement are owned by at least two different persons, for example when the first flat is sold by the developer. However, for the reasons explained above, principally the concern that the government may in future wish to impose regulatory obligations on owners' associations rather than directly on the owner or owners of tenement buildings, our policy is that a tenement should have an association even when wholly owned by a single person.[29]

4.26 In light of the support from consultees, our initial view was that, for tenements created after the legislation is in force, an owners' association should be established on the date on which a certificate of temporary occupation is issued for the tenement, or where no such certificate is issued, on the date when the completion certificate is accepted. Either certificate would provide a useful proxy for the date on which a tenement within the meaning of section 26 of the 2004 Act could be said to exist. Relying on these certificates would also make it relatively straightforward to identify the date on which the association was established.

---

[24] This was discussed in the Discussion Paper at para 5.2.
[25] Discussion Paper, paras 6.18 – 6.21.
[26] Building (Scotland) Act 2003 s 17. This Act requires that where a building has been newly constructed (or converted), a completion certificate must be submitted to confirm this has been done in accordance with building regulations. It is an offence to occupy a building before the completion certificate has been approved (save for where temporary occupation is approved under s 21(3) of the Act).
[27] Consultees who agreed included the Senators of the College of Justice, Aberdeen Law School, non-legal stakeholder bodies such as BEFS, PMAS, the Scottish Association of Landlords and Under One Roof, and four out of five local authority respondents.
[28] This is possible under the Building (Scotland) Act 2003 s 21.
[29] See paras 4.10 – 4.20 above.

4.27 As the project developed, however, we came to have concerns about this approach. The purposes of completion certificates and certificates of temporary occupation are determined by planning law and building regulations, and the mechanisms by which such certificates can be accepted or issued also lie within those areas of law. There may be a risk in connecting the establishment of an owners' association – which, if this legislation is enacted, will obviously be a foundational feature of tenement law in future – to legislation designed for a different purpose. Future changes to planning law or building regulations will not necessarily have regulation of tenement maintenance at their heart, and the effect of such changes could be to unbalance or create gaps in the owners' association regime.

4.28 More fundamentally, a tenement will exist where a building meets the definition in section 26 of the 2004 Act. This definition makes no reference to planning law or building regulations. In practice, we think it is highly likely that a court or tribunal would expect a certificate of temporary occupation or a completion certificate to be available in order for this definition to apply to a newly constructed tenement. However, given the terms in which the definition in section 26 is drafted, the possibility remains in principle – no matter how unlikely in practice – that a tenement might exist notwithstanding the absence of a relevant completion certificate or certificate of temporary occupation.

4.29 From the perspective of "futureproofing" the draft legislation, we did not think it was acceptable to leave a gap in situations like this, such that a tenement might exist but a connected association would not. Although such a tenement would be unoccupied,[30] it may nevertheless be the case that a future government wishes to impose duties on the association in relation to the building, for example if urgent works are required to remedy newly discovered defects with previously approved construction materials. The likelihood of this occurring is, perhaps, low, but the difficulty is that any prediction of what might occur here is necessarily speculative. Although we recognise the arguments are finely balanced, we considered it would be preferable to "close the gap".

4.30 Taking the above into account, we consider that the establishment of an owners' association must be connected to the existence of a tenement within the meaning of the 2004 Act. In short, an owners' association should be established at the point at which a tenement exists. We appreciate that there is no straightforward way to determine the date on which this occurs. In principle, the definition of tenement in the 2004 Act might be amended to provide more certainty in relation to the point at which a newly constructed tenement exists, but such an amendment lies beyond the scope of our project, and was not a matter on which we consulted. In any event, we do not think the absence of a readily ascertainable "date of birth" for the owners' association is an insurmountable obstacle to this approach. This is because it will not generally be necessary to identify the precise date on which an owners' association is established. Under our recommendations, the association will not immediately be subject to any statutory obligations,[31] and nothing turns on the period of time during which an association has been in existence. We note also that there is a precedent for the existence of a legal person without a readily verifiable "date of birth" in Scots law under sections 1 and 2 of the Partnership Act 1890.

---

[30] As noted at fn 26 above, it is an offence to occupy a building before a completion certificate has been approved unless permission for temporary occupation has been granted.

[31] We recommend key duties on the association, including when such duties should first apply to an association, in Chapter 6.

4.31 Accordingly, we recommend that, for tenements which come into existence after the introduction of the new legislation, an owners' association should be established on the date on which a tenement in the meaning of section 26 of the Tenements (Scotland) Act 2004 first exists.

4.32 There is one further situation in which a new owners' association may need to be established for a tenement. Above, we recommended that an owners' association should not exist in relation to a tenement subject to a DMS. Although it would be unusual, it is possible that the status of a tenement in this respect may change over its lifetime. Owners in a tenement subject to a DMS may choose to disapply the DMS, which can be done by registration of a relevant deed under section 73 of the Title Conditions (Scotland) Act 2003. Should that occur, a tenement in that development should no longer be excepted from the owners' association legislation. Provision is accordingly required to establish a new owners' association for a tenement which had been subject to a DMS on the date when that scheme is disapplied from the tenement.

4.33 Taking together all the points above, we recommend:

7. (a) For tenements in existence on the introduction of the new legislation, an owners' association should be established on the date when the relevant provisions of the legislation are brought into force;

(b) For tenements which come into existence after the introduction of the new legislation, an owners' association should be established on the date on which a tenement in the meaning of section 26 of the Tenements (Scotland) Act 2004 first exists;

(c) Where the DMS ceases to apply to a tenement, an owners' association should be established on the day on which the DMS ceases to apply.

(2004 Act, s 3A(1) - (3), inserted by Draft Bill, s 1)

4.34 As noted above, we think circumstances in which the precise date of creation of the association will require to be known will be unusual. Nevertheless, it seems appropriate to for there to be a mechanism by which the association's "date of birth" can be determined in the event of dispute. The Bill accordingly makes provision for any person with an interest in the association to seek a determination from the Tribunal as to the date on which the tenement, the association or both first existed. A determination may also be sought as to whether the tenement or the association existed on any specific date, which might potentially be relevant for example in connection with a claim that a right has been established or extinguished by way of prescription.

4.35 We recommend:

8. On application by any person with an interest, the Tribunal should have power to determine the date on which a tenement or an association first existed, and to determine whether a tenement or an association existed on any particular date.

(2004 Act, s 3C(a)(i) and (iii) & (b), inserted by Draft Bill, s 1)

Basic features of an owners' association

Name and address

4.36 An owners' association will need a name and address so that it can be identified when entering into contracts, opening bank accounts and so on. In the Discussion Paper, we noted that it is common for the name of a legal person to reflect which type of entity it is, and suggested this approach would be sensible for owners' associations.[32] We proposed therefore that an association should be named "The Tenement Owners' Association of" followed by the address of the tenement building, so for example "The Tenement Owners' Association of 48-52 High St, Stirling".[33] We suggested the appropriate postal address for the association should be that of the manager, given that the manager will be the person acting on behalf of the association on a day-to-day basis.[34]

4.37 We asked consultees for their views. Twenty-four out of 35 respondents agreed with our suggestion on the name of an association. The seven respondents who disagreed[35] generally favoured associations being provided with a unique registration number, along the same lines as a company registration number, or suggested that associations should be free to choose a name. Since associations are to be established by statute, these approaches do not seem workable: there is no body controlling the creation of the association which could be responsible for allocating numbers or ensuring an appropriate name is recorded.

4.38 As regards the address of an association, 19 of the 35 respondents supported our proposed approach. These included the Faculty of Advocates, non-legal stakeholder bodies such as RIAS, the Scottish Association of Landlords and Under One Roof, and four out of five local authority respondents. Eleven of the 35 respondents were opposed,[36] including four consultees from the property management sector and five members of the public. Some of these consultees suggested that the address of an association member holding a position such as the chair or the secretary of the association should instead be used. Since our Bill does not recommend the creation of such positions within the association, this proposal does not seem workable. Professor Kenneth Reid suggested that, in addition to the address of the manager, the address of the tenement should also be valid for the association, to cover the situation where no manager is in post. We agree that this is a sensible solution to what might otherwise be a gap in our proposals. We would go further to suggest that the address of the tenement should always be valid, even where there is a manager in post (meaning that the association may have two addresses.) This is to ensure that an address can always be identified even if there are difficulties in identifying the manager, whose name may not be a matter of public record.[37]

---

[32] Discussion Paper, para 5.10. This approach was inspired by the rules on naming a DMS owners' association (see DMS rule 2.2 and 2.4) and a commonhold owners' association (see The Commonhold Regulations 2004 s 12).
[33] This is a fictional example.
[34] Discussion Paper, para 5.10; DMS rule 2.4.
[35] The remaining four responses were neutral or unclear.
[36] The remaining five responses were neutral or unclear.
[37] We recommend that details identifying the tenement, including the name and address of the owners' association, should require to be noted on the Land Register title or recorded against the Sasine title of any property which forms part of the tenement at paras 6.40 – 6.41 below. A manager who is a registered factor may be identified by way of the Scottish Property Factor Register: the Register was established under the Property Factors (Scotland) Act 2011 ss 1 – 2 and can be accessed at https://www.propertyfactorregister.gov.scot/PropertyFactorRegister/. The appointment, capacity, and duties of the association manager are discussed in Chapter 5.

4.39 Accordingly, we recommend:

9. (a) The name of an owners' association should be "The Tenement Owners' Association of" followed by the address of the tenement building.

(b) The address of an association should be the address of the tenement building, and where a manager is in post, the address of the association manager.

(2004 Act, s 3A(4) and schedule A1 para 3, inserted by Draft Bill, s 1)

Function and general capacity

4.40 Legislation must make provision as to the capacity of an owners' association, meaning the extent of its power to take actions which have a legal effect. As a general rule, the association will be able to exercise its capacity only where members have taken a decision that it should do so.[38] In the Discussion Paper,[39] we considered how capacity is provided for other types of legal person, noting the unlimited capacity conferred on companies and LLPs,[40] and the more detailed list of specific powers provided in some other cases.[41] A middle path is taken in relation to the capacity of an owners' association under the DMS. The function of the association is defined as being "to manage the development for the benefit of the members".[42] The association is then given a general power "to do anything necessary for or in connection with the carrying out of [its] function". This power is supplemented by a non-exhaustive list of specific actions it may take.[43] Our preliminary view was that a similar approach should be taken for a tenement owners' association.

4.41 We asked consultees whether the function of the owners' association should be to manage the tenement for the benefit of members.[44] Of the 37 consultees who responded to this question, 34 agreed that it should, albeit that the agreement was qualified in some cases. Some consultees suggested that the function should be tied more clearly to maintenance of the building, noting that avoiding maintenance work could be considered "to the benefit of members" in the sense that the costs associated with maintenance would be avoided. Owners are, however, under a duty to maintain parts of the building which they own.[45] Any purported interpretation of "benefit" which results in owners breaching that duty would seem necessarily invalid. Moreover, connecting the function of the association closely to maintenance may give rise to disputes about whether an association can undertake improvement work or other activities which it may be sensible to organise in that way. An element of flexibility seems desirable.

---

[38] The default rules on association decision making are discussed in Chapter 9. The association manager has a limited statutory discretion to act on behalf of the association in the absence of an association decision as discussed n Chapter 5.
[39] Discussion Paper, paras 7.5 – 7.7.
[40] By default, both companies and LLPs have unlimited capacity subject to the terms of their constitutions: see Companies Act 2006 s 31(1); Limited Liability Partnerships Act 2000 s 1(3).
[41] See, for example, the list of default powers available to Community Benefit Societies under the Co-operative and Community Benefit Societies Act 2014 ss 26 – 27.
[42] DMS rule 3.1.
[43] DMS rule 3.2.
[44] Discussion Paper, para 7.9.
[45] 2004 Act s 8. See the discussion at paras 3.21 – 3.26 above.

4.42 We also asked consultees whether the association should be given the power to do anything necessary for or in connection with its general function, as expressed above. Thirty-one out of the 36 consultees who responded to this question agreed, although the agreement of some consultees was qualified. It was suggested that the proposed general power should be qualified (for example) by reference to reasonableness or proportionality, so that (for example) the association should have the power to do anything necessary for or in connection with its general function insofar as reasonable to do so. The concern animating these suggestions was largely to avoid the risk that flat owners might fall into financial hardship as a result of the association carrying out extensive or expensive works.

4.43 We note here that the exercise of any power by the association is under the control of members, outwith the limited discretionary powers available to the association manager.[46] A majority vote is generally required for a decision in favour of action.[47] Members who oppose a majority decision may challenge it on various grounds,[48] including ultimately through an application to the Tribunal for annulment of a decision which is not in the best interests of all the owners or may cause undue hardship to one or more.[49] These mechanisms enable flat owners to control any unreasonable exercise of power by an association. Accordingly, it does not seem necessary or appropriate to include a reasonableness qualification in provision on the general capacity of the association.

4.44 In the process of preparing the Bill appended to the Report, we were referred to current guidance on legislative drafting in relation to the general powers of a legal person.[50] In addition to our suggestion in the Discussion Paper that the association should have the power to do anything necessary for the purposes of, or in connection with, the performance of its function, the guidance recommended that a legal person should have the power to do anything which appears to it to be otherwise conducive to the performance of its function. We think that adopting this formulation for the powers of the owners' association may avoid disputes which might otherwise arise from a strict reading of the test of "necessity", whilst retaining the spirit of the association's intended capacity. We have accordingly adopted this formulation in the draft Bill.

4.45 We recommend:

10. (a) The function of an owners' association should be to manage the tenement for the benefit of members of the association.

(b) The association should have power to do anything which appears to it to be necessary or expedient for the purpose of, or in connection with, the performance of its function, or to be otherwise conducive to the performance of its function.

(2004 Act, s 3A(4) and schedule A1 para 4(1) & (2), inserted by Draft Bill, s 1)

---

[46] See paras 5.26 – 5.32 below.
[47] See paras 9.23 – 9.38 below.
[48] See generally paras 9.64 – 9.74 below.
[49] See paras 9.69 – 9.74 below.
[50] Parliamentary Counsel Office, *Drafting Matters!* (2nd edn, 2018), available at https://www.gov.scot/publications/drafting-matters/, p 106 – 107.

Specific powers: a non-exhaustive list

4.46 The broad definition of the capacity of the owners' association recommended above offers a useful degree of flexibility. However, owners and managers may feel uncertain about which powers fall within the definition. To address this concern, we suggested in the Discussion Paper that the legislation could provide a non-exhaustive list of specific powers available to the association, mirroring a similar approach taken in the DMS.[51]

4.47 In the Discussion Paper, we suggested that this list might form part of the default rules on the operation of the owners' association, meaning that the list could be modified or disapplied by provision in the tenement titles.[52] On reflection, we have realised that this approach would not make sense. The capacity of the owners' association is, and must be, prescribed by legislation. It cannot be open to owners to modify that capacity in the tenement titles, or else an association may find itself without capacity to carry out the function for which it was created. Since the capacity of the association cannot be modified by owners, it follows that the list of powers also cannot be modified by owners. The list of powers therefore cannot form part of the default rules on operation of the association. Having said that, we would emphasise that the list of powers is non-exhaustive. In addition, we would reiterate that powers on the list can be exercised only insofar as necessary for compliance with the association's function as per our recommendation above, and only where owners have decided that the powers *should* be so exercised.[53]

4.48 Thirty-five consultees responded to our question in relation to a non-exhaustive list of powers modelled on the list in the DMS.[54] Thirty-four agreed that a non-exhaustive list should be included, and 30 thought that the same powers should be included as on the equivalent list in the DMS.[55] However, some consultees expressed concern about the association having the power to invest or borrow money. We do not envisage that associations will generally hold investment portfolios under the provisions in our draft Bill. However, we note that the introduction of compulsory reserve funds as recommended by the Working Group might result in large sums of money being held by an association. Making clear that the association has the power to invest such funds seems to us sensible, bearing in mind that it could do so only where necessary or expedient for the performance of its function, or conducive to the performance of its function. We note also that the association has the power to engage professional assistance with complex tasks such as investing funds or employing people.

4.49 Various suggestions were made for additional powers which might be added to the list. These included the power to impose financial penalties on members for non-payment of a service charge and the power to become a shareholder in a subsidiary, a corporate director, or a member in a partnership. We do not think that either power is likely to be necessary in connection with performance of the function of the association, and we cannot see a basis on which to suggest that the association should have power to levy fines unless such a power is explicitly consented to by owners. It was also suggested that the association should have the

---

[51] Discussion Paper, paras 7.10 – 7.14. In the DMS, a list of powers available to the owners' association is set out at rules 3.1 and 3.2.
[52] We explain how the default rules may be disapplied by real burdens in the tenement titles at paras 8.12 – 8.35 below.
[53] The manager may exercise a limited selection of association powers in the absence of such a decision as explained at paras 5.26 – 5.32 below. The decision making powers of members more generally are discussed in Chapter 9.
[54] Discussion Paper, para 7.14.
[55] DMS rule 3. See generally Discussion Paper, para 7.10.

duty to co-operate with third parties who share ownership of mutual tenement structures. We cannot see a basis on which to incorporate such a duty into a list of powers. We note, however, that where parts of a tenement make up one share of a mutual wall or other mutual structure, and where those parts of the tenement are association property, the power of the association to deal with maintenance of that property would seem clearly to include coordinating with the other mutual owner or owners.

4.50 Following from the above, we recommend:

11. (a) The general power of the owners' association should be supplemented by a non-exhaustive list of specific powers which it may wish to exercise.

(b) The non-exhaustive list of powers exercisable by the association should include the power to –

(i) Carry out maintenance, improvements, or alterations to association property;

(ii) Carry out inspections of association property to determine whether maintenance is necessary;

(iii) Enter into a contract of insurance in respect of the tenement or any part of it (for which purposes the association is deemed to have an insurable interest in the tenement);[56]

(iv) Purchase or otherwise obtain the use of moveable property;

(v) Open and maintain an account with any bank or building society;

(vi) Invest any money held by the association;

(vii) Borrow money;

(viii) Engage employees or appoint agents.

(2004 Act, s 3A(4) and schedule A1 para 4(3)(a)-(h) and 4(5), inserted by Draft Bill, s 1)

4.51 The Discussion Paper went on to seek views on some further powers which we considered the association should be able to exercise. First, it looked at three interconnected powers in relation to demolition of the tenement.[57] We suggested that the association should have the power to demolish all or part of the tenement building.[58] We suggested that the association should have the power to seek approval from the Tribunal for sale of the demolition site and distribution of the proceeds under section 22 of the 2004 Act. Finally, we suggested

[56] It is arguable that provision to the effect that the association has an insurable interest in the tenement will be caught under the insurance reservation set out in Schedule A2 to the Scotland Act 1998, with the effect that competence to legislate on this matter is reserved to the UK Parliament. We discuss this further at para 1.43 above.
[57] Discussion Paper, paras 7.20 – 7.23.
[58] This power is available to a DMS owners' association under DMS rule 3.2(b).

the association should have the power to seek approval from the Tribunal for sale of an abandoned tenement building and distribution of the proceeds under section 23 of the 2004 Act.

4.52 Twenty-seven out of 34 consultees agreed that the association should have power to demolish the tenement. Several consultees suggested that the power to demolish should be exercisable only with the unanimous consent of flat owners. We recommend a requirement of unanimity for the exercise of this power in our discussion of members' decision making powers in Chapter 9.[59] Some consultees noted that demolition could only take place where relevant planning requirements had been complied with, and that demolition may be ordered by the local authority absent the consent of the association in some circumstances. Nothing in our draft Bill will alter the operation of these broader legal rules. Some consultees suggested that new, more stringent requirements than under current law should be placed on the ability to demolish the tenement, for example an independent review in the courts of whether demolition is justified. Changes of this kind seem clearly to lie beyond the scope of the project.

4.53 In relation to sale of the demolition site, 22 out of 32 consultees agreed that the association should be able to make an application to the Tribunal for this power under section 22 of the 2004 Act. We note here that demolition of the building will usually trigger the winding up of the association under our recommendations below,[60] however, sale of the site could be concluded during the winding up process if owners wished. In relation to sale of an abandoned tenement building, 29 out of 33 consultees agreed that the association should be able to make an application to the Tribunal for this power under section 23 of the 2004 Act. In both cases, some consultees emphasised that this should be possible only where all affected owners were in favour, a concern which we address in Chapter 9.[61]

4.54 We recommend:

12. (a) An owners' association should have the power to instruct demolition of all or part of the tenement building;

(b) An owners' association should have the power to seek approval from the Tribunal for sale of the demolition site and distribution of the proceeds under section 22 of the 2004 Act;

(c) An owners' association should have the power to seek approval from the Tribunal for sale of an abandoned tenement building and distribution of the proceeds under section 23 of the 2004 Act.

(2004 Act, s 3A(4) and schedule A1 para 4(3)(l), inserted by Draft Bill, s 1, and 2004 Act, ss 22 and 23 and schedule 3 as amended by Draft Bill, schedule para 16, 17 and 23)

4.55 Finally, we suggested that it should be made clear that the association has the power to execute a deed which modifies the application of the default rules of the association, or a deed which applies a DMS to the tenement.[62] In Chapter 8, we discuss how the default rules of the association can be disapplied through the creation of real burdens affecting all the flats

[59] See paras 9.37 – 9.38 below.
[60] See paras 4.77 – 4.81 below.
[61] See the discussion at paras 9.31 – 9.38 below.
[62] Discussion Paper, para 7.25.

in the tenement and which meet certain statutory requirements. The Bill uses the term "association conditions" to refer to burdens which meet these rules, and so a deed of association conditions will be necessary to disapply the default rules of the association.[63] The DMS can be applied to a tenement through registration of a DMS deed of application.[64] The DMS provides that the owners' association may grant deeds of disapplication or variation where the requisite majority of members have determined to do so.[65] Of the 30 consultees who responded to our question on this issue, 22 thought the association should have power to execute these deeds. In Chapter 9, we recommend that a decision to execute such a deed should require a special majority of 75% of the votes allocated under the default rules on operation of the association.[66]

4.56 We recommend:

13. The owners' association should have power to execute and register a deed creating, varying or discharging association conditions in relation to the tenement, or to execute a deed applying the DMS to the tenement.

(2004 Act, s 3A(4) and schedule A1 para 4(3)(j) & (k), inserted by Draft Bill, s 1)

Limitations on capacity

4.57 Our draft Bill sets out the broad capacity of the association and makes non-exhaustive provision for specific powers as outlined above. The Discussion Paper also suggested, however, that the association should be subject to two specific limitations on its capacity. First, the association should be prohibited from carrying on a trade.[67] Second, the association should be prohibited from acquiring heritable property outwith the tenement, and perhaps also heritable property forming part of the tenement.[68]

4.58 In the DMS,[69] the owners' association is prohibited from carrying on any trade, whether or not for profit. This followed from a recommendation in our *Report on Real Burdens*, in which we said:

> "An owner should have the reassurance that the association will not embark on the manufacture of ball bearings or on a career of property speculation; and the special informality which we are proposing for owners' associations should not be available for corporations which are engaged in trade."[70]

4.59 In the Discussion Paper, we suggested the same considerations applied in relation to a tenement owners' association, and asked consultees for their views. Of the 31 consultees who provided a response, 26 agreed. No consultee offered the view that an association should be able to carry on a trade.

---

[63] See paras 8.12 – 8.35 below.
[64] Title Conditions (Scotland) Act 2003 s 71(1).
[65] DMS rule 16.2.
[66] See paras 9.31 – 9.36 below.
[67] Discussion Paper, paras 7.28 – 7.29.
[68] Discussion Paper, paras 7.30 – 7.38.
[69] DMS rule 3.3.
[70] Scottish Law Commission, Report on Real Burdens (Scot Law Com No 181, 2000) available at https://www.scotlawcom.gov.uk/files/8712/7989/7470/rep181.pdf, para 8.14.

4.60 Accordingly, we recommend:

14. An owners' association should be prohibited from carrying on a trade, whether or not for profit.

(2004 Act, s 3A(4) and schedule A1 para 4(4)(b), inserted by Draft Bill, s 1)

4.61 The Discussion Paper also explored whether an association should be permitted to own heritable property. Consideration was first given to ownership of parts of the tenement to which the association relates.[71] In other jurisdictions, it is not uncommon for the equivalent of an owners' association to own some or all of the common parts of an apartment building. In principle, the association could own parts of the tenement such as the main door and close or lift, with flat owners relying on their membership of the association as the basis for access to or use of these areas. However, such an arrangement would be novel in Scots law. It risks disturbing settled principles in relation to access to and use of a tenement building which, under current law, invariably follows from a flat owner's share in the ownership of the common parts. The position is arguably different in relation to parts of the tenement which are not essential to use of the flats, most obviously a garden. Here, there are fewer concerns about disturbing existing principles, though the benefit to allowing for such areas to be owned by an association may also be unclear. We sought views.

4.62 Thirty consultees responded to this question. Fifteen considered that the association should be able to own parts of the tenement. These included non-legal stakeholder bodies such as PMAS, RIAS, the Scottish Association of Landlords and Under One Roof, and one local authority consultee. Twelve consultees disagreed, including the Faculty of Advocates, legal academics including Professor Kenneth Reid, and three local authority consultees.

4.63 Notwithstanding the views of a small majority of consultees, on balance we have reached the view that the association should be prohibited from owning parts of the tenement. The examples suggested by consultees of situations in which such ownership might be desirable – for example, to own a flat which might be offered as guest accommodation – on reflection seem unlikely to be consistent with the function of the association. There also seems little to be gained from property being owned by the association, rather than by the flat owners between them, in such cases. Allowing the association to own heritable property would also introduce complications, such as the possibility of the association taking on debt secured on that property, which might suggest the need for a more rigorous approach to the regulation of associations than under our current recommendations. At this early stage of introducing a new form of legal person, we think a cautious approach is to be preferred. Since any potential benefit to conferring on the association power to own parts of the tenement is unclear, our recommendation is that it should not be possible for the association to do so.

4.64 We asked consultees separately whether the association should have power to own heritable property beyond the boundaries of the tenement. Our provisional view was that this would be inconsistent with the function of the association, particularly in combination with the prohibition on trade recommended above. We noted that an owners' association in the DMS has no such power.

---

[71] Discussion Paper, paras 7.30 – 7.35.

4.65 Of the 31 consultees who responded to this question, a slight majority of 16 agreed with our provisional view. These included all the consultees from a legal background, who cited concerns about the potential legal complication including the implications for regulation of associations if ownership of heritable property were permissible. On the other hand, 12 consultees[72] thought associations should be able to own heritable property beyond the boundaries of the tenement. These included a number of property management consultees and Under One Roof. It was suggested that the association might wish to acquire land beyond the tenement to provide facilities for flat owners such as car parking spaces or garden ground. As above, we do not think it is clear that allowing an association to own such property offers advantages over the property being owned in common by the flat owners, and are wary of the complications which might arise. Again, we suggest a cautious approach, in this case bolstered by the support of a slim majority of consultees.

4.66 Taking into account all of the above, we therefore recommend:

15. An owners' association should be prohibited from owning heritable property.

(2004 Act, s 3A(4) and schedule A1 para 4(4)(a), inserted by Draft Bill, s 1)

Signing documents and executing deeds

4.67 As a practical matter, the legislation should make clear how an association may validly sign a document or execute a deed (where it falls within its capacity to execute such a deed). In the Discussion Paper, we suggested that the manager should generally be empowered to sign on behalf of the association.[73] Twenty-eight of the 33 consultees who responded to our question on this issue agreed with this approach. Some consultees noted that a manager should not be able to sign documents without appropriate authority from the association. We outline the extent of the manager's discretion and the limits of the manager's authority to act on behalf of the association in Chapter 5.

4.68 For completeness, we note that it would be open to the association to delegate power to another person or persons to act as a signatory, either in relation to a specific transaction or on an ongoing basis. That person could be a member of the association, or an outside party who the association trusts to act on its behalf.

4.69 We recommend:

16. The manager or another person so authorised by the owners' association should have power to sign documents and execute deeds on the association's behalf.

(2004 Act, s 3A(4) and schedule A1 para 26, inserted by Draft Bill, s 1)

[72] The three remaining consultees gave responses which were neutral or unclear.
[73] Discussion Paper, para 6.40. This mirrors the position in the DMS (rule 5) and is in keeping with the rules for other bodies corporate under the Requirements of Writing (Scotland) Act 1995 Schedule 2.

Insolvency

4.70 Any legal person with the capacity to incur debts also has the capacity to become insolvent, by which we mean that their liabilities may exceed their assets. The risk of an owners' association becoming insolvent should be low. When the association has creditors (such as contractors) to pay, the funds will generally be obtained from the owners of the flats in the tenement by way of the annual budget and service charge system.[74] Where an owner does not pay their service charge, the association can take enforcement action against that owner's assets, including the owner's flat.[75] If such action ultimately proves unsuccessful, the other owners in the building can be required to cover the cost of the missing share owed to the association.[76] Only if debt enforcement action against the other owners is also unsuccessful might the association find itself to be insolvent.

4.71 Chapter 12 of the Discussion Paper considered which insolvency process would be appropriate for an association which finds itself in intractable financial difficulties of this kind. Our provisional view was that the appropriate procedure was likely to be sequestration, often referred to as "bankruptcy".

4.72 Sequestration[77] is the insolvency process available to most persons in Scotland other than companies and LLPs.[78] In this process, all the debtor's assets at the date of the sequestration are vested in an insolvency practitioner (known as the "trustee in sequestration") who acts in the interests of the debtor's creditors.[79] The trustee is tasked with recovering or realising the debtor's assets and redistributing them amongst the creditors in proportion to the creditors' claims.[80] As in any insolvency process, a creditor in a sequestration will not generally receive repayment in full of what they are owed. Instead, they will accept partial repayment, with the remainder of what is owed being "written off".

4.73 An insolvent person may apply to the Accountant in Bankruptcy for their own sequestration, or a creditor may apply to the Sheriff Court for sequestration of their insolvent debtor.[81] Whilst sequestrated, the debtor is subject to various restrictions including a requirement to advise any potential new creditor about the sequestration.[82] The debtor will usually be discharged once 12 months have elapsed from the date of sequestration.[83] At this point, the restrictions are lifted and they are free of debt,[84] though the trustee may still be in the process of redistributing the sequestrated estate to the satisfaction of existing creditors.

4.74 The outcome of the sequestration process – a "debt-free" entity given a fresh start – seems to align most obviously with the intention behind allowing an owners' association to take advantage of a process of this kind. The corporate insolvency process of liquidation,

---

[74] Owners' liabilities in relation to costs incurred by the association, and the details of the annual budget system, are set out in Chapter 10 below.
[75] Debt enforcement mechanisms and the new tenement-specific form of land attachment are discussed in Chapter 11 below.
[76] See the discussion at paras 10.38 – 10.41 below.
[77] For an overview, see https://www.mygov.scot/browse/money-tax/money-debt-advice/debt-solutions/bankruptcy. A detailed scholarly account of the law in this area can be found in D McKenzie Skene, *Bankruptcy* (2018), Chapters 6 – 19.
[78] See Bankruptcy (Scotland) Act 2016 s 2 and ss 5 – 6.
[79] 2016 Act s 78(1).
[80] 2016 Act s 50.
[81] 2016 Act s 2.
[82] 2016 Act s 218.
[83] 2016 Act s 137(2) and s 138(2).
[84] 2016 Act s 145.

which is designed to terminate the existence of the legal person subject to it, does not fit easily with the position of an owners' association which must necessarily continue to exist notwithstanding the financial difficulties in which it may find itself. The alternative corporate insolvency process of administration, designed to rescue an entity as a going concern, is an expensive process and to some extent replicates the management system already in place for the association.

4.75 When we asked consultees for their views on this matter, 20 out of the 28 who responded agreed that sequestration would be the appropriate insolvency process for an owners' association. A further seven of the responses were neutral or unclear. Accordingly, we recommend:

17. The insolvency process which should be available to an owners' association is sequestration.[85]

4.76 A handful of consultees responding to this question suggested that it should also be open to an owners' association to grant a trust deed for creditors, a less formal (and therefore theoretically less expensive) process for settling debts.[86] While we agree, we consider the power to do so to be available to the association as part of its general capacity outlined above, and recommend no specific provision to that effect.

Termination and winding up

4.77 It will not usually be possible for members to dissolve an owners' association, since every tenement requires to have such an association.[87] However, the tenement itself may cease to exist, such as where the building is demolished, or where the building is converted from flats into a single unit. Alternatively, owners may agree that the DMS should apply to the tenement, in which case the owners' association regime will cease to apply in line with our earlier recommendation.[88] In either of these situations, the owners' association will require to be dissolved and its affairs wound up.

Triggers for termination

4.78 In the Discussion Paper, we suggested that the termination process should begin automatically when the legislation on owners' associations is disapplied from a tenement or plot of land through registration of a relevant deed or notice in the Land Register.[89] This was intended to capture both scenarios above, namely the tenement ceasing to exist, or the application of a DMS to the tenement. Twenty four of the 29 consultees who responded to this question supported our proposed approach.

4.79 On reflection, we realise that a tenement may cease to exist without any change being made to the property registers. If the building is demolished, titles for individual flats will not immediately disappear: owners of the former flats may continue to own the airspace until such

[85] We note that no provision is needed in the draft Bill to make sequestration available in relation to an owners' association. This process is available in relation to the estate of any body corporate under section 6(1)(c) of the Bankruptcy (Scotland) Act 2016. Since the owners' association is a body corporate as discussed at paras 4.4 – 4.7 above, it follows that sequestration will be available in relation to its estate under this provision.
[86] An overview can be found at https://aib.gov.uk/debt-solutions/protected-trust-deeds.
[87] The exception is tenements subject to the DMS: see the discussion at paras 4.8 – 4.17 above.
[88] See para 4.17 above.
[89] Discussion Paper, paras 13.3 – 13.4.

times as the plot is sold on as a consolidated whole,[90] which may take some time. Alternatively, a whole tenement building may be held on a single title, and the owner may convert the building from a tenement to a single larger property. Earlier in this Chapter, we considered the question of when a tenement might first be said to exist.[91] We concluded that this was principally a question of fact concerning when a building meets the definition of a tenement in section 26 of the 2004 Act. By the same token, the question of when a tenement ceases to exist must also be answered by reference to section 26. In principle, then, the trigger for the termination of an owners' association should be when the tenement itself ceases to exist as a matter of fact.

4.80 In practice, we recognise that there may be disagreement as to the date on which this occurred. This creates a difficulty for the process of dissolving the owners' association. Our policy is that the association should be dissolved by legislation within a fixed period of time following on the tenement ceasing to exist. This is to prevent owners' associations from having an indefinite continuing existence. If owners or the association were required to undertake a form of conveyancing or registration process to trigger the dissolution of the association, there is a real danger that many simply would not do so. This might particularly be the case if the association had no remaining funds or was in debt. However, allowing legal persons to simply continue to exist without any purpose is obviously undesirable from the perspective of legal certainty. A fixed period for dissolution is therefore desirable.

4.81 Our draft Bill includes provision which aims to square this circle. Demolition or renovation of a tenement into a single building will generally require a building warrant, with the acceptance of a completion certificate by the relevant building standards department confirming that the work is concluded. Accordingly, the date when the completion certificate is accepted will provide an appropriate trigger for the winding up process in some cases. This approach does not provide a complete solution, however. There will be cases in which a building warrant is not sought or a certificate is never approved for various reasons - a tenement may be destroyed by an unplanned event such as a fire, for example, or a warrant may simply not be sought for renovation work despite the fact it should be under building standards rules. Alternatively, there may be cases in which the completion certificate will not be approved until some time after the tenement has physically ceased to exist (for example, if demolition of the tenement is part of a larger development project), but former owners are keen to wind up the association more quickly. In such cases, any party with an interest may seek a determination from the Tribunal of the date on which the tenement ceased to exist. The winding up process will be triggered on the date the Tribunal determines in such cases.

4.82 Finally, a tenement will become subject to a DMS where a deed is registered which has that effect under section 71(1) of the Title Conditions (Scotland) Act 2003. Currently this can only be achieved through registration of a deed of application under section 71(1)(a). Registration of such a deed should therefore trigger the winding up of the owners' association. In these circumstances, there will be a period of overlap between the two regimes, since the DMS owners' association will come into existence on the date of registration of the deed of application, but the tenement owners' association will not be dissolved until its affairs are fully wound up.[92] During that period, the tenement owners' association will cease to have duties in respect of, or capacity for, anything other than the winding up process. The rules on the

[90] 2004 Act s 20.
[91] See para 4.31 above, and the preceding discussion at paras 4.22 – 4.30.
[92] See paras 4.88 – 4.91 below on the date of dissolution.

operation of the association should remain applicable only insofar as they are necessary to facilitate its dissolution.[93]

4.83 Taking into account the above, we recommend:

18. The process of terminating an owners' association should begin automatically when:

(a) The tenement ceases to be a tenement; or

(b) Registration of a relevant deed applies the DMS to the tenement.

19. A tenement should be taken to have ceased to be a tenement on the date on which:

(a) A completion certificate is accepted in relation to the demolition or renovation which caused the tenement to cease to exist; or

(b) The Tribunal determines that it ceased to exist.

(2004 Act, s 3B(1) & (10) and s 3C(a)(ii) & (iv), inserted by Draft Bill, s 1)

Winding up the association

4.84 In the Discussion Paper, we suggested that responsibility for winding up the association's affairs during the termination process should fall largely on the association manager.[94] We considered the procedure for winding up a DMS owners' association to offer a useful model.[95] Under the DMS, the manager must use association funds to pay off any debts of the association as soon as practicable after the commencement of the winding up, and distribute any remaining funds amongst the owners of the units in the development. The manager must also prepare the final accounts of the association, outlining how the winding up was conducted and how funds were disposed of,[96] and send a copy of these accounts to the owner of every unit in the development no later than six months after the commencement of the winding up.[97] Of the 28 consultees who responded to our question on this issue,[98] 25 agreed that the manager of a tenement owners' association should undertake the same duties, and no consultee disagreed.

4.85 We also asked consultees if any further responsibilities should be held by the manager.[99] No duties not already owed by the manager or flat owners under our Discussion Paper were suggested.

---

[93] Where owners are performing the opposite exercise and winding up a DMS owners' association, meaning that a tenement owners' association would be established under s 3A(3) of the 2004 Act (inserted by s 1 of our draft Bill), section 73 of the Title Conditions (Scotland) Act 2003 will produce the opposite result, such that the tenement owners' association would prevail over the DMS owners' association for the purposes of managing the tenement.
[94] Discussion Paper, paras 13.5 – 13.13.
[95] DMS rule 6.
[96] DMS rule 6.3.
[97] *Ibid*.
[98] Discussion Paper, para 13.9.
[99] *Ibid.*

4.86 Under the DMS, where funds are distributed amongst owners during the winding up process, each unit is entitled to an equal share.[100] This aligns with the default rule on liability for costs in that scheme, where each unit pays an equal share of the service charge.[101] In our draft Bill, the default rules on division of liability for costs amongst tenement flat owners are more complex, mirroring the default rules under current law.[102] In the Discussion Paper, we asked how funds distributed amongst owners during the winding up of a tenement owners' association should be divided.[103] Amongst the 27 consultees who responded to this question, ten suggested that funds should be divided equally amongst members, whereas 12 suggested that funds should be divided based on the allocation of liability for costs. We note that it may not be straightforward for the manager to determine which surplus funds relate to which costs, but recognise the basic fairness inherent in "getting back what you put in". Taking into account the majority view amongst consultees, we have concluded that this latter rule provides the correct approach. However, we recommend that owners should be free to agree an alternative distribution in the default rules of the association or at the time such funds are being distributed.

4.87 Taking together all the points above, we recommend:

20. During the winding up period, the manager should:

(a) As soon as practicable after the commencement of the winding up, use association funds to pay any debts of the association then distribute any remaining funds to flat owners;

(b) Where any funds remain after the association's debts have been satisfied, distribute those surplus funds to owners on the same basis on which the relevant funds were originally paid to the association unless owners have agreed otherwise;

(c) Prepare the final accounts of the association and send a copy of those accounts to every member.

(2004 Act, s 3B(4), (5)(a)-(d) & (6), inserted by Draft Bill, s 1)

Date of dissolution

4.88 Since the winding up process will take time, it is not possible for the association to be dissolved on the same date on which the termination of the association is triggered. The DMS deals with this problem by providing that an owners' association is instead dissolved automatically six months after the deed triggering the termination process is registered, or on a later date if that deed so provides.[104] If necessary, the DMS allows members to vote to delay dissolution beyond the six-month period, or the period specified in the deed.[105] In the

[100] DMS rule 17.
[101] DMS rule 19.1.
[102] See paras 10.3 – 10.7 below.
[103] Discussion Paper, para 13.13.
[104] DMS rule 6.4; Title Conditions (Scotland) Act 2003 s 73(1)(a) – (b).
[105] DMS rule 6.5.

Discussion Paper, we suggested a similar approach would be appropriate for tenement owners' associations.[106]

4.89 We sought views from consultees. In relation to the question of whether the association should be deemed dissolved within six months of the trigger event, 19 of the 27 consultees who responded agreed that it should. A further two agreed subject to the proviso that the six-month period was extended to one year,[107] though the majority of consultees were content with the shorter period. In relation to the question of whether members of the association should be permitted to postpone the dissolution for a specified period, 25 consultees responded and 21 agreed.

4.90 Only two consultees opposed both aspects of the proposed scheme. These consultees preferred a system under which a deed requires to be registered to dissolve the association. As explained earlier, we do not support this approach due to the risk it creates of associations continuing to exist indefinitely after the related tenements have disappeared. However, we note the concern raised by these consultees that assets formerly belonging to the association, or liabilities incurred by the association, may not be identified until after the association has been dissolved. The Building Societies Act 1994 provides a solution here in circumstances where a building society is dissolved. Section 94 of that Act conveys to the members of the building society any rights (including ownership rights) or liabilities remaining to the society on dissolution. We consider an equivalent provision would be beneficial within the legislative scheme for owners' associations. This would help minimise any risk that dissolution could be used to evade liability and clarify the ownership of any assets which may have been overlooked.

4.91 Taking all of the above into account, we recommend:

21. (a) The owners' association should be dissolved six months after the commencement of the winding up, or on a later specified date if members so decide prior to the expiry of the six-month period;

(b) Any rights and liabilities remaining to the association on the date of dissolution should be transferred to the members of the association, with any such rights or liabilities to be shared equally, subject to an association decision otherwise.

(2004 Act, s 3B(2) & (7)-(8), inserted by Draft Bill, s 1)

Owners' associations and the Property Factors (Scotland) Act 2011

Overview of the 2011 Act

4.92 Clarity is required in the legislation about the interaction between the owners' association and the Property Factors (Scotland) Act 2011. This statute sets out a regulatory regime for persons who take on property management work on a commercial or professional basis. A person who, in the course of that person's business, manages the common parts of land owned by at least two other persons, and used to any extent for residential purposes, is

[106] Discussion Paper, paras 13.14 – 13.16.
[107] A further four consultees gave responses which were neutral or unclear, with only two opposing the proposal.

a property factor.[108] In practice, property management or property factoring will usually be the sole or core aspect of the business of a person taking on this kind of work on a commercial basis. However, where another professional (such as an architect or surveyor) takes on property management work in the course of their business, they will equally meet the definition of "property factor" in the 2011 Act. Under current law, a flat owner who takes on a "self-factoring" role for their tenement will usually not be a "property factor" for the purposes of the 2011 Act, since they will usually not fulfil the part of the statutory definition which requires them to be acting in the course of their business.

4.93 A "property factor" is alternatively defined as a local authority or housing association which manages the common parts of land owned by at least two other persons (or by the local authority or housing association and at least one other person), and used to any extent for residential purposes.[109] A local authority or housing association which owns a flat will therefore usually be caught by the 2011 Act where they act as a "self-factor".

4.94 The Act provides that it is an offence for any person to operate as a factor without being registered on the Scottish Property Factor Register.[110] Registration is possible only where Scottish Ministers are satisfied that the applicant is a fit and proper person within the meaning of the Act.[111] In determining whether this test is met, Ministers are directed to have regard to various matters, including whether the applicant has been convicted of any offence involving fraud or dishonesty, violence or drugs, and whether they have contravened any provisions of the law concerning tenements, property or debt.[112] Once entered, a person remains on the register for three years, at the conclusion of which the entry will be deleted unless a successful reapplication is made.[113]

4.95 Once registered, factors are required to comply with the Property Factors' Code of Conduct,[114] which sets out minimum standards in relation to communication and consultation, carrying out maintenance and actions to recover debt from owners, amongst other things.[115] Disputes between owners and factors as to whether these standards have been met are adjudicated by the Housing and Property Chamber of the First-tier Tribunal,[116] which can make a Property Factor Enforcement Order requiring a factor to take certain actions and/or pay compensation where the factor has not adhered to the Code. Failure to comply with such an order is an offence[117] and will prevent the offender from being registered as a factor in future.[118]

The 2011 Act and the owners' association

4.96 As noted above, a person who, in the course of that person's business, manages the common parts of land owned by at least two other persons, and used to any extent for

---

[108] Property Factors (Scotland) Act 2011 s 2(1)(a).
[109] 2011 Act s 2(1)(b). The Act goes to define two other categories of person acting in a property management role as a property factor at ss 2(c) and 2(d), which are concerned with management of land which, although not in common ownership, is available for common use by two or more owners of property neighbouring that land.
[110] 2011 Act s 12. The Register was established under ss 1 – 2 of the 2011 Act and can be accessed at https://www.propertyfactorregister.gov.scot/PropertyFactorRegister/.
[111] 2011 Act ss 4(4) – (5).
[112] 2011 Act s 5.
[113] 2011 Act s 4(7).
[114] 2011 Act s 14(5).
[115] The Code of Conduct was most recently revised in 2021 and is available at https://www.gov.scot/publications/property-factors-scotland-act-2011-code-conduct-property-factors-2/.
[116] 2011 Act s 17.
[117] 2011 Act s 24.
[118] 2011 Act ss 4(4) – (5).

residential purposes, is a property factor.[119] In Chapter 5, we consider the circumstances in which the manager of an owners' association might fall within that definition, and make recommendations in that respect. However, a prior issue arises: the owners' association *itself* is a person which manages the common parts of the tenement. Might the association be considered a property factor within the meaning of the 2011 Act?

4.97 The 2011 Act clarifies the position for the DMS by explicitly excluding a DMS owners' association from the definition of "property factor".[120] The reasons for this provision were not explicitly discussed during the passage through Parliament of the Bill which became the 2011 Act. However, it might reasonably be suggested that regulating the owners' association itself, rather than the manager carrying out the day-to-day work of the association, seems inappropriate. The legislation aims to regulate professional standards within the property management sector for the benefit of customers.[121] This aim does not have an obvious fit for an owners' association – it is not a commercial enterprise, and the owners are not customers of the association. Regulating both the association and the manager would also seem confusing and unnecessary.

4.98 For the same reasons, we suggested in the Discussion Paper that it would be appropriate to exclude tenement owners' associations from the definition of "property factor" in the 2011 Act.[122] Of the 34 consultees who responded to this question, 32 agreed. Accordingly, we recommend:

22. Owners' associations should be excluded from the definition of "property factor" in the Property Factors (Scotland) Act 2011.

(Property Factors (Scotland) Act 2011, s 2(2)(d), inserted by Draft Bill, Schedule para 25(1) & (2)(a))

[119] 2011 Act s 2(1).
[120] 2011 Act s 2(2)(b).
[121] Policy Memorandum for the Property Factors (Scotland) Bill, available at https://webarchive.nrscotland.gov.uk/20240327012403/https://archive2021.parliament.scot/parliamentarybusiness/Bills/22539.aspx, paras 2 – 7.
[122] Discussion Paper, paras 6.46 – 6.49.

Chapter 5 The manager and members

Introduction

5.1 The previous Chapter set out our recommendations for the owners' association, including how this new form of legal person will be created, its basic features, its legal capacity to act and how it can be dissolved in relevant circumstances. In this Chapter, we consider the persons who will control this new legal entity, namely the manager of the association and its members. The manager is the person tasked with the day-to-day running of the association, and will usually be the person exercising the powers of the association on its behalf. The members – the owners of flats in the tenement – will decide when and how those powers should be exercised, and take on liability for costs incurred by the association as a result.

5.2 Taken together, the recommendations in Chapters 4 and 5 provide the "skeleton" of the owners' association: a legal person which can exercise its capacity through its manager, subject to the control of its membership. Chapter 6 of the Report will recommend a set of key statutory duties on the association, intended to ensure it functions at a minimum level, with Chapter 7 considering how these key duties can be enforced through appointment to the association of a "remedial manager" by the Tribunal. Chapters 8, 9 and 10 go on to recommend how the "skeleton" of the association should be clothed by rules as to its operation, detailing how members can take decisions about the association's actions and how liability for the association's costs is to be divided between them.[1]

5.3 Our recommendations in this Chapter follow from consultation in Chapters 6 and 9 of the Discussion Paper.

The manager

5.4 Any legal person needs a human being to carry out actions on its behalf. Our draft Bill creates the position of the association manager to fulfil this role, in line with the intentions of the Working Group.

5.5 Under current law, flat owners may delegate power to one of their number from time to time to arrange certain works on behalf of the group (sometimes referred to as "self-factoring"), or may contract collectively with a professional factor to arrange works for the group on an ongoing basis. If legislation on owners' associations is enacted, maintenance of association property will in future be instructed by the association itself rather than owners as individuals.[2] Owners will be required to appoint a manager to run the association, failing which a manager may be appointed by the Tribunal.[3] The manager may be one of the owners (a "self-manager"), or a professional factor.[4] Where owners decide that the association should,

---

[1] Chapter 8 of this Report recommends that the rules on the operation of the association can be set out by way of real burdens in the titles to the flats in the tenement. Where relevant burdens have not been created, a default set of statutory rules will apply. Those default rules are explained in Chapters 9 and 10.
[2] See paras 3.2 – 3.14 above for an overview of these changes in the legal framework for tenement maintenance.
[3] The appointment of a manager is a key duty on the association as discussed at paras 6.5 – 6.15 below. Enforcement through the appointment of a remedial manager is considered in Chapter 7.
[4] The appointment of a manager is discussed at paras 5.7 – 5.15 below. Terminating an appointment of a manager is discussed at paras 5.48 – 5.50.

for example, carry out maintenance works, the manager will be responsible for implementing those decisions. The manager will also have the power – and the duty – to take certain actions without a decision by owners, including calling the annual meeting and preparing the annual budget, to ensure that the association can comply with its key statutory duties.[5]

5.6 A manager or equivalent is a feature of apartment law in many jurisdictions, but our proposals for the association manager role have been influenced most strongly by the provisions on the equivalent manager role in the DMS.[6] In an earlier Report, we explained that role as "the executive arm of the [DMS owners'] association and hence the equivalent of the board of directors in a company."[7] Two key rules lay the groundwork for the DMS manager undertaking that role. First, the DMS manager is an agent of the owners' association. Second, the manager is given a general power to exercise the powers of the association, and a counterpart duty to manage the development for the benefit of members. We discuss a modified approach in relation to the manager of a tenement owners' association below. First, we consider how a manager may be appointed.

Appointing a manager

5.7 Under our recommendations discussed in the previous Chapter, the association has capacity to appoint an agent, which would include the association manager.[8] The association's capacity may be exercised only on the basis of an association decision to that effect. The rules on operation of the association in question will govern how owners may take such a decision. The default rules which we recommend later in this Report allow for the decision to be taken by a simple majority of votes.[9] The effect of such a decision would be that the manager enters a contract with the association.

5.8 The terms of the relationship between the association and the manager will be defined at a basic level by the legislative provisions on the manager's capacity and duties outlined below. However, we anticipate that associations and managers will often choose to make more detailed provision in a written contract. Under current law, for example, owners who appoint a factor will often agree that the factor can instruct maintenance works of certain kinds, or up to a certain financial value, without seeking specific authority from the owners. No doubt owners, through their association, will continue to find it convenient to arrange their affairs in this way in future. The contract may also specify obligations owed to the manager by the association, most obviously in relation to remuneration where the manager acts on a commercial basis. An association can agree to the terms of any contract with the manager by way of an association decision, taken by owners.

5.9 In the DMS, provision is made to the effect that the actings of the manager should be valid notwithstanding any defect in the process by which they were appointed.[10] We recommend equivalent provision in our draft Bill. Although this is not a matter on which we specifically consulted, we consider this power to be in line with the general provision we

[5] These duties are discussed in Chapter 6.
[6] See generally DMS rules 7 and 8.
[7] Scottish Law Commission, Report on Real Burdens (Scot Law Com No 181, 2000), available at https://www.scotlawcom.gov.uk/files/8712/7989/7470/rep181.pdf, para 8.16.
[8] See paras 4.46 – 4.50 above.
[9] See paras 9.24 – 9.30 below.
[10] DMS rule 4.3.

recommend later that association decisions should not be invalidated by any procedural irregularity in that making of that decision, which received strong support from consultees.[11]

5.10 We recommend:

23. The actings of a manager should be valid regardless of any defect in the manager's appointment.

(2004 Act, s 3A(4) and Schedule A1 para 9(5), inserted by Draft Bill, s 1)

5.11 The DMS provides for a "certificate of appointment" recording the appointment of a specific person as manager and noting the period for which the appointment has been made. The certificate must be signed by the manager and a member (acting on behalf of the owners' association) within one month of the manager's appointment.[12] The certificate can then be used to satisfy contractors and other third parties of the manager's power to act.

5.12 In the Discussion Paper, we suggested equivalent provision for the manager of a tenement owners' association.[13] We asked consultees if the manager and a member acting on behalf of the association should be required to sign a certificate to confirm the manager's appointment.[14] Twenty-seven out of 31 consultees who responded agreed with this proposal. Two consultees suggested a letter of appointment instead of a certificate. However, we think this approach overlooks the value of a signature by the manager relating to their appointment.

5.13 We also asked if the certificate should require to be signed within one month of the manager's appointment.[15] Twenty-six out of 30 consultees who responded agreed with this proposal. Aberdeen Law School queried what the consequences would be if the certificate was not signed within the applicable timescale. Signing the certificate is not a requirement for the validity of the manager's appointment, but a manager who fails to comply will be in breach of their duties to the association and can be held to account. If no member signs on behalf of the association, under powers we recommend later in this Chapter, the manager can enforce that duty against owners through an application to the Tribunal if necessary.

5.14 In the Discussion Paper, we had suggested that provision on the certificate of appointment might form part of the default rules on operation of the association. On reflection, in the interests of simplicity and certainty, we consider it would make more sense for this provision to form part of the legislation. We are influenced here particularly by the fact that the certificate of appointment is intended primarily to benefit third parties such as contractors who may not be familiar with the rules on operation applicable to any individual association, unlike the manager and members themselves.

---

[11] See paras 9.60 – 9.63 below.
[12] DMS rule 7.3.
[13] Discussion Paper, para 9.27.
[14] Discussion Paper, para 9.28.
[15] *Ibid.*

5.15 We recommend:

24. (a) The manager and a member acting on behalf of the owners' association should be required to sign a certificate of appointment confirming the manager's appointment;

(b) The certificate should require to be signed within one month of the manager's appointment.

(2004 Act, s 3A(4) and Schedule A1 para 9(3)-(4), inserted by Draft Bill, s 1)

Manager as agent

5.16 The DMS manager is designated an agent of the owner's association.[16] The benefit of designating the manager an agent is that the general law of agency applies, providing a solid grounding for the relationship between the association and the manager. The law of agency can be a complex topic[17] but some key rules can be outlined. The agent (in this context, the manager) is a fiduciary of the principal (in this context, the owners' association). In simple terms, this means that the principal places its trust in the agent, who owes the principal their loyalty in return. It follows that the agent has a duty to avoid conflicts of interest in relation to the principal's business.[18] The agent also has a duty to pass on any benefits received in the course of that business, sometimes referred to as the rule against taking a secret profit at the principal's expense.[19] Additionally, the agent is under an obligation to follow instructions from the principal using reasonable skill and care.[20] An agent who breaches these duties is liable in damages to the principal. Designating the manager an agent also allows for the application of certain principles to dealings between the manager and third parties such as tradespersons, which is of particular importance where a manager purports to act beyond the capacity conferred on them by the association. We return to this issue below.[21]

5.17 In the Discussion Paper, we suggested the manager of a tenement owners' association should be designated an agent of that association. Our question to consultees on this issue covered both the designation of the manager as an agent and the extent of the manager's capacity and duties.[22] Of the 31 consultees who responded to this question, 27 agreed in full with our preliminary view on these matters, and no consultee disagreed entirely. As discussed further below, our policy in relation to the capacity and duties of the manager has evolved. We continue to adhere to our preliminary view in relation to the manager as an agent, however, and do not consider the majority consultee support for that view to be called into question by our revised approach to the other elements of this consultation question.

5.18 The Discussion Paper also suggested that this aspect of the manager's role should be located within the default rules on operation of the association, which would mean it could be modified in relevant association conditions. On reflection, it is clear that such an approach would not be practical. The relationship between the association and the manager should be

---

[16] DMS rule 4.4.
[17] A full account of the law in Scotland can be found in L J Macgregor, *The Law of Agency in Scotland* (2013).
[18] See generally Macgregor, *Agency,* paras 6-21 – 6-24.
[19] See generally Macgregor, *Agency,* paras 6-30 – 6-34.
[20] G J Bell, *Commentaries on the Law of Scotland* (7th edn, 1870) vol 1, p 516; Macgregor, *Agency,* paras 7-01; 7-04 – 7-07.
[21] See paras 5.38 – 5.47 below.
[22] Discussion Paper, paras 9.29 – 9.34.

clearly defined in statute, not least so that it is possible to enforce compliance by the association with its key duties through the appointment by the Tribunal of a remedial manager as discussed in Chapter 7.

5.19 Accordingly, we recommend:

25. The manager should be designated an agent of the association.

(2004 Act, s 3A(4) and Schedule A1 para 14(4), inserted by Draft Bill, s 1)

Powers and duties: the DMS approach

5.20 The DMS manager is given a general capacity to exercise any of the powers available to the owners' association under that scheme.[23] To ensure the manager does so appropriately, they are placed under a corresponding responsibility to manage the development for the benefit of members, supplemented by a non-exhaustive list of specific duties covered by that responsibility.[24]

5.21 In the Discussion Paper, we suggested the manager of a tenement owners' association should have a similar broad capacity and a similar general responsibility to members.[25] As noted above, of the 31 consultees who responded to this question, 27 agreed in full with our preliminary view, and no consultee disagreed entirely. We also suggested that the manager's general responsibility should be supplemented by a non-exhaustive list of specific duties similar to the list provided for in the DMS.[26] Consultees were also largely supportive of this proposed approach, with 26 of the 32 consultees who responded to our question on this issue[27] in favour of a non-exhaustive list which largely mirrored the DMS provision.

5.22 On reflection, however, we have realised that following the DMS model in relation to the manager's powers and duties may provide the manager with a far greater degree of latitude than we had intended. Broadly speaking, our recommendations in this Report aim to conserve the current decision making powers of flat owners in relation to maintenance to the greatest extent possible within the framework of the association. In general, this should mean that the association does not take action unless owners decide that it should do so.[28] We think this approach is appropriate to ensure the legislation is consistent with the A1P1 rights of flat owners, taking into account the fact that the owners' association legislation will necessarily apply in all tenements.[29]

5.23 By contrast, the DMS – which, it should be recalled, is a voluntary scheme – assumes as a default that owners of units in the development will be content for the manager to exercise the powers of the DMS owners' association without their input.[30] Owners must be given the opportunity to approve or reject the annual budget for works proposed by the manager,[31] and have the power to direct the manager in other ways should they wish.[32] Generally, however,

---

[23] DMS rule 4.5(a).
[24] DMS rule 8.
[25] Discussion Paper, paras 9.29 – 9.34.
[26] Discussion Paper, paras 9.35 – 9.38.
[27] Discussion Paper, para 9.39.
[28] In Chapter 9, we set out default rules on how owners may take such decisions.
[29] There is an exception for tenements subject to a DMS: see paras 4.8 – 4.17 above.
[30] The thinking behind this is set out in our Report on Real Burdens at para 8.16, see also paras 8.56 – 8.57.
[31] DMS rule 18.3.
[32] DMS rules 4.7 and 8(e).

the assumption is that the manager will make decisions about what is needed to manage the tenement, guided by the non-exhaustive list of specific duties which requires them, for example, to arrange for maintenance to be carried out.[33]

5.24 Our consultation questions in the Discussion Paper on the manager's general capacity and duties did not explore these consequences of replicating the DMS provision. We think it is reasonable to assume, based on the views of consultees in relation to other elements of our scheme, that consultees would not have been supportive of replicating the DMS provision had this outcome been explained in full. Even if we are incorrect about that, we are doubtful that transferring such extensive power from the owners to the manager in the context of a compulsory legislative scheme would be consistent with A1P1. Accordingly, we have developed a set of revised recommendations in relation to the framing of the manager's capacity and duties in the context of a tenement owners' association.

5.25 As a preliminary remark, we note that the Discussion Paper suggested that this aspect of the manager's role should be located within the default rules on operation of the association, which would mean it could be modified by conditions in the tenement titles. On reflection, it is clear that such an approach would not be practical. The relationship between the association and the manager should be clearly defined in statute, not least so that it is possible to enforce compliance by the association with its key duties through the appointment by the Tribunal of a remedial manager as discussed in Chapter 7. Accordingly, our recommendations below are for statutory provisions rather than default rules.

Capacity of an association manager

5.26 The role of the association manager is to manage the tenement on behalf of the association. The basic principle underlying our recommendations is that the manager may exercise the powers of the association in order to fulfil this role only where so authorised by an association decision. Without an association decision, the manager has no general power to act on the association's behalf.

5.27 Certain exceptions are, however, needed to this basic rule. The legislation must confer on the manager a limited authority to act even in the absence of an association decision in order to ensure that the association is always able to function at a minimum level. Otherwise, the association would cease to function where flat owners were indifferent or absent, or might even be prevented from functioning by owners taking decisions which prevent the association complying with its statutory duties. Allowing for these outcomes would obviously run contrary to the intentions of the Working Group in recommending that associations should be introduced.

5.28 To address these concerns, the legislation must place a duty on the manager to ensure compliance by the association with its key duties. Not only will this compel the manager to take the action required keep the association functional, it also provides a protection against flat owners who are hostile to the operation of the association. Owners might, for example, take an association decision not to hold an annual meeting, or not to prepare an annual budget. Placing a duty on the manager to carry out these actions will require the manager to

[33] DMS rule 8.

do so notwithstanding association decisions to the contrary. Any action reasonably required for compliance with the key duties will be covered by this provision.

5.29 We should note for clarity that this duty does not, in itself, empower or compel a manager to instruct maintenance. An association decision will always be required before maintenance can be carried out,[34] and we anticipate that such a decision will usually be taken in future through approval of an annual budget detailing the maintenance to be undertaken over the coming year.[35] If owners did not approve an annual budget, however, the duty on the manager to ensure compliance by the association with its key duties will allow the manager to seek approval of a budget from the First-tier Tribunal instead.[36] Approval from the Tribunal will enable the manager to instruct the relevant works on behalf of the association in the same way as if an association decision had been taken to approve the budget, and to issue a service charge and collect payments from owners in line with the budget in the usual way.

5.30 We also recommend that the manager should have two discretionary powers. These are powers which the manager has authority to exercise notwithstanding the absence of an association decision. However, the manager is not compelled to exercise these powers, meaning that the manager may choose *not* to take action in the absence of an association decision. The first discretionary power which we recommend is the power to enforce any duty owed to the association by members under the legislation or the association rules. This will ensure the manager can, for example, enforce payment by members of their service charges where appropriate. Second, we suggest that the manager should have discretion to undertake emergency work to association property. We consider the definition of emergency work later in this Chapter, where we recommend that owners should also have the power to instruct emergency work of this kind.[37]

5.31 These exceptions to the basic rule that an association decision is required for any action by the manager should be sufficient to ensure that the association can function at a basic level, whilst continuing to respect the rights of owners to control maintenance decisions in relation to their properties. The association's powers are limited by its function to manage the tenement for the benefit of members,[38] meaning that the range of powers exercisable by the manager on the association's behalf are also so limited. In addition, the manager is under the usual duties of an agent as outlined above, most notably to act with reasonable skill and care. We think it may be useful to impose some further duties on the manager to safeguard the position of owners, and to deal with other elements of the operation of the association, and discuss those duties in the following section.

5.32 For the reasons outlined above, we recommend:

26. (a) The role of the association manager should be to manage the tenement on behalf of the association;

---

[34] There is an exception in the case of emergency work, which both the manager and members of the association are authorised to carry out: see paras 5.30 – 5.32 (manager's power) and paras 5.82 – 5.85 (members' power) below.
[35] We consider the content of the annual budget at paras 10.15 – 10.25 below.
[36] We recommend that this power should be conferred on the Tribunal, see paras 11.27 – 11.28 below.
[37] See paras 5.82 – 5.85 below.
[38] This is discussed at paras 4.40 – 4.45 above.

(b) The manager should have the functions conferred by the owners' association legislation and the rules on operation of the association;

(c) The manager should be under an obligation to ensure compliance by the association with its key duties under the legislation;

(d) The manager may instruct or carry out emergency work to association property;

(e) The manager may enforce any obligation owed to the association by a member or the association rules.

(2004 Act, s 3A(4) and Schedule A1 para 14(1)&(2), 15, 18 and 19(1), inserted by Draft Bill, s 1)

Duties of the association manager

5.33 In the DMS, the manager's broad capacity to exercise any of the powers of the association has, as a counterpart, an equally broad duty to manage the development for the benefit of members. Direct replication of this broad responsibility within the tenement owners' association scheme does not fit well with the limits on the capacity of the manager in this context. Put simply, the manager will not always have the authority required to manage the tenement for the benefit of members in the absence of relevant association decisions.

5.34 However, we do recommend that the manager should be subject to a number of specific duties which, in the DMS, follow from the manager's general responsibility. To some extent these duties will flow from the manager's position as an agent of the association, but in the interests of certainty, we suggest express provision in the legislation. We consider each of the duties on the DMS list in turn.

- *The duty to implement any decision made by the owners' association*. This duty would follow from the role of the manager as the agent of the association. However, we recommend that it should be replicated for the avoidance of any doubt.

- *The duty to comply with the directions given by the association as respects the exercise by the manager of the association's powers, or compliance by the manager with their duties, so far as is reasonably practicable*. This duty would also seem to follow from the role of the manager as the agent of the association. However, we think the duty should be replicated for the avoidance of any doubt.

- *The duty, in so far as it is reasonable to do so, to enforce: (i) any obligation owed by any person to the association; and (ii) the rules on operation of the association.* Above, we have recommended that the manager should have discretion to enforce duties owed to the association by its members. However, we do not think it is appropriate to place a duty on the manager to do so. The manager may exercise this capacity where they consider it appropriate, or where they are directed to do so by an association decision. There seems no justification by which to compel the manager to enforce such duties where neither the manager nor members consider it to be necessary.

- *From time to time to carry out inspections of scheme property and arrange for the carrying out of maintenance to scheme property*. Bearing in mind the limited statutory discretion available to the manager under our recommendations above, we do not consider it appropriate for this duty to be imposed. Where an association decision is taken in relation to investigating or carrying out maintenance, the manager already has a duty to implement it. Absent an association decision, the manager has no capacity to undertake such work.

- *To keep a record of the name and contact details of each member of the association.* We recommend a duty to this effect later in this Chapter.[39]

- *To fix the financial year of the association*. We recommend that the manager should be subject to this duty to ensure the administrative functioning of the association.

- *To keep, as respects the association, proper financial records and prepare the accounts of the association for each financial year*. Again, we recommend a duty to this effect to ensure the administrative functioning of the organisation.

- *On request by any member, to make available for inspection any document which relates to the management of the tenement (other than correspondence with individual members).* This duty may follow from the role of the manager as the agent of the association. However, we recommend that it should be replicated for the avoidance of any doubt.

We note for completeness that the DMS manager also has a duty to keep a copy of any regulations (rules governing the use of recreational facilities)[40] which have been in relation to facilities in the relevant development.[41] Such regulations do not form part of our Bill, so there is no need for a similar duty to be imposed.

5.35 The Discussion Paper also suggested that the manager should have a duty to monitor compliance by owners with their duty under section 18 of the 2004 Act to take out insurance against prescribed risks for the reinstatement value of any part of the tenement which they own. Consultees were supportive of this duty on the manager, though it was pointed out that the manager will not generally be in a position to assess the reinstatement value of the property without expert advice. Below, we recommend that the manager should be under a duty to monitor compliance by members with this duty, subject to the proviso that compliance with this duty does not require the manager to obtain a valuation of any part of the tenement.

5.36 In light of the above, we recommend:

27. The manager should be subject to the following specific duties—

[39] See paras 5.76 – 5.81 below.
[40] DMS rule 3.6.
[41] DMS rule 8(g).

(a) to implement any decision of the association, except to the extent that the decision is contrary to any provision of the legislation or the association's rules;

(b) so far as reasonably practicable, to comply with any direction given by the association as respects the exercise of the manager's powers except to the extent that the direction is contrary to any provision of the legislation or the association's rules;

(c) to fix the financial year of the association;

(d) to keep, as respects the association, proper financial records and prepare the accounts of the association for each financial year;

(e) on request by any member, to make available for inspection any document which relates to the management of the tenement (other than correspondence with individual members);

(f) to monitor compliance by owners with their duty to take out insurance under section 18 of the 2004 Act, subject to the qualification that the manager is not required to obtain a valuation of the tenement for this purpose.

(2004 Act, s 3A(4) and Schedule A1 para 16-17, 19(2)&(3), 20-21, inserted by Draft Bill, s 1)

5.37 The DMS specifies, for the avoidance of any doubt, that duties on the manager are owed to the members of owners' association, and to the association itself. Clarification of the persons to whom duties are owed facilitates enforcement action against a manager who is not performing adequately. In the Discussion Paper, we suggested that it would be sensible to make similar provision for the manager of a tenement owners' association.[42] Of the 30 consultees who gave a view on this issue, 28 agreed with our suggestion. Accordingly, we recommend:

28. The duties of the manager should be owed to the association itself and to its members.

(2004 Act, s 3A(4) and Schedule A1 para 14(3), inserted by Draft Bill, s 1)

What if the manager exceeds their authority?

5.38 A further issue considered in the Discussion Paper concerned acts by the manager going beyond the authority conferred on them.[43] The manager's capacity to act for the association is not unlimited, and powers may generally be conferred on them only by way of an association decision. The question therefore arises of the status of transactions purportedly entered into by a manager which go beyond the manager's capacity.

5.39 This problem is not unique to the owners' association regime. It arises in any area of law where one person acts as an agent for another. The general rule is that acts by an agent

[42] Discussion Paper, paras 9.40 – 9.41.
[43] Discussion Paper, paras 9.42 – 9.49.

which exceed their authority are void. This protects the interests of the person for whom the agent acts, since it prevents that person becoming bound by the agent in a way that had not been authorised. However, it can be argued that the rule provides insufficient protection to third parties. It may be difficult for a third party to correctly ascertain the extent of an agent's authority. A third party who contracted in good faith with an agent may subsequently discover that the purported contract is void, and the third party's right to payment from the principal under the contract therefore non-existent, through no fault on the part of the third party. For this reason, the director of a company is generally able to bind the company when transacting with a third party who is in good faith, even if the transaction in question goes beyond the director's powers.[44]

5.40 We considered this issue when recommending the manager provisions in the DMS.[45] There, we took the view that it was not necessary for the manager of the DMS owners' association to have the ability to bind the association when acting beyond their powers. The rule by which a director acting beyond their powers nevertheless binds the company is appropriate in that context because there is huge diversity in the objects and powers of different companies, making it difficult for third parties to know what any individual director is authorised to do. Owners' associations in the DMS have a far more limited range of powers which can generally be identified from relevant legislation and/or the Land Register, making it easier for third parties to accurately gauge the capacity of the manager. The same will be true of tenement owners' association managers under our draft Bill. A blanket rule of the kind applicable in company law would seem therefore to be inappropriate for these managers also.

5.41 In the absence of a company law-type rule, we noted three specific difficulties for third parties transacting with a DMS manager.[46] First, the third party will wish to be sure that the person claiming to be the manager actually *is* the manager. Again, this problem occurs in any area of law where one person acts as an agent for another. Above, we recommend that the manager of a tenement owners' association should obtain a certificate of appointment from members.[47] A certificate of this kind provides greater proof of an agent's authority than is generally available in the commercial world, and we do not think further provision to protect the interests of third parties is required in this respect.

5.42 Second, within the DMS, certain actions can be taken by the manager only where approved by a special majority vote of members.[48] In recommending the DMS, we took the view that a third party acting in good faith would be entitled to assume that such a vote had been cast, since it would not be practicable for the third party to investigate the position for themselves.[49] Third, a similar difficulty may arise in the DMS where a power that is usually available to the manager under the rules of the scheme has been restricted by a member's vote.[50] Again, we considered that a third party would be entitled to rely on the apparent authority of the manager to transact without any such restriction, provided that the third party

---

[44] Companies Act 2006 s 40.
[45] Report on Real Burdens, paras 8.71 – 8.74.
[46] Report on Real Burdens, para 8.73.
[47] Equivalent provision is found in DMS rule 7.3.
[48] DMS rule 13.1.
[49] We relied here on the "indoor management" rule set out in the case of *Royal British Bank v Turquand* (1855) 5 El. & Bl. 248, in which a company's directors had taken out a loan on behalf of the company without first obtaining the necessary shareholder resolution in favour of doing so. The court found that the third party (the Bank who provided the loan) was entitled to rely on the apparent authority of the company's directors: see our Report on Real Burdens at para 8.74.
[50] DMS rule 4.7.

did not know, or reasonably suspect, that the manager's powers had been altered by a vote. In other words, the onus would be on members to make it known that the manager did not have the usual authority."[51]

5.43 In the Discussion Paper, we suggested that a similar analysis would apply in relation to the manager of a tenement owner's association who acted beyond their authority. We suggested, broadly speaking, that a third party would be entitled to assume that a manager had authority to contract with the third party, unless that third party knew or reasonably suspected that authority for the transaction in question was lacking, or the transaction was so unusual or out the ordinary that authority could not be assumed. We also suggested that these common law rules struck the right balance between the interests of members and those of third parties in the tenement context.

5.44 Our analysis in the Discussion Paper proceeded on the basis that the manager of a tenement owners' association would have similar powers to those of the manager of a DMS owners' association. Since that time, our recommendations in relation to the authority available to the manager of a tenement owners' association have evolved. As discussed above, we now recommend that the authority available to the manager to act on behalf of the association under the legislation should be limited. The manager should be authorised to carry out actions necessary to enable the association to comply with its key statutory duties, or the duties placed on the manager under the legislation or the association rules. Beyond that, however, an association decision is generally required to authorise the manager to act. In particular, a manager will generally not be authorised to instruct work to the tenement building without an association decision in that respect.

5.45 In light of this more restricted approach to the manager's authority, we think the doctrine of apparent authority in the common law of agency may have a more limited application in the owners' association context. The so-called "indoor management" rule in company law which allows a third party to rely on the apparent authority of a company director makes sense in that context, since directors usually have broad powers and the internal workings of a company may be complex. The powers of an owners' association manager are considerably less broad, however, which is clear on the face of the statute. Information on whether the appropriate authority has been obtained by a manager may also be less difficult to obtain: the contract between the association and the manager may set out certain powers, and where association decisions are taken authorising further action by the manager (for example, by way of approval of the annual budget), a record of that decision will require to be kept under the association rules.[52] In these circumstances, the case for the apparent authority of the manager seems to us less clear. A contractor would be better advised to seek clarification of the manager's authority to enter the particular contract, or else risk finding that the manager has acted beyond their authority, meaning that the purported contract is void.

5.46 Our provisional view in the Discussion Paper was that there was no need for any specific provision within the draft Bill to deal with acts by the manager in excess of their authority. We sought views from consultees on this point, and received 31 responses. Of these, 15 said that further provision was required. However, almost none of these consultees suggested what provision was required here or why the general law did not suffice. Aberdeen

---

[51] Report on Real Burdens, paras 8.73 – 8.74.

[52] Provision is made for this in the default association rules we recommend later: see para 9.53 (on association decisions taken at a meeting) and para 9.59 (on association decisions taken by way of consultation) below.

Law School suggested the general law might be restated in the draft Bill so that it could provide a "one-stop shop" for interested parties to know the relevant rules. While we recognise that this could be a useful approach in terms of legal accessibility, capturing the nuances of the law of agency in statutory form would be a difficult task and might result in minor divergences from the common law which would give rise to complex interactions between the two regimes. Given the resource implications of undertaking such a task, and taking into account that the incidence of managers acting beyond their authority in this way is likely to be low, we concluded that such an approach would not be justified here.

5.47 A minority of 11 consultees out of the 31 who responded agreed with our provisional view that no further provision was required. These consultees included legal practitioner bodies, Professor Kenneth Reid, the Scottish Association of Landlords and two out of five local authority respondents. Although the majority of consultees favoured additional provision here, since no suggestion was given on what provision might be required,[53] and we have not ourselves been able to identify the need for any further provision, our final view aligns with the minority. Accordingly, we do not recommend any additional provision within our draft Bill to deal with circumstances in which a manager purports to act beyond their authority.

Terminating an appointment as manager

5.48 Although not a matter on which we consulted, we think it is necessary to make provision within the legislation for the termination of a manager's appointment by way of an association decision. This power is available to owners within the DMS.[54] The power to terminate the appointment should apply regardless of any contractual terms agreed between the manager and the association in relation to termination of the appointment. This is to prevent the association being rendered unable to operate during a period where the association and its manager are in dispute about whether the contract allows for the appointment to be brought to an end. Should the termination be in breach of the terms of the contract, the former manager would be able to seek damages for that breach in the usual way.

5.49 The appointment will also be brought to an end in other circumstances by dint of the general law of agency. Under the law in that area, the manager's appointment will be terminated by the mental incapacity or death of a manager who is a natural person, the dissolution of a manager who is a legal person, or the dissolution of the association.[55] Similarly, the manager may resign from the post at any time, subject to a claim for damages for breach of contract by the association where the resignation fails to comply with any relevant contractual terms. Finally, as discussed in Chapter 7, any existing managerial appointment will be terminated where the Tribunal orders the appointment of a remedial manager to the association.

5.50 We recommend:

29. A manager's appointment should be terminated by an association decision to that effect.

---

[53] The exception to this general statement was the response from Aberdeen Law School, discussed in the preceding paragraph.
[54] DMS rule 4.2.
[55] See generally L J Macgregor, *The Law of Agency in Scotland* (2013), paras 10-04 – 10-08.

(2004 Act, s 3A(4) and Schedule A1 para 9(6), inserted by Draft Bill, s 1)

Transitional arrangements: should an appointed factor become an association manager?

5.51 The association will be subject to a key duty to appoint a manager, and will have power to do so from the day on which the legislation comes into force.[56] Flat owners who have appointed a factor to manage maintenance of their tenement under current law may wish to appoint the same person as their association manager. In such a case, there would be nothing to stop all parties negotiating the terms of an agreement to that effect prior to the new legislation coming into force, with the contract to be concluded by way of an association decision once the legislation is in force and the association is established.

5.52 In a proactive tenement, the transition into the new law could therefore be fairly smooth. However, the reality is that not all tenements will be proactive. In many tenements, particularly those with a larger number of flats than average, considerable effort may have been expended on building the consensus required amongst owners to appoint a factor in the first place. Some stakeholders have expressed concern about the challenges to be faced if this exercise needs to be repeated as a result of the introduction of owners' associations.

5.53 It was suggested that, to mitigate this risk, the Bill could include provision for a novation process to take place in relation to existing factoring contracts. In essence, the contract between the flats owners and the factor under the current law would be replaced by a contract between the owners' association and the factor (as association manager) once any legislation on owners' associations was introduced. This could operate on an "opt-out" basis, where novation would occur by virtue of the legislation unless one party to the contract notified the others that they wished to "opt-out". Alternatively, there could be an "opt-in" process, where a party who wished the statutory novation process to apply would notify the other parties to the original contract, and unless any objection was received within a certain period, novation would operate.

5.54 We recognise the challenges that may be posed by the duty to appoint an association manager. We consider there may be some merit in exploring how existing factoring arrangements might best be used to smooth the transition into the new legislative regime, and it may be that a form of novation process is appropriate in that respect. However, we stop short of recommending provision to that effect in our draft Bill.

5.55 In essence, we do not consider that the consultation we have carried out in the project provides us with a basis on which to make such a recommendation. This issue was not canvassed in our Discussion Paper. The terms of existing factoring contracts have not formed a primary focus of our research,[57] and it is not clear to us whether a novation process could operate in a relatively straightforward way. It is also not clear to us whether such a process would have the support of stakeholder groups such as flat owners.

5.56 As noted above, owners or factors who wish to continue their relationship would be free to enter into discussions to that effect prior to the legislation coming into force. In addition,

---

[56] The key duty to appoint a manager is discussed at paras 6.5 – 6.15 below. The duty will not start to run until an appointed day to be fixed after the legislation is in force. This will give an association for a tenement which exists at that time a grace period in which to organise their affairs before the duty becomes enforceable.

[57] Contrast, for example, the survey of tenement title deeds carried out in preparation of our Discussion Paper: see Appendix B.

our draft Bill provides an alternative mechanism for dealing with flat owner apathy in relation to appointment of an association manager by way of application to the Tribunal for appointment of a remedial manager. It may also be the case that the government wish to carry out further consultation with relevant stakeholder groups as to whether a statutory novation process would be desirable in this context as work on tenement law reform continues. For the reasons outlined above, however, we make no recommendation to that effect here.

Association managers and the Property Factors (Scotland) Act 2011

5.57 Clarity is required in the legislation about the interaction between the role of the association manager and the Property Factors (Scotland) Act 2011. We provided an overview of the operation of the 2011 Act in Chapter 4. In short, a person who, in the course of that person's business, manages the common parts of land owned by at least two other persons, and used to any extent for residential purposes, is a property factor.[58] We noted in Chapter 4 that, under current law, a flat owner who takes on a "self-factoring" role for their tenement will usually not be a "property factor" for the purposes of the 2011 Act since they are not generally acting in the course of their business.

Should all association managers be regulated under the 2011 Act?

5.58 There will almost invariably be parts of a tenement which are "common parts" and used for residential purposes. Parts of the tenement in common ownership will be association property, and management of those parts will therefore be a central aspect of the association manager's role. A person who carries out the role of association manager in the course of their business will therefore be a "property factor" in the meaning of the 2011 Act, and will be subject to that regulatory regime. Similarly, a local authority or housing association which takes on the association manager role will be a property factor in the meaning of the Act whether they own flats in the tenement or not.

5.59 It may be the case, however, that a person takes on the role of association manager otherwise than in the course of their business. This would happen, most obviously, where one of the flat owners in the tenement is willing to act as the manager on a voluntary basis, much as flat owners sometimes "self-factor" under current law. "Self-factors" who act on a voluntary basis are not caught by the 2011 Act definition.

5.60 In the Discussion Paper, we asked whether an association manager should always have to register as a factor and otherwise comply with the requirements of the 2011 Act, even where "self-managing".[59] We noted that imposing this requirement might be considered necessary to provide a level of "quality control" in respect of manager appointments, bearing in mind the potential complexity of the role. Our provisional view, however, was that no such requirement should be imposed. We suggested that it should remain possible for "self-managers" or others acting on a voluntary basis to take on the role without regulation under the 2011 Act. This would retain the freedom that owners have to appoint a (non-regulated) "self-factor" under the current law, and mirror the position under the DMS.

5.61 Of the 37 consultees who responded to this question, 27 agreed with our provisional view. Professor Kenneth Reid summarised a common opinion amongst these respondents in

[58] Property Factors (Scotland) Act 2011 s 2(1).
[59] Discussion Paper, paras 9.12 – 9.19.

saying that flat owners should be free to waive their entitlement to the protection offered by the 2011 Act regime by appointing a non-commercial manager if they so wished. It was suggested that such arrangements may be cheaper for flat owners, since professional fees would not be incurred. In policy terms, we might also suggest that legislation which encourages owners to learn to self-manage is likely to produce more sustainable results for tenement management in the long term. Requiring owners to comply with the 2011 Act regime even where not acting commercially is likely to be a significant disincentive to self-management.

5.62 The Discussion Paper also asked whether eligibility to act as a manager should be subject to any requirements other than compliance with the 2011 Act regime. Of the 33 consultees who responded to this question, 18 thought no further requirements were necessary. However, four of these 18 consultees, all from the professional property management sector, suggested that although no qualifications should be required at the advent of the legislation, in time a national training programme should be developed which association managers could be encouraged or eventually required to attend. This point echoes a broader concern amongst consultees to ensure appropriate support in the form of training is available to flat owners to acclimatise to the new legislation as discussed in Chapter 2.[60] Amongst the 11 respondents who suggested further requirements *were* necessary in relation to eligibility to act as an association manager, there was little consensus as to what those requirements should be. Suggestions tended to overlap to some extent with the requirements of the 2011 Act, and similar arguments against their inclusion apply here.

5.63 Following from the above, we do not recommend the introduction of any eligibility criteria for appointment as an association manager, or any changes to the definition of a property factor in the 2011 Act to reflect the introduction of the owners' association regime. It follows that:

- Any person may be appointed the association manager where they are willing to do so, and where members take an association decision to that effect.[61]

- Where a person acts as a manager in the course of their business – whether that business is focused on property management or on, for example, architecture, surveying or legal services – that person will be a "property factor" within the meaning of the 2011 Act. They will therefore be required to comply with its terms, including through entry on the Scottish Property Factor Register.

- Where a local authority or housing association is appointed the manager, they will be a "property factor" in the meaning of the 2011 Act and be required to comply with its terms. This will be the case whether or not they own a flat in the tenement.

- Where a person who is not a local authority or housing association acts as the manager otherwise than in the course of their business, they will not meet the definition of "property factor" within the 2011 Act, and will therefore not be required to comply with its terms. We would anticipate that such a person will usually be an

[60] See paras 2.25 – 2.29 above.
[61] Decision making processes are considered in Chapter 9 below. We note for completeness that where the court appoints a remedial manager, that person must either be an owner of a flat in the tenement, or else entered on the Scottish Property Factor Register: see paras 7.10 – 7.15 below.

owner of a flat in the tenement. However, in principle, any person could take on this role on a voluntary basis where they are willing to do so, and where members take an association decision to that effect.[62]

Small payments to self-managers

5.64 One further issue to which we gave thought in the DP concerned the extent of payment an association manager might receive before they are considered to be acting "in the course of their business".[63] We noted that, under current law, self-factors sometimes receive small forms of benefit from their neighbours for taking on the role, which might be in the form of direct payments or might be benefits in kind. Our provisional view was that, where a person who owns a flat in the tenement is appointed manager, they should not be considered to be acting "in the course of their business" within the meaning of the Property Factors (Scotland) Act 2011 solely because they are in receipt of a moderate benefit for that work**.** We asked consultees for their views. Nineteen out of 28 consultees agreed with our position, whilst six disagreed.[64]

5.65 We went on to ask whether consultees had comments on how "moderate benefit" should be defined in this context. We received 19 responses, amongst which there was little consensus.

- Five suggested there was no need for a definition;
- Five suggested broadly that national minimum wage (or living wage) should be allowed in respect of time spent on management duties;
- Three suggested that expenses reasonably incurred should be recoverable;
- Six suggested smaller amounts – an honorarium, a small flat fee or a percentage of expenses incurred.

5.66 We were surprised by responses suggesting recovery of expenses incurred by the manager should be the only benefit allowed. It seems to us unreasonable to suggest that this should be considered any kind of benefit at all. Beyond that, the question of how best to capture the notion of "moderate benefit" proved challenging. Ideally, legislation would set out a test which provides enough certainty for an association manager to be confident that any benefit they are receiving does not tip them into the definition of "acting in the course of their business". In principle, they will be committing an offence by doing so without being entered on the Scottish Property Factor Register. However, the certainty desired here runs counter to the flexibility required for the legislation to deal with the variety of arrangements which associations for different tenements might put in place. For example, the certainty of a test based on receipt of the national living wage, as suggested by some consultees, is appealing, but in tenements where the management work is complex and many hours of work are

[62] In early consultation for the project, we heard an example of a small tenement in Edinburgh where the daughter of an elderly resident had effectively taken on a factoring role for the building on an unpaid basis as a way to assist her mother.
[63] Discussion Paper, paras 9.20 – 9.24.
[64] The remaining three consultees gave answers which were neutral or unclear.

required each month, it might be difficult to argue that payment at that level does not amount to the manager acting in the course of their business.

5.67 Against that background, we have not felt able to go any further in the draft Bill than provision to the effect that a manager will not be taken to be acting in the course of their business only because they are remunerated.

5.68 We recommend:

30. Where a member of the association is appointed to be the manager of the association, they should not be considered to be acting "in the course of their business" within the meaning of section 2(1) of the Property Factors (Scotland) Act 2011 only because they are remunerated for that work.

(Property Factors (Scotland) Act 2011, s 2(2A)-(2B), inserted by Draft Bill, Schedule para 25(1) & (2)(b))

Membership of the owners' association

Owners

5.69 A body corporate requires members. In the case of the owners' association, the members are obviously intended to be the owners of the flats in the relevant tenement. In the Discussion Paper, we suggested the legislation should provide that, once the association has been established, the owners of flats in the related tenement are automatically members.[65] Any person who owns a flat at the time the association is established, or who becomes the owner of a flat subsequently, will accordingly be a member. Where a person ceases to be an owner of a flat in the tenement, for example by selling their flat, they will cease to be a member.[66] Where a flat is co-owned by two or more people, for example a married couple, each co-owner will be a member.[67]

5.70 We noted that the term "owner" is defined in section 28 of the 2004 Act, with a definition in similar terms given in the DMS Order art 18. An "owner" is:

- A person with registered title to a flat in the tenement;
- A person who has right to a flat in the tenement but has not registered their title,[68] sometimes referred to as an "unregistered holder";[69]
- A heritable creditor in lawful possession of a flat in the tenement.[70]

---

[65] Discussion Paper, paras 6.22 – 6.23.
[66] We consider the liability of an owner and their successor for certain costs under the 2004 Act in Chapter 11 below: see the discussion at paras 11.19 – 11.20 and our recommendation at para 11.23.
[67] We consider exercise of the right to vote and liability for costs in relation to co-owned flats below: see paras 9.19 – 9.21 and para 10.5.
[68] There are various situations in which a person may not register title despite being in a position to do so, for example if they have been assumed as a trustee in a continuing trust, or they are dealing with the property as a trustee in sequestration. Further discussion can be found in our Report on Real Burdens at paras 13.3 – 13.5.
[69] Land Registration etc. (Scotland) Act 2012 s 101.
[70] A heritable creditor, sometimes colloquially referred to as a "mortgage holder", may take possession of a property as a precursor to selling it where the debtor is in default on their loan repayments: see generally the Conveyancing and Feudal Reform (Scotland) Act 1970 Schedule 3 para 10.

5.71 Of the 37 consultees who responded to our question on this issue, 31 agreed with our preliminary views on membership. Accordingly, we recommend:

31. The members of the association should be the owners, for the time being, of each flat in the tenement to which the association relates.

(2004 Act, s 3A(4) and Schedule A1 para 2, inserted by Draft Bill, s 1)[71]

Non-owner occupiers

5.72 The Discussion Paper considered whether occupiers of tenement flats who are not owners, such as residential or commercial tenants, or a spouse or civil partner of a flat owner,[72] should also be members of the association.[73] It was recognised that tenement maintenance decisions may impact significantly on such persons. Where the tenement is poorly maintained, occupiers may experience repercussions in terms of damp or leaks, for example. Where maintenance works are undertaken, occupiers may experience disruption or even require to be decanted from their properties for a period of time. Where maintenance costs are incurred by a landlord, this may ultimately result in the landlord increasing the rent payable under the lease when possible to do so.

5.73 Our preliminary view was that such occupiers should not be association members. As under current law,[74] our proposed legislation links the power to make decisions in respect of maintenance with liability for the costs incurred.[75] If decision making power was also to be conferred on occupiers who are not owners, it would represent a significant dilution of the existing rights of owners. This would be difficult to justify, particularly if such occupiers were not also subject to an equivalent share of liability for costs. There might also be a broader disruption to the law of leases if tenants in tenement flats were given power to participate in decision making in relation to the property, whereas tenants of other types of property were not.

5.74 We asked consultees for their views. Of the 33 consultees who responded, 27 agreed with our preliminary view that such occupiers should not be members of the association. There were no responses which disagreed. Nevertheless, many consultees voiced concern about the need for some mechanism by which the voice of occupiers could be heard in relation to maintenance. For example, Ailsa Macfarlane suggested non-owner occupiers should have the right to be informed of decisions impacting them, and Dowanhill, Hyndland and Kelvinside Community Council thought that social landlords might be placed under a duty to consult with tenants in specified circumstances. Others suggested that tenants should have the right to attend meetings of the association or to otherwise input into association decisions albeit not to vote on them. One suggested that the association should be under a duty to have regard to non-owner occupiers' representations when taking decisions. One suggested that a non-

---

[71] The definition of "owner" in section 28 of the 2004 Act will apply to this provision, with the effect that any unregistered holder or heritable creditor in possession of a flat in the tenement will be a member of the association.
[72] Occupancy rights are conferred on the spouse of a flat owner by section 1 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, and on the civil partner of a flat owner by section 101 of the Civil Partnership Act 2004.
[73] Discussion Paper, paras 6.24 – 6.28.
[74] Under the TMS, an owner who does not share liability for the costs of a scheme decision is not allocated a vote in respect of that decision: TMS rule 2.3.
[75] The relationship between ownership, voting rights and liability for costs is discussed at paras 9.4 – 9.10 below.

owner who was legally responsible for repairs and maintenance might apply to the court to be a member in place of a non-liable owner in some circumstances.

5.75 We recognise the strong concerns expressed by some consultees about the need for greater protection and participation of non-owner occupiers in tenement management and maintenance. Ultimately, however, we think that any provision (for example, on taking into account the views of an occupier, or reporting to the occupier about decisions made by the association) would be more appropriately made within relevant tenancy legislation or guidance. Government may wish to consider whether changes, for example to the Model Tenancy Agreement for private residential tenancies,[76] may be appropriate here. However, we do not recommend that any specific provision be made in relation to such occupiers in our draft Bill.

List of members

5.76 The association will not be able to function effectively unless the manager is able to contact members. In some cases, it may also be necessary for members to contact one another. An up-to-date list of the names and contact details of members is therefore essential. In the Discussion Paper, drawing on provision in the DMS,[77] we suggested that the association manager should be under a duty to keep a record of the names and contact details of each owner.[78] Members should be under a counterpart duty to provide the manager with these details. We suggested members should be required to provide this information within three months of the appointment of the first manager, and thereafter to inform the manager of any changes to these details within one month of the changes occurring. Where a member intends to sell or otherwise dispose of their flat, we suggested, as in the DMS,[79] that they should be under a duty to notify the manager of any change to their contact details which will result, the name and contact details of the new owner, the name and address of the solicitor acting for the new owner and the date on which the new owner will be entitled to take entry. We suggested that where a member fails to provide their contact details, the manager should have power to seek it elsewhere (for example, from the Land Register or the Landlord Register) and impose any associated cost directly on the member in question.

5.77 We also suggested that any member of the association should be entitled to obtain this information from the manager where necessary in connection with management and maintenance of the building or the operation of the association, as under DMS rule 4.8.[80]

---

[76] The current version of the Model Tenancy Agreement available for use in connection with tenancies granted under the Private Housing (Tenancies) (Scotland) Act 2016 can be found at https://www.gov.scot/publications/private-residential-tenancy-model-agreement/pages/3/.

[77] DMS rule 8(h).

[78] Discussion Paper, paras 6.37 – 6.38. The DMS requires the manager to maintain a list of names and addresses of members. In a tenement owners' association, the address of a member will not necessarily be the flat which they own in the tenement: some members will be companies with a registered company address, and even members who are human beings may live elsewhere. Legislation which requires a member who is a human being to share their home address may give rise to difficulties under article 8 of the ECHR (the right to respect for private and family life, home and correspondence) where a less intrusive approach can secure the same outcome (see *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29 at para 90). In practice, the manager or members of the association will be concerned chiefly with a mechanism by which other members can be contacted, rather than requiring their home addresses as such. Accordingly, we consider the requirement to provide the manager with contact details, rather than an address, to be more appropriate for the owners' association legislation.

[79] DMS rule 4.9.

[80] See also our Report on Real Burdens at para 8.78.

5.78 We asked consultees for their views. Thirty-five consultees responded.[81] Thirty-two agreed that the manager should be under a duty to maintain a list of names and contact details of the members of the association. Thirty-two also agreed that members should be under a duty to provide these details to the manager within one month of them changing (with four consultees suggesting this time limit should apply equally in relation to the first manager and subsequent managers). Twenty-seven agreed that members should be under a duty to provide information to the manager as outlined above on disposal of their property. Twenty-six agreed that members should be entitled to obtain details of their fellow members in the circumstances outlined above.

5.79 Consultees who disagreed with the proposals (and some who agreed) generally flagged data protection issues as a concern. The Data Protection Act 2018 and the UK General Data Protection Regulation (UK GDPR) provide the framework for the law in this area. Where flat owners are human beings, their names and contact details will be "personal data" in the meaning of the data protection legislation,[82] and the storing and sharing of those details by the manager will be considered "processing" of that data,[83] at least where the manager is a legal person and/or is acting commercially.[84] Data must be processed in compliance with the principles set out in article 5 of the UK GDPR. The first of these principles is that the data must be processed "lawfully". A legislative obligation on the manager to maintain the list of contact details will provide that lawful basis for processing. Compliance with the remaining principles, including ensuring that data is processed securely and kept for no longer than is necessary, will be matters for the manager. We recognise that the data protection framework may not be straightforward to navigate, particularly for non-professionals. In Chapter 2, we urged the government to consider ways of building capacity amongst flat owners to comply with the legislation on owners' associations.[85] The production of simple guidance on how owners' names and contact details should be handled in line with data protection principles might be one way of addressing that need. Commercial factors have an obligation to comply with relevant data protection principles under the Code of Conduct for Property Factors,[86] so it may reasonable to assume that capacity already exists within this sector to manage a list of members' names and contact details in line with data protection rules.

5.80 Taking into account the support of a majority of consultees in relation to our provisional proposals on this issue, the draft Bill includes provision to that effect. We note the addition of a requirement that the contact details provided by members should include details of how a member may be contacted in writing, which will be necessary in order for the manager to circulate, for example, the draft annual budget each year.

---

[81] Only 34 responses were received to the element of the question dealing with the duty on members to provide information to the manager on disposal of their flat; Discussion Paper, para 6.39.
[82] Data Protection Act 2018 s 3(2) and (3).
[83] Data Protection Act 2018 s 3(4).
[84] UK GDPR art 2(2)(a) provides that where an individual processes data "in the course of purely personal or household activity", the regulation does not apply. Where the association manager is a human being who owns a flat in the tenement (in other words, a "self-manager"), an argument could be made that maintaining the list of members' details is a purely household activity, since it is a necessary part of managing the self-manager's household as part of the wider building. Whether this argument is correct is difficult to say with certainty.
[85] See paras 2.25 – 2.29 above.
[86] See section 2.23 of the Code. The current version of the Code was published in 2021 and is available at https://www.gov.scot/publications/property-factors-scotland-act-2011-code-conduct-property-factors-2/pages/1/.

5.81 We recommend:

32. (a) The manager should be under a duty to maintain a record of names and contact details of members of the association.

(b) Members of the association should be under a duty to provide the first manager with their name and contact details within one month of the manager's appointment, and to inform the manager of any changes to their name and/or contact details within one month of their occurrence.

(c) To the extent that it is known to them, a member, on disposal of their flat, should be obliged to notify the manager of: (i) any change to their contact details; (ii) the name and contact details of the new owner; (iii) the name and address of the agent acting for the new owner; (iv) the date on which the new owner will be entitled to take entry.

(d) A member of the association should be entitled to obtain the name and contact details of another member or members where necessary in connection with the management and maintenance of the building or the operation of the association.

(e) A member's contact details must include details of how that person may be contacted in writing.

(2004 Act, s 3A(4) and Schedule A1 para 22 and 24 inserted by Draft Bill, s 1)

Emergency work

5.82 Under the new framework for maintenance that will result from the introduction of owners' associations,[87] maintenance of association property will usually be carried out by the association itself. Owners retain the power to carry out work to property which they own. They may recoup the costs of such work where that property falls within the definition of association property, and where the work was required for compliance with the duty to maintain set out in section 8 of the 2004 Act.[88] However, in cases of emergency, it seems preferable for the power to instruct work to association property to be available to any flat owner who is in a position to do so.

5.83 In the Discussion Paper,[89] we suggested that owners should have the power to carry out emergency work to association property, mirroring the position in relation to "scheme property" under the TMS.[90] Where the terminology of the TMS rule is adapted for the owners' association legislation, "emergency work" can be defined as:

> "work which, before an association decision can be obtained, requires to be carried out to association property –
>
> (a) to prevent damage to any part of the tenement; or

[87] See generally paras 3.2 – 3.19 above for discussion.
[88] See paras 3.21 – 3.26 and 3.32 – 3.39 above.
[89] Discussion Paper, para 8.79.
[90] TMS rule 7.

(b) in the interests of health and safety

5.84 All 34 consultees who responded to this question agreed that members should have power to carry out emergency work, with 32 out of 35 consultees agreeing that emergency work should be defined as under the TMS. Under the TMS, the costs of emergency work can be recouped from other owners liable for the relevant works. In the same way, we think it is appropriate for the association to have a duty to reimburse an owner for costs incurred carrying out emergency work. That payment can, in turn, be recouped from owner in line with the association rules on liability for association costs.[91] Under the TMS, this rule can be modified or overridden by conditions in the tenement titles, and we consider the same approach to be appropriate within the owners' association legislation.

5.85 We accordingly recommend:

33. In the default rules on operation of the association:

(a) Members should have the power to carry out emergency work to association property;

(b) Emergency work should be defined as per rule 7.3 of the TMS;

(c) The association should have a duty to reimburse the costs of emergency work.

(2004 Act, s 3D(1) and Schedule A2 para 25, inserted by Draft Bill, s 2 and 2004 Act, s 29 amended by Draft Bill, Schedule para 20(b))

[91] Default rules on liability for association costs are discussed in Chapter 10.

Chapter 6 Key duties

Introduction

6.1 In Chapter 4, we explained how the provisions of the draft Bill establish an owners' association for each tenement.[1] Creating the association by way of legislation avoids the need for owners to undertake a potentially burdensome conveyancing or registration process. However, it gives rise to the risk that owners will simply not engage with the association at all, leaving it to exist "on paper" without operating in practice. To mitigate that risk, we recommend that the association should be subject to four key duties intended to ensure that it functions at a basic level. The duties in question are: to appoint a manager; to hold an annual meeting of members; to approve an annual budget; and to apply for a note of "tenement identification information" to be entered on the property registers. These duties align with the basic functions of the association as envisaged by the Working Group.

6.2 In this Chapter, we explain the four key duties. We recommend that the application of these duties should be modified in relation to small tenements and tenements in single ownership. We consider how the duties might be met in tenements managed as part of wider development. In the next Chapter, we recommend that these duties should be enforceable not only by owners of flats in the tenement, but by any person with an interest in the effective operation of the owners' association. We suggest that enforcement should be carried out by way of an application to the First-tier Tribunal for appointment of a remedial manager to the association.

6.3 The existence of key duties were considered in Chapter 4 of the Discussion Paper. The question of whether the application of these duties should be modified in relation to certain categories of tenement was considered in Chapter 5.

Key duties

6.4 The Working Group intended the owners' association to be at the centre of a more systematic approach to maintenance of tenements. Rather than work being undertaken by owners on an issue-by-issue basis, the association would provide the framework for an annual repair plan and budget, to be debated and approved at an annual meeting of owners, and put into action by a manager who would also have power to enforce payment by recalcitrant owners of their share of costs.[2] In the Discussion Paper, this model of an effective owners' association served as the basis on which we proposed a set of four key legislative duties.[3] In combination, these duties are intended to ensure the basic operation of the association, whilst maintaining the freedom of flat owners to the greatest extent possible within the limits of the Working Group's recommendation.

---

[1] See paras 4.22 – 4.32 above. We recommend that an association should not be established where a tenement is subject to a DMS.
[2] Working Group on the Maintenance of Tenement Scheme Property, *Final Recommendations Report* (2019), available at https://www.scotlawcom.gov.uk/index.php/download_file/view/2306/1687/, p 6.
[3] Discussion Paper, paras 4.3 – 4.19.

Duty to appoint a manager

6.5 First, we suggested that the owners' association should have a duty to appoint a manager.[4] The manager will be the person tasked with carrying out the work of the association for the benefit of members on a day-to-day basis, as outlined in Chapter 5. Without a manager, it would therefore be almost impossible for the association to function. We suggested that the duty to appoint a manager should first arise when the association is established.[5] The duty would then apply at any time when the position of manager became vacant, for example where the manager resigns or is dismissed under the terms of their contract with the association, or where the manager dies.[6] As discussed in Chapter 5, members may appoint a manager by taking an association decision in line with the rules on decision making for their individual association.[7]

6.6 We suggested that legislation should set a time limit within which a manager must be appointed in the interests of certainty. Six months seemed an appropriate period, taking into account the responsibility of the manager to arrange a members' meeting at least once every 12 months, as discussed below.[8]

6.7 Our consultation question in relation to this proposed duty received 38 responses, amongst which 32 supported the imposition of the duty. Only one consultee disagreed that the duty to appoint a manager should be imposed.

6.8 Although consultees were supportive of the inclusion of this duty within the legislative scheme, it was noted that associations may struggle to comply with the six-month time limit for appointment of their first manager. Thousands of associations will be established on the date when the legislation is first enacted. For bodies who own a large number of flats such as local authorities and housing associations, the work of engaging in discussions with other flat owners in every relevant tenement about the appointment of an initial manager will be considerable. It might be expected that professional property managers will also be dealing with a volume of work which is significantly higher than normal at that point in time. More broadly, flat owners may need a grace period to "get to grips" with the new legislation. For tenements which are constructed after the legislation is in force, the concerns are slightly different. Under our recommendations earlier, the owners' association for such a tenement will be established as and when the tenement first exists, but at that time, most or all of the flats in the building will still belong to the developer.[9] A grace period is needed to recognise the likelihood that membership of the association will change rapidly in the first months of the tenement's existence, and to allow new flat owners time to organise themselves.

6.9 We agree that these concerns are valid, and consider it justifiable both when the legislation is first brought into force, and when new tenements are constructed at a later stage,

---

[4] Discussion Paper, paras 4.13 – 4.14.
[5] An owners' association will be established for tenements already in existence when this legislation is brought into force or established for tenements constructed after that time at the point when the tenement first exists. See the discussion at paras 4.22 – 4.32 above.
[6] We consider the circumstances which will terminate the manager's appointment at paras 5.48 – 5.50 above.
[7] Appointing a manager is discussed at paras 5.7 – 5.15 above. The default association rules on decision making are discussed in Chapter 9 below.
[8] Under the default association rules we recommend in Chapter 9, the manager will be under a duty to arrange the annual meeting, and owners will have the power to do so where the manager fails in that duty or where there is no manager: see paras 9.40 – 9.44 below.
[9] See paras 4.26 - 4.31.

to allow flat owners a grace period in which to arrange for appointment of a first manager. For tenements which are currently in existence, the Bill addresses this through the use of an "appointed day" mechanism. For tenements constructed after the legislation is in force, we suggest the time limit for appointment of a first manager should be 18 months, rather than the usual 6 months.

6.10 To explain further, where a tenement exists when the owners' association legislation is brought into force, the association will be established on that day.[10] Once established, it will be possible for an association to appoint a manager as and when an association decision is taken to that effect, and practically speaking, this is one of the first steps owners should take. However, the *duty* on these associations to appoint a manager will not start to run until the "appointed day", which is a date after the legislation comes into force, and which can be fixed by Scottish Ministers by way of delegated legislation. This will allow the government to bring the duty into force only once the initial volume of work caused by thousands of associations all being established on the same date has abated, and flat owners have been given sufficient time to learn about the new legislation.[11]

6.11 For tenements constructed after the appointed day, a different approach is necessary. Earlier, we recommended that an association should be established for such tenements on the date on which a tenement as defined by section 26 of the 2004 Act first exists. However, the duty to appoint a manager, alongside the other key duties we recommend, will not serve a purpose until the tenement is occupied. Accordingly, we suggest that the duty to appoint a manager should not apply until the first day on which occupation of the building is possible in terms of relevant planning law or building regulations. As explained in Chapter 4,[12] a tenement may be lawfully occupied where a certificate of temporary occupation is issued in respect of it by the relevant building authority.[13] Where no such certificate is applied for or issued, which will more commonly be the case where construction of the tenement is a standalone project rather than part of a wider development, a tenement may be lawfully occupied where a completion certificate for the building is accepted by the relevant authority.[14]

6.12 Although it is difficult to imagine how this would occur in practice, provision should also be made for the circumstance in which a tenement constructed after the legislation is in force is occupied, but no record can be found of a certificate of temporary occupation or a completion certificate.[15] We recommend the Tribunal should have power to determine the day on which the tenement was completed on application by any interested party in such circumstances.

6.13 Although the duty to appoint a manager will apply from the first day on which the tenement can be occupied, as explained above, the flats in the tenement cannot lawfully be sold or tenanted until that date. During the following months, it is accordingly likely that many

---

[10] See paras 4.22 – 4.32 above.
[11] The duty will also start to run on the appointed day for an association established in relation to a "new" tenement (meaning a tenement which comes into existence after the legislation is in force) if the appointed day is later than the first day on which that tenement can be occupied.
[12] See para 4.24 above.
[13] This is possible under the Building (Scotland) Act 2003 s 21.
[14] Building (Scotland) Act 2003 s 17. This Act requires that where a building has been newly constructed (or converted), a completion certificate must be submitted to confirm this has been done in accordance with building regulations. It is an offence to occupy a building before the completion certificate has been approved (save for where temporary occupation is approved under s 21(3) of the Act).
[15] As noted previously, it is an offence under s 21(4) of the Building (Scotland) Act 2003 to occupy a building without either approval of a completion certificate or permission for temporary occupation.

or all the flats in the tenement will be sold by the developer, and leases of the flats may also be granted. The time period for appointment of a first manager to the association should take account of the likelihood of such changes during this initial period of the tenement's existence. Accordingly, we recommend that an owners' association established after the appointed day should be required to appoint its first manager within 18 months of the first day on which that tenement can be occupied.

6.14 We note that an association may also come into existence as the result of the disapplication of the DMS from a tenement.[16] In these circumstances, the duty to appoint a manager will start to run from the date on which the association is established (in other words, the date on which the DMS is disapplied), and the usual six-moth time period for appointment of a manager will apply. This reflects the fact that associations established in this way will not be caught up in the "rush" of new associations established when the legislation is first brought into force, nor will such associations have to deal with changes resulting from new flats being sold which will occur in a newly constructed tenement. In addition, flat owners in tenements formerly subject to the DMS will necessarily have been acting collectively already in order to register a deed of disapplication of the DMS. There seems no justification for a "grace period" in relation to compliance with the key duties in such circumstances.

6.15 Once an association has appointed its first manager, it will have a duty to appoint any subsequent manager within six months of that position becoming vacant. Accordingly, once the "set-up" phase for new associations has passed, enforcement action will be possible at any time an association goes without a manager for more than six months.

6.16 We recommend:

34. (a) An owners' association established prior to the appointed day must appoint its first manager within six months of the appointed day;

(b) An owners' association for a tenement which comes into existence after the appointed day must appoint its first manager within 18 months of the first day on which the tenement can be occupied;

(c) An owners' association for a tenement which comes into existence following disapplication of the DMS from the tenement must appoint its first manager within six months of the disapplication of the DMS;

(d) An owner's association must appoint its second and any subsequent manager within six months of the position becoming vacant.

(2004 Act, s 3A(4) and Schedule A1 para 8(1)(a), 9(1)-(2), and 13, inserted by Draft Bill, s 1)

[16] See para 4.32 above.

Duty to hold annual general meeting

6.17 Second, we suggested that the association should have a duty to hold an annual general meeting of members.[17] The absence of any mechanism within the existing law to encourage (or compel) flat owners to coordinate with one another on maintenance of the building positions Scotland as an outlier internationally.[18] It has been highlighted as a significant disadvantage of our legislation in written commentary on tenement law.[19] The requirement to hold an annual meeting is the key mechanism within the new legislation supporting owners to act as a collective, in line with the intention of the Working Group. The process by which a meeting can be called will be set out in the association rules. Under the default rules we recommend later in this Report, the manager will be under a duty to arrange the annual meeting, and owners will have power to do so where the manager fails in that duty or where there is no manager.[20]

6.18 Again, we suggested that legislation should set a time limit in relation to the holding of meetings. Following the DMS,[21] we proposed that the first annual meeting should be held within 12 months of the establishment of the association, after which no more than 15 months should be allowed to elapse between meetings.[22]

6.19 Thirty-eight consultees responded to our question on this duty. Thirty-three indicated general support, though some suggested changes to the time limits – for example, that the duty should simply require one meeting every calendar year. Such comments were in the minority and did not suggest any particular consensus in favour of an alternative to the time limit we proposed. Only two consultees disagreed with the imposition of the duty to hold an annual meeting. The staffing and resource challenges for local authorities and similar bodies in attending many annual meetings over the course of a year were highlighted in Chapter 2,[23] and we again urge the government to give consideration to that matter.

6.20 As with the duty to appoint a manager, we suggest the association should be under a duty to hold its first annual general meeting within one year of the appointed day for existing tenements, within two years of the first day on which the tenement can be occupied for "new" tenements, or within one year of the day on which the association is established following disapplication of the DMS from the tenement.

6.21 We recommend:

35. (a) An owners' association established prior to the appointed day must hold its first annual meeting within 12 months of the appointed day;

---

[17] Discussion Paper, paras 4.16 – 4.17.
[18] See generally C G Van der Merwe, "Apartment Ownership" in K Zweigert (ed), *International Encyclopaedia of Comparative Law* (1992) Volume VI: Property and Trusts, paras 333 and 360.
[19] D Weatherall, F McCarthy and S Bright, "Property law as a barrier to energy upgrades in multi-owned properties: insights from a study of England and Scotland" (2018) 11(7) Energy Efficiency 1641 at 1650.
[20] See paras 9.40 – 9.44 below.
[21] DMS rules 9.1 and 9.2.
[22] These rules followed equivalent provision for annual general meetings of shareholders in company law: see Companies Act 2006 s 336.
[23] See para 2.21 above.

(b) An owners' association for a tenement which comes into existence after the appointed day must hold its first annual meeting within 24 months of the first day on which the tenement can be occupied;

(c) An owners' association for a tenement which comes into existence following disapplication of the DMS from the tenement must hold its first annual meeting within 12 months of the disapplication of the DMS;

(d) An owner's association must hold an annual meeting in every fifteen months after the first annual meeting.

(2004 Act, s 3A(4) and Schedule A1 para 8(1)(b), 10, and 13, inserted by Draft Bill, s 1)

Duty to approve an annual budget

6.22 Third, we suggested that the association should have a duty to approve an annual budget dealing with projected maintenance works in the coming year.[24] The introduction of a budgeting system is key to the systematic approach to maintenance the owners' association framework is intended to foster, in line with the intention of the Working Group. It is anticipated that budget approval would usually be a key item of business for the annual meeting of members. However, it would also be possible for approval to be obtained through an informal consultation process with members outwith a meeting where that is permitted by the association rules. Provision for a process of that kind is included in the default rules we recommend later in this Report.[25] In Chapter 11, we recommend that where approval for an annual budget cannot be obtained from members, the Tribunal should have power to approve a minimum budget covering only the work required that year to meet the duty on owners to maintain the tenement.[26] The manager may accordingly ensure the compliance of the association with the budget duty even in the face of an apathetic membership through an application to the Tribunal.

6.23 Thirty-nine consultees responded to our question in relation to this proposed duty. Thirty-three indicated general support, though several suggested further prescription was required in relation to the content of the budget. We set out our recommendations in that respect in Chapter 10.[27] Some consultees suggested an explicit connection should be made between the annual budget and the five-yearly tenement condition inspections recommended by the Working Group,[28] for example to the effect that the inspection report would dictate the content of the budget year-on-year. As we note in Chapter 2, the government may wish to take these suggestions into account as it moves forward with work to implement the five-yearly inspection recommendation.[29]

6.24 Only three consultees disagreed with the proposed budget duty, some suggesting it would impose unnecessary bureaucracy. The resource implications for local authorities and

---

[24] Discussion Paper, para 4.18.
[25] See paras 9.57 – 9.59 below.
[26] See paras 11.27 – 11.28 below. The duty on owners to maintain the parts of the tenement which they own is discussed at paras 3.21 – 3.30 above.
[27] See paras 10.15 – 10.23 below.
[28] The Working Group's recommendations are outlined in the discussion at paras 1.8 – 1.10 above.
[29] See paras 2.14 – 2.17 above.

similar bodies in connection with the duty were again noted, and we again urge the government to take this matter into consideration.

6.25 Again, we suggest that the association should be under a duty to approve its first budget within one year of the appointed day for existing tenements, within two years of the first day on which the tenement can be occupied for "new" tenements, or within one year of the day on which the association is established following disapplication of the DMS from the tenement. Once an association has approved its first budget, it will be required to approve a budget for every financial year thereafter.

6.26 We recommend:

36. (a) An owners' association should be under a duty to approve a budget in respect of association costs for each financial year;

(b) An owners' association established prior to the appointed day must approve its first budget within 12 months of the appointed day;

(c) An owners' association for a tenement which comes into existence after the appointed day must approve its first budget within 24 months of the first day on which the tenement can be occupied;

(d) An owners' association for a tenement which comes into existence following disapplication of the DMS from the tenement must approve its first budget within 12 months of the disapplication of the DMS.

(2004 Act, s 3A(4) and Schedule A1 para 8(1)(c) & (2), and 13, inserted by Draft Bill, s 1)

Duty to apply for tenement identification information to be noted or recorded

6.27 Finally, we suggested that the association should have a duty to comply with any relevant registration requirement.[30] Thirty-two out of 39 consultees who responded to this question offered support for this proposal, with only one consultee disagreeing. We now recommend specifically that the association should be under a duty to apply for a note of "tenement identification details" to be entered against relevant property titles on the Land Register and/or recorded against relevant titles in the Register of Sasines. The application should be made within two years of the appointed day for tenements in existence at that time, within three years of the first day on which the tenement can be occupied for "new" tenements, or within two years of the day on which the association is established following disapplication of the DMS from the tenement.

6.28 The need for this requirement arises from the fact that, under current law, there is no public record of the existence of a tenement in Scotland. The Discussion Paper explained that, although it is possible in principle to identify the extent of a tenement by examining potentially relevant flat titles together with section 26 of the 2004 Act, in practice this process is complex and will usually require professional legal advice.[31] Flat owners will necessarily have obtained

[30] Discussion Paper, para 4.15.
[31] Discussion Paper, paras 5.4 – 5.9.

that advice when acquiring their flat and might be expected to understand the extent of their own tenement. Once owners' associations are in operation, however, it would be impractical to expect any third party seeking to contract with an association to carry out the same research simply to understand who they are dealing with. In addition, some public record will be required of the association's name and address.

6.29 The Discussion Paper suggested four potential options to make identification of the tenement more straightforward in future. We sought consultees' views on which was preferred.[32] The 34 responses we received were not straightforward to analyse, with some consultees expressing multiple preferences and others giving qualified or conditional preferences. Nevertheless, the strongest support by some margin was offered to the approach we had labelled "option 2(a)", namely entry by the association of relevant details in the Land Register within a short period after its creation.[33] In the Discussion Paper, we suggested that two years may be an appropriate time period for compliance with this duty, and consultees generally agreed. In light of consultee support for this option, and with valuable assistance from colleagues at Registers of Scotland, we have developed the approach below.

6.30 Owners' associations will be under a duty to apply for a note of tenement identification information to be entered against relevant titles in the Land Register or recorded against relevant titles in the Register of Sasines. The Bill provides for a new section 64A to be entered into the Land Registration etc (Scotland) Act 2012 to set out the details of this process. "Tenement identification information" means the name of the owners' association, the address of the tenement building, the address of each flat in the tenement, the title sheet number for each property in the Land Register which forms part of the tenement and the address in the Register of Sasines against which title is recorded for any property which forms part of the tenement.[34] The "relevant titles" against which the information must be entered are the titles to every property which forms part of the tenement to which the association relates.

6.31 An application for a note of tenement identification information will require to be accompanied by payment of the relevant fee. By comparison with current application fees, in principle this might be around £80 for each registered title forming part of the tenement. It may be possible to reduce this fee – perhaps so that only one fee is required for information to be entered or recorded against all the relevant titles – assuming a digital application process of the kind outlined below can be developed. These details will be finalised in delegated legislation if and when it becomes clear that owners' association legislation is to be introduced.

6.32 The process by which an application can be made will be set out in land registration rules to be created by Ministers under the powers in sections 115 and 116 of the Land Registration etc (Scotland) Act 2012. It is anticipated that a digital process will be developed

---

[32] Discussion Paper, paras 5.12 – 5.23.

[33] Option 2(a) was supported by 16 consultees. By contrast, option 1 (ask the manager) was supported by five consultees, option 2(b) (a gradual registration requirement) was supported by five consultees and option 3 (wait for a tenement register) was supported by two consultees. Six consultees provided a neutral or unclear response.

[34] A tenement will usually be made up of a number of different registered properties, each with an individual title. In some cases, each flat in the tenement will have its own title. In others, multiple flats may be held on a single title. This will be common, for example, where a local authority or housing association owns multiple flats within the same tenement. Accordingly, the identification information must include both the address of each flat in the tenement, the title numbers of any Land Register properties which make up the tenement and the Sasine addresses of any property forming part of the tenement title to which is recorded in that Register. We understand that most registered properties forming part of a tenement will now be included in the Land Register, but this is not universally the case, so provision is needed in respect of both registers.

which takes the applicant through various prompts designed to support (and compel) applicants to submit the identification information in the appropriate format. For example, the process would include protocols which would connect a postal address ("2f2 12 High Street") with the Unique Property Reference Number[35] for the same flat ("12C High Street"), and flag any discrepancies between the title sheet numbers submitted by the applicant and those which existing data held by Registers of Scotland suggest should relate to the tenement. This digital application approach should streamline the process and help to catch errors in inputting the information.

6.33 On receipt of the application, the Keeper will enter the identification information against the titles to the properties which make up the tenement. The note will be entered in the property section of the title sheet for relevant Land Register properties, and recorded against relevant Sasine titles.

6.34 The entry of tenement identification information against relevant titles is intended to provide a shorthand record of the name and address of the owners' association, and the addresses of the flats which make up the relevant tenement. It is important to note that both the tenement and the owners' association will exist regardless of the entry of identification information. The existence and extent of the tenement is determined by an application of section 26 of the 2004 Act to the tenement titles. The existence, name and address of the owners' association will be determined by the provisions in our draft Bill discussed earlier,[36] if enacted. The entry of identification information on the property registers cannot change or override the effect of these provisions. Accordingly, failure to enter such information, or mistakes in the information which is entered, have no effect on the existence or extent of the tenement, or the existence and identity of the owners' association.

6.35 It follows from the above that the Keeper does not warrant the accuracy of tenement identification information entered in the Land Register under section 73 of the 2012 Act. Since the application for entry of identification information is not an application for registration, section 73 has no effect. Similarly, the omission of identification information or any mistake in the information entered does not give rise to an inaccuracy under section 65 of the 2012 Act. The Keeper accordingly has no obligation to correct such mistakes under the rectification provision in section 80 of the 2012 Act, and changes in the identification information entered cannot give rise to any compensation claim under section 84.

6.36 Although the accuracy of identification information in the Land Register is not warranted, it will obviously be desirable nevertheless to ensure that the information is correct insofar as possible. As noted above, we anticipate the development of an application process which should help to prevent errors in the submission of the relevant information. There may also be a risk of information being fraudulently entered as a mechanism to "prove" the existence of an owners' association which does not actually exist.[37] To address this risk, the Bill includes provision for a criminal offence where, in making an application for the entry of tenement identification information on the registers, a person makes a materially false or

---

[35] This is the government-standard address format for properties in the UK, which is used by Registers of Scotland (but not necessarily by conveyancing solicitors drafting deeds, or by owners). For further information see https://www.gov.uk/government/publications/open-standards-for-government/identifying-property-and-street-information.

[36] See paras 4.22 – 4.39 above.

[37] The non-existent association might then, for example, take out a loan, following which the fraudster who "created" the association by entry of false details on the property registers will disappear.

misleading statement, is reckless as to whether a statement is false or misleading, or intentionally or recklessly fails to disclose information in relation to such an application. This offence, to be set out in a new section 64C of the 2012 Act, is modelled on the offence currently set out in section 112 of the 2012 Act in relation to the making of false or misleading statements in an application for registration. As under that section, it is a defence that the applicant took all reasonable precautions and exercised all due diligence to avoid the commission of the offence. The defence will be established if the accused acted in reliance on information supplied by another person, and did not know or had no reason to suppose that information was false or misleading or that all material information had not been disclosed. As with the offence under section 112, the new offence is punishable on summary conviction to imprisonment not exceeding 12 months or a fine not exceeding the statutory maximum or both, and on indictment to imprisonment not exceeding two years, or to a fine, or both.

6.37 The identification information entered on the property registers may be incorrect as a result of an error. Alternatively, the identification information for a tenement may change over time. This may occur, for example, where a single flat in a tenement is divided into two smaller flats, with the result that a new flat address and new title sheet number requires to be included in the note of identification information. As another example, title to a flat recorded on the Register of Sasines may come to be registered on the Land Register, with the result that a new title sheet number requires to be included in the note of identification information. Other examples can be imagined. In such cases, the identification information entered on the property registers should be amended to bring it up to date.

6.38 To assist in ensuring that necessary amendments are made in such circumstances, the Bill places a duty on members of the owners' association to inform the manager: (i) if they become aware of any inaccuracy in the identification information noted for the tenement on the property registers, or (ii) of any action the member intends to take which is likely to result in a change to the identification information for the tenement. The manager is under a duty to make an application for amendment of the identification information noted in the Land Register, or to record a new note of tenement identification in the Register of Sasines, within six months of the day on which any information changes. New section 64A of the 2012 Act allows for such applications to be made and for the Keeper to act in respect of such applications as would be the case where an initial application for entry of identification information is made.

6.39 Finally, where a tenement ceases to exist (for example, because it has been demolished), a process is required by which identification information can, if necessary, be removed from property titles which formerly formed part of the tenement.[38] The Bill makes provision for new section 64B to be inserted into the 2012 Act allowing for any person with an interest to apply for removal of identification information in such circumstances. Again, the application process will be developed by way of delegated legislation if and when legislation on owners' associations is introduced, and will aim to identify erroneous applications for removal.

[38] It may be that property titles are themselves deleted where former flats are consolidated into a single plot, but it will not always be the case that every relevant title is deleted.

6.40 Drawing together the threads of the preceding paragraphs, we recommend that:

37. (a) An owners' association should be under a duty to make an application for tenement identification information to be entered against relevant titles on the Land Register and/or Register of Sasines;

(b) The association must make such an application within two years of the appointed day for existing tenements, within three years of the first day on which the tenement can be occupied for "new" tenements, or within two years of the day on which the association is established following disapplication of the DMS from the tenement;

(c) Any member of the association who becomes aware that the identification information noted in relation to the tenement is inaccurate, or who intends to do something likely to result in a title sheet in respect of any part of the tenement being made up or cancelled, must inform the manager as soon as reasonably practicable;

(d) Where there is a change in tenement identification information, the manager should be under a duty to make an application for amendment of the information entered on the Land Register or Register of Sasines within six months of the day on which the information changed.

(2004 Act, s 3A(4) and Schedule A1 para 8(1)(d), 11, 13 and 25, inserted by Draft Bill, s 1)

6.41 Separately, we recommend:

38. The Land Registration etc (Scotland) Act 2012 should be amended as follows:

(a) An owners' association should be able to apply for a note of tenement identification information to be entered in the Land Register or recorded in the Register of Sasines, or for information so entered on the Land Register to be amended;

(b) Tenement identification information should be defined to mean the name of the owners' association for the tenement; the address of the tenement; the address of each flat in the tenement; the title number of each property registered in the Land Register which forms parts of the tenement and the address for each property recorded in the Register of Sasines which forms part of the tenement.

(c) An application for entry or amendment of tenement identification information should be accompanied by payment of the relevant fee;

(d) Where the Keeper accepts such an application, she must enter or amend the identification information in the property section of the title sheet for each plot of land which forms parts of the tenement, and/or record the note of identification information in the Register of Sasines in relation to each property in that Register which forms part of the tenement;

(e) Where a tenement has ceased to exist, any person with an interest in the tenement may apply to the Keeper for removal of identification information relating to that tenement from the Land Register or Register of Sasines;

(f) An application for removal should be accompanied by payment of the relevant fee;

(g) Where the Keeper accepts such an application, she must remove identification information from the Land Register or record the note of removal in the Register of Sasines;

(h) A new offence should be created in relation to the making of false or misleading statements in applications for entry or amendment of tenement identification information, with this offence modelled on the offence currently set out in section 112 of the 2012 Act.

(Land Registration etc (Scotland) Act 2012, ss 64A-64C, inserted by Draft Bill, Schedule para 26)

Additional key duties?

6.42 In the Discussion Paper, we asked whether any further key duties should be imposed on the association beyond those discussed above.[39] Ten consultees provided a response to this question. Amongst this group, several suggested that the other two Working Group recommendations, in relation to five-yearly tenement condition inspections and the establishment of reserve funds, should be incorporated as key duties on the association. These recommendations lie beyond the scope of our project, but the government is committed to taking forward their implementation in a separate workstream.[40]

6.43 Some consultees, principally those from a property management background, suggested a detailed set of duties covering the constitution and governance of the association, the operation of annual meetings, enhanced reporting requirements and connected matters. To some extent, these matters are already covered by duties on the association manager. More broadly, however, the intention is that the association should be capable of operation by motivated owners largely without the need for professional assistance, just as owners are free to manage their tenements at present. This is in keeping with the Working Group's approach and helps to ensure the A1P1 compatibility of the legislation. Detailed regulation of associations along similar lines to the regulation of companies is therefore inappropriate, in our view. Enforcement of such duties would also be complex.

6.44 Other duties suggested by consultees (for example, to maintain the tenement to a particular level or to enforce payment by owners of their share of costs) are not aimed at ensuring the basic operation of the association, and therefore seem inappropriate for enforcement by any person with an interest, as is intended for the key duties. We note,

[39] Discussion Paper, para 4.20.
[40] See para 1.10 above.

however, that owners and the manager of the association are subject to a range of duties under the draft Bill which cover the issues raised by consultees here.

6.45 Accordingly, we do not recommend the imposition of any further key duties on the association in the draft Bill.[41]

Disapplying certain key duties in certain tenements

6.46 In Chapter 4, we set out our recommendation that an owners' association should be established for every tenement except those forming part of a development subject to the DMS.[42] However, we noted that one intended purpose of an owners' association was to facilitate cooperation amongst flat owners in relation to the common parts of their building. For tenements in certain circumstances, namely small tenements, tenements wholly owned by one person, and tenements managed as part of wider development, the existence of an owners' association will arguably offer little or no benefit in that respect. Some of the key duties we propose above are intended to ensure the association functions in order to facilitate that cooperation. Requiring the association to take on the burden of compliance with those duties in circumstances where it would be of little benefit seems difficult to justify. Accordingly, we recommend the disapplication of certain key duties in certain circumstances.[43]

Which duties?

6.47 As noted above, in tenements where cooperation concerning maintenance does not need to be facilitated, the key duties intended to facilitate that cooperation should be disapplied. In that respect, we recommend that associations in relevant circumstances should not be required to appoint a manager, hold an annual meeting or approve an annual budget. We should emphasise that an association would continue to have capacity to undertake any of these actions should its members decide on that course of action. However, there would be no obligation to do so, and no basis on which a remedial manager could be appointed if these actions are not undertaken.

6.48 To explain further, the disapplication of the duties to associations in relevant circumstances would operate as follows:

- The duty to appoint a manager would be disapplied. In this situation, the owner or owners of flats in the tenement may exercise the powers of the association by taking decisions to do so on a case-by-case basis and, if necessary, delegating authority to one of their number to act for the association in respect of that decision. Alternatively, they may choose to appoint a manager (which could include one of their own number) should they wish.

- The duty to hold an annual general meeting would be disapplied. In a tenement where flats are owned by more than one person, they would remain free to meet to decide on actions to be taken by the association should they wish.

---

[41] For the avoidance of doubt, we do not intend to suggest that further key duties could or should not be imposed on owners' associations in future legislation: our concern here is only with key duties emerging from this project.
[42] See paras 4.8 – 4.21 above.
[43] See para 6.54 below. We considered the circumstances in which the legislation could be disapplied in the Discussion Paper at paras 5.24 – 5.40.

- The duty to approve an annual budget would be disapplied. The owner or owners of flats in the tenement would remain free to prepare a budget for the association should they wish.

6.49 For the avoidance of any doubt, the key duty to make an application for entry of tenement identification information on the property registers will apply to every owners' association. There are no circumstances in which this duty is disapplied.

Which tenements?

6.50 The intention behind disapplying the three key duties outlined above is to reduce the administrative burden of running the owners' association in tenements where the work of doing so might be disproportionate to the benefits to be obtained in terms of improved cooperation. We consider that this would be the case in small tenements, and in tenements where all the flats are owned by the same person.

6.51 We agree with the Working Group that the machinery of the owners' association is likely to be unnecessary in a small tenement. In large part, this is because the work of coordinating a small number of owners – perhaps only two – is significantly less complex than coordinating a larger number of owners. Where owners have a reasonable relationship, maintenance can progress without the need for formal meeting and budgeting processes. If maintenance cannot be agreed between such owners on a relatively informal basis, it is not obvious that a requirement to meet annually and agree a budget will do anything to move matters forward. Separately, it might be argued that a tenement with a larger number of flats is more likely to have complex maintenance needs than a smaller building, although we accept that this will not always be the case. We recommend that a small tenement should be defined as a tenement of two or three flats.

6.52 We also recommend that the three key duties outlined above should be disapplied in tenements where all the flats are owned by the same person, or all the flats are co-owned by the same co-owners. It would obviously make little sense to suggest that an annual meeting should be held in such circumstances, and the production of an annual budget also seems somewhat artificial.

6.53 In consultation, Professor Kenneth Reid raised the matter of larger tenements where the number of owners is small. If the justification for disapplying the relevant key duties in a tenement of two or three flats is that informal cooperation between so few owners might reasonably be expected, then why not disapply the duties in a tenement of eight flats where seven are owned by the same person?

6.54 We think a distinction can be made here based on likelihood of the position changing over the lifetime of the tenement. Changes to the number of flats in a tenement are possible – flats may be divided or merged – but they are relatively unusual. Accordingly, it will be relatively unusual for a "small tenement" in the meaning of the legislation to cease being a small tenement, or for a larger tenement to become a small tenement. In addition, the number of flats in a tenement will be easy for a third party such as a tenant, contractor, the local authority or a potential flat purchaser to ascertain provided that identification information has been entered in the property registers. Even if identification information has not been entered, the number of flats may be simple to ascertain from a visual inspection, particularly to a person who is familiar with the types of tenement which tend to be found in a particular area. On that

basis, it should be straightforward for a third party to identify whether a tenement is "small" in the meaning of the legislation, and therefore whether relevant key duties have been disapplied from the owners' association in question.

6.55 By contrast, the owners of tenement flats change frequently. We have no data from which to ascertain how frequently this results in changes to the overall number of owners in any particular tenement. However, it seems reasonable to speculate that the overall number of owners of flats in a tenement changes more frequently than the total number of flats. In addition, although it should be possible for third parties to ascertain the number of owners in the tenement by searching the property registers, this will be a less straightforward (and more costly) exercise than checking the identification information to ascertain the number of flats. Accordingly, it would not be straightforward for a third party to identify whether the circumstances existed in which the relevant key duties had been disapplied from the association in question.

6.56 Accordingly, we do not recommend that the three key duties mentioned above should be disapplied in tenements with a small number of owners. We accept that the challenges for a third party in identifying the number of owners of flats in a tenement may also arise in relation to identifying whether a tenement is in single ownership. However, the evident illogicality of requiring an association to comply with the relevant key duties in that circumstance is sufficiently strong to justify our recommendation in that respect.

Views from consultees

6.57 In the Discussion Paper, we asked consultees whether: (i) the owners' association legislation should apply to small tenements subject to disapplication of inappropriate key duties along the lines recommended above; or (ii) the owners' association legislation should not apply to small tenements unless flat owners "opted-in" (in which case inappropriate key duties would be disapplied).[44] Of the 34 consultees who responded to this question, 21 preferred option (i). Those who offered comments in support of their view generally accepted the arguments in favour of our recommendation outlined above. The nine consultees who preferred option (ii) generally referenced the importance of owners having freedom of choice. Our recommendation accords with the view of the majority here. We consider that the extent of freedom of choice preferred by the minority on this issue is not compatible with the spirit of the Working Group's recommendation for the reasons discussed in Chapter 4.[45]

6.58 We also asked consultees whether a "small tenement" should be defined as a tenement of three flats or fewer. Of the 31 responses we received to this question, 15 agreed with this definition. The 11 consultees who disagreed generally suggested that a small tenement should be defined as two flats only. Several consultees noted that maintenance disputes can and do arise even in two-flat tenements, which we accept, but as we noted above, we do not think the key duties will assist in resolving such disputes. Our recommendation above that a small tenement be defined as a tenement consisting of two or three flats accords with the view of the majority here.

6.59 In the Discussion Paper, we separately asked consultees whether: (i) the owners' association legislation should apply to tenements in single ownership subject to disapplication

---

[44] Discussion Paper, para 5.34.
[45] See the discussion at paras 4.10 – 4.13 above.

of inappropriate key duties along the lines recommended above; or (ii) the owners' association legislation should not apply to tenements in single ownership unless flat owners "opted-in" (in which case inappropriate key duties would be disapplied).[46] Of the 32 responses we received to this question, 15 preferred option (i), although in some cases support was qualified.[47] Eleven preferred option (ii), generally taking the view that the association was unnecessary in such cases since the single owner had sole responsibility for repairs to all areas of the tenement. As discussed in Chapter 4, we think a cautious approach under which an association is established for such tenements is appropriate in light of the government's broader housing programme.[48] Our recommendation in favour of option (i) above accords with the majority view here. We again urge the government to consider the position for tenements solely owned by local authorities and RSLs as discussed earlier.[49]

6.60 Drawing together the above, we make the following recommendations:

39. (a) The key duties to appoint a manager, hold an annual meeting and approve an annual budget should be disapplied from owners' associations in relevant tenements.

(b) A relevant tenement is a small tenement consisting of two or three flats, or a tenement where all the flats are owned or co-owned by the same person or persons.

(2004 Act, s 3A(4) and Schedule A1 para 12, inserted by Draft Bill, s 1)

Key duties and tenements managed as part of a wider development

6.61 A somewhat separate issue arises in relation to compliance with the key duties for an owners' association in a tenement managed as part of a wider development. Over the past thirty years or more, it has become common for developers and builders of new housing estates to include in the title conditions of all the properties in the estate the requirement to have a manager. Typically, the estate will not have an owners' association in the sense of an entity with legal personality. Instead, the manager (or factor) will act as an agent for the owners of all the properties in the estate. The manager will be referred to as the "development manager", since they manage the whole estate or development. The extent of the manager's role will be determined largely by a deed of conditions incorporated into the titles of all the properties in the estate. One of the manager's key responsibilities will invariably be to organise maintenance of commonly owned areas (a car park, garden ground etc). The manager will usually set out an annual budget, the costs of which are recovered through payment of a monthly service charge by each property owner.

6.62 In developments which include a mixture of tenements and other buildings, the development manager will usually be tasked in the deed of conditions with managing the common parts of the tenements, in addition to managing the development-wide common areas. The costs of maintenance to the tenement common parts will, of course, be met by the flat owners in that tenement alone. They will also pay a share of the costs of maintenance of

---

[46] Discussion Paper, para 5.36.
[47] Some property management consultees suggested there should be no disapplication of the key duties, for example.
[48] See the discussion at paras 4.10 - 4.17 and para 4.20 above.
[49] See paras 4.18 – 4.20 above.

the development common parts, in this case shared amongst owners of all properties in the development. Arrangements in this respect can be quite complex but are not uncommon. In the survey of tenement title conditions we undertook in preparing the Discussion Paper, we came across 38 examples of this type of arrangement in the 239 titles we reviewed.[50]

6.63 Under our earlier recommendations,[51] an owners' association will be established for a tenement which forms part of a wider development. That association will be subject to the key duties in the usual way (unless the tenement is a small tenement or in single ownership). In the Discussion Paper, we suggested it should be clear in the legislation that the key duties for such an association will be satisfied where the relevant actions are undertaken as part of a broader process involving not only the tenement owners' association, but other aspects of management of a wider development.[52] For example, where a manager is appointed for the development as a whole including the association, that will comply with the duty to appoint a manager for the association. Where an annual meeting is held for all owners in the development, that will meet the key duty of holding an annual general meeting of members of the association, assuming the meeting is called and run in line with the association rules. Where an annual maintenance budget is approved for the development, that will meet the duty to approve a budget for the association, assuming it complies with the requirements in relation to the content of the budget set out in the association rules. In short, the key duties can be complied with as part of the management of the development more broadly. It is not necessary to put tenement-specific processes in place, so long as the wider development processes are aligned with the association rules.

6.64 In response to our question on this issue in the Discussion Paper, we received 34 responses. Twenty-one supported the approach outlined above, and ten were neutral or unclear in relation to this point. Consultees who disagreed generally suggested it would be preferable to allow more than one manager to operate within the same development. We should note that nothing in our recommendations prevents association members from appointing an association-specific manager should they so wish.

6.65 We do not consider that any specific recommendation or provision within the Bill is necessary to reflect our analysis of the position of tenements forming part of a wider development. Our understanding of the position follows from an application of the provisions in the Bill in relation to the key duties without any additional provision being required.

---

[50] Discussion Paper, Appendix B at para 21.
[51] See generally the discussion at paras 4.8 – 4.17 and 4.22 – 4.32 above.
[52] Discussion Paper, paras 5.37 – 5.39.

Chapter 7 Enforcing the key duties: remedial manager appointment orders

Introduction

7.1 In Chapter 6, we set out our recommendations for the key duties on owners' associations. These duties are intended to ensure associations function at a minimal level. It is hoped that most associations will routinely comply with the key duties voluntarily once the new legislation has had the chance to "bed in". Organisation of the annual meeting and preparation of the annual budget will generally be dealt with by the association manager, and the hope is that flat owners (and prospective purchasers) will come to expect that any tenement should and will have a manager in place.

7.2 In some tenements, however, apathy will inevitably prevail. An enforcement mechanism is therefore needed. The mechanism we propose is the appointment by the Tribunal of a remedial manager to an association which is in breach of the key duties. To explain the idea in brief, where an association fails to comply with one or more of the key duties, any person with a relevant interest[1] may apply to the Housing and Property Chamber of the First-tier Tribunal for a remedial manager appointment order.[2] The effect of the order is to appoint a remedial manager to the association, terminating any existing managerial appointment. The remedial manager is tasked primarily with bringing the association into compliance with the key duties. The manager's discretionary powers[3] will enable the remedial manager to call an annual meeting and prepare an annual budget, with budget approval obtained from the Tribunal if necessary.[4] Ultimately the remedial manager will try to support owners to appoint a manager in their own right, which will bring the remedial management appointment to an end.

7.3 The Tribunal can make a remedial manager appointment order only in respect of a person who meets certain eligibility criteria and who has agreed to act. Where no willing volunteer can be found, we recommend that the local authority in which the tenement is situated should have a duty to take on an appointment as remedial manager of last resort.

7.4 In the Discussion Paper, we noted that the proposed remedial management mechanism was inspired in part by other legal processes in which the court appoints an agent to look after the affairs of a person who has proved incapable of doing so for themselves.[5] One point of reference was Part 6 of the Adults with Incapacity (Scotland) Act 2000, which confers power on the court to appoint a guardian to make decisions in respect of the property, financial affairs or personal welfare of an adult who lacks capacity. We also looked at insolvency

---

[1] We explain this further below: see paras 7.32 – 7.34.
[2] We recommend later in the Report that disputes relating to the operation of the association or to tenement maintenance more broadly should be brought within the jurisdiction of the First-tier Tribunal: see Chapter 11.
[3] See paras 5.30 – 5.37 above for discussion.
[4] See paras 11.27 – 11.28 below.
[5] Discussion Paper, para 4.23.

processes, where the court appoints a person to deal with the financial affairs of a person who has become insolvent.[6] The power of the Crofters Commission to appoint a grazings constable to manage and maintain common grazings where crofters fail to do so under section 47(3) of the Crofters (Scotland) Act 1993 was also of interest. We have continued to refer to these models as we have refined our recommendations below.

Making a remedial manager appointment order

7.5 In the Discussion Paper, we asked consultees for their views as to whether a remedial manager scheme was, in principle, the correct approach to enforcement of the key duties imposed on the owners' association.[7] We noted the examples mentioned above of other circumstances in which the law allows for an agent to be appointed to manage the affairs of a person who is not able to do so for themselves, and offered the view that appointment of a remedial manager would implement a version of the Working Group's suggestion that compulsory factoring should be the fallback position where an owners' association cannot be established or fails.[8] Of the 36 consultees who responded to this question, 33 supported the introduction of remedial management, and only one consultee was entirely opposed.

7.6 We suggested that the appointment of a remedial manager to an association should be possible only by way of an order from the First-tier Tribunal.[9] This recognised that such an appointment should be possible only where the key duties had been breached by the association, and that determining whether there had been such a breach might involve both factual and legal questions such as whether a (non-remedial) manager had been validly appointed by members. We provisionally proposed that the relevant order could be made by the Tribunal where: (i) the association has failed to adhere to the key duties; and (ii) it is reasonable in all the circumstances of the case.[10] The inclusion of the second limb of the test was designed to give the Tribunal discretion to consider any developments since the application for the order was made, for example if association members had begun the process of appointing a manager voluntarily.

7.7 In response to our consultation questions on these issues,[11] 20 out of 35 consultees supported the requirement for an order of the Tribunal to appoint a remedial manager. Seven consultees disagreed,[12] generally suggesting the alternative of an administrative process by which the local authority could be empowered to appoint a remedial manager to an association which was in breach of the key duties. Whilst we accept that an approach of this kind would be likely to be quicker, cheaper and more straightforward for flat owners than an application to the Tribunal, we did not feel able to recommend it for two reasons. First, the spirit of the Working Group's recommendations is to support and encourage flat owners to take responsibility for their own property without the need for local government intervention. Second, allocating this responsibility to local authorities would place an additional, potentially substantial, burden on them in resource terms. As noted elsewhere, local authorities have

---

[6] The court can appoint a trustee in sequestration to manage the estate of an insolvent human being or certain other insolvent persons in the interests of their creditors: see Pt 1 – 4 of the Bankruptcy (Scotland) Act 2016. The court separately has the power to appoint a liquidator to manage the affairs of an insolvent company under Pt IV of the Insolvency Act 1986.
[7] Discussion Paper, para 4.24.
[8] Discussion Paper, para 4.22.
[9] Discussion Paper, paras 4.28 – 4.29.
[10] Discussion Paper, para 4.33.
[11] Discussion Paper, paras 4.34 – 4.35.
[12] The remaining eight consultees provided neutral or unclear responses.

expressed significant concerns about the resource implications of our recommendations even without this additional role.[13]

7.8 In relation to the proposed two-limbed test for making a remedial manager appointment order, 25 out of 30 consultees were supportive. Only one consultee disagreed with the proposed test.

7.9 Taking all of the above into account, we recommend:

40. (a) The Tribunal may make an order for the appointment of a remedial manager to an owners' association, and removal of any existing manager of the association.

(b) The Tribunal should be able to make a such an order where:

(i) The association is in breach of a key duty; and

(ii) It is reasonable in all the circumstances to make the order.

(2004 Act, s 3F(1) & (2) inserted by Draft Bill, s 3)

Who can be appointed as a remedial manager?

Eligibility for appointment

7.10 In the Discussion Paper,[14] we suggested that a person should be eligible for appointment as a remedial manager only if they own a flat in the relevant tenement (and would therefore be a "self-manager" as discussed in Chapter 5),[15] or if they are a person entered on the Scottish Property Factor Register.[16] Since persons entered on the Register must comply with the regulatory scheme outlined in Chapter 4, requiring a remedial manager to be entered on this Register should ensure that only a professional with the expertise necessary to bring the association back into compliance with its key duties can take on the role. This echoes the requirement for a trustee in sequestration[17] or a liquidator[18] to be a qualified insolvency practitioner.

7.11 In response to our consultation question on this issue,[19] 24 out of 38 consultees agreed with our proposed eligibility criteria. A further four gave partial agreement,[20] and only one consultee disagreed entirely.[21] A small number of these consultees queried the risk of an individual owner, perhaps with a particular agenda, taking control of the association by way of this process to the detriment of other owners. We consider that the Bill as a whole contains sufficient safeguards against the risk of an owner "holding other owners to ransom" in this

---

[13] See paras 2.20 – 2.24 above.
[14] Discussion Paper, paras 4.25 – 4.26.
[15] See the discussion at para 5.5 above.
[16] For an overview of the regulatory regime applicable to commercial factors, see paras 4.92 – 4.95 above.
[17] Bankruptcy (Scotland) Act 2016 s 51. See also Pt XIII of the Insolvency Act 1986 in relation to insolvency practitioner qualifications.
[18] Insolvency Act 1986 s 230. See also Pt XIII of the Act in relation to insolvency practitioner qualifications.
[19] Discussion Paper, para 4.27.
[20] Three consultees from the property management sector agreed that persons entered on the Scottish Property Factor Register should be eligible for appointment, but that flat owners should not.
[21] The remaining nine consultees gave answers which were neutral or unclear.

way. First, the remedial manager's role is limited as explained below.[22] Second, any owner may hold to account a manager who is in breach of their duty of care and seek appropriate remedies such as interdict, damages or appointment of a new remedial manager if necessary.[23] Finally, and most importantly, owners will always have the power to appoint a new manager by taking an association decision to that effect. Under the default association rules we recommend later, a simple majority vote is sufficient for such an appointment.[24] An association decision could be taken to this effect even where a remedial management application is in progress, or a decision could be taken to remove a remedial manager and appoint a manager chosen by owners at any time.[25]

7.12 Nine consultees suggested additional persons who should be appointable, with suggestions including solicitors, surveyors, letting agents, architects, local authorities and Historic Environment Scotland. Under the Property Factors (Scotland) Act 2011, organisations or individuals who manage commonly owned residential property in the course of their business must be entered on the Scottish Property Factor Register and comply with the relevant regulatory regime to avoid committing an offence.[26] We cannot see a justification for suspending that requirement in the case of remedial management, where the high standard of factoring expertise intended to be assured through the regulations is likely to be more necessary than usual. Solicitors and others who wish to take on remedial management work will therefore be required to register as factors, and as a result will become appointable in terms of the eligibility criteria outlined here.

7.13 We note the concerns of some consultees, particularly those from local authorities, regarding the likely paucity of persons who are, or are willing to become, registered factors in rural areas. This was highlighted as an issue in Chapter 2. We urge the government to consider the desirability of support or incentivisation for property management in rural areas to avoid the work falling by default onto local authorities as remedial managers of last resort under the recommendations discussed below.

7.14 Based on responses from consultees, we recommend the eligibility criteria proposed in the Discussion Paper. However, in the process of developing our policy in this area, we have also considered it appropriate to recommend one further eligibility criterion, namely that the intended remedial manager has agreed to be appointed on terms which the Tribunal considers reasonable in all the circumstances of the case. We consider this new criterion necessary in light of our recommendation below that title to apply for a remedial manager appointment order should be held by a wide range of persons, not solely by owners of flats in the tenement. While there are strong policy reasons for taking this approach, there is an obvious risk that an applicant for a remedial management appointment order who will not ultimately be responsible for paying the remedial manager's fees may not be overly concerned about what the remedial manager intends to charge or the other terms of the appointment. To assist the Tribunal in determining whether the terms proposed are reasonable, we recommend that government works with property management sector stakeholders to produce guidance on appropriate terms for appointment as a manager to an owners' association.

---

[22] See paras 7.45-7.47 below.
[23] See the discussion at paras 5.16 – 5.19 (manager as agent) and also para 5.37 (manager duties owed to owners and to the association) above.
[24] The voting thresholds required for an association decision to be taken are discussed at paras 9.23 – 9.38 below.
[25] See paras 5.48 – 5.50 (power to remove a manager) and paras 5.7 – 5.25 (appointing a manager) above.
[26] For further discussion of the 2011 Act regime see paras 4.92 – 4.95 above.

7.15 We recommend:

41. The Tribunal may appoint a person as a remedial manager only where that person:

(a) Either owns a flat in the relevant tenement, or is entered on the Scottish Property Factor Register; and

(b) Has agreed to be appointed on terms which the Tribunal considers reasonable in all the circumstances.

(2004 Act, s 3F(3)(a) & (4) inserted by Draft Bill, s 3)

Remedial manager of last resort

7.16 It may be the case that no person who meets the eligibility criteria outlined above is willing to act as the remedial manager. In the Discussion Paper,[27] we noted that public bodies are required to step into the gap where a willing agent cannot be found in other contexts where an agent is appointed to a person who cannot manage their affairs. The Accountant in Bankruptcy must act as a trustee in sequestration in certain circumstances,[28] and a local authority's chief social worker can be appointed as an adult's welfare guardian in the absence of another suitable appointee.[29] We suggested that a similar approach would be sensible in relation to owners' associations, and considered that the local authority for the area in which the tenement is situated would be the most appropriate public body to act as a remedial manager of last resort.

7.17 We received 33 responses to our consultation question on this matter. 18 consultees supported the proposal, while 12 opposed it.[30]

7.18 Consultees who agreed included Aberdeen Law School, non-legal stakeholder bodies such as BEFS, EHA, RIAS, the Scottish Association of Landlords and Under One Roof, and two out of five local authority respondents. Consultees who disagreed with the proposal included the Faculty of Advocates, property management consultees such as PMAS and Hacking & Paterson, and three out of five local authority respondents. Most consultees who disagreed cited lack of funding and other resources for local authorities as the basis for their disagreement, including the three local authority respondents. Concern was repeatedly noted amongst both groups of consultees about the resource implications of this role being assigned to local authorities, including anxiety that other housing needs may be neglected in order for remedial management duties to be fulfilled. This would run counter to the intention of the Working Group that private owners of flats should be supported by the owners' association legislation to manage their own maintenance without the need for intervention on the part of the public sector. We recognise the importance of these concerns. We reiterate our call to the

[27] Discussion Paper, paras 4.37 – 4.38.
[28] For example, where a sheriff does not appoint a particular person to be the trustee in sequestration, they must appoint the Accountant in Bankruptcy: see s 51(3) and (7) of the Bankruptcy (Scotland) Act 2016.
[29] Adults with Incapacity (Scotland) Act 2000 s 59(1). See also section 57 as regards the local authority's duty to apply for a guardianship order.
[30] The remaining three consultees provided a neutral response.

government in Chapter 2 to give careful consideration to the resource implications of this legislation particularly as regards local authorities.[31]

7.19 Another concern expressed by some consultees was that flat owners might be disincentivised from taking action to appoint their own manager if it was known that the local authority would ultimately be required to take on the role. It was suggested by one or two consultees that this problem may be compounded by owners perceiving the local authority to be a cheaper or more cost effective option than appointing a commercial property factor. To address this concern, we would recommend, first, that a local authority should be both entitled and expected to charge the association for management services where it is appointed as a manager, whether by way of an appointment of last resort or otherwise. In line with the approach taken to the role of the Accountant in Bankruptcy in relation to sequestrations, we recommend that a fee scale be developed and set out in delegated legislation in relation to the discharge of this statutory function by a local authority, and the Bill includes a power for the Scottish Ministers to make regulations to that effect.

7.20 Second, we do not think it should necessarily be the case that local authority employees will take on the day-to-day work of remedial management directly. As in other areas where a public body acts as an agent of last resort, it should be open to the local authority to contract with commercial providers to carry out this work on the local authority's behalf. This approach can be found in relation to the local authority's role as guardian of last resort for an adult with incapacity, where the local authority may engage a solicitor to carry out the guardianship work on the local authority's behalf. The draft Bill includes provision to clarify the powers of the local authority acting as a remedial manager of last resort in this respect.

7.21 To prevent applicants treating the local authority as the "go-to" remedial manager, in cases where an application is made to appoint the local authority as remedial manager of last resort, the applicant will be required to include evidence of attempts to engage other parties to act as a remedial manager. We discuss the application process further below.[32]

7.22 A number of consultees suggested alternative persons who might act as a remedial manager of last resort. A common suggestion was that commercial property factors, solicitors or other professionals could be appointed to the role. While there would be no difficulty with such persons being appointed as a remedial manager by the Tribunal (presuming they met the eligibility criteria outlined above), we do not think it is possible to *compel* such persons to act as a remedial manager of last resort in cases where they do not wish to act, particularly where payment for those services may not be straightforward to obtain. That is the reason why we consider a public body is likely to be the only appropriate candidate for this responsibility.

7.23 Four consultees suggested a new public body should be established to take on this and potentially other roles in connection with owners' associations and tenement maintenance more generally, as discussed in Chapter 2.[33] While we have suggested that the government give further consideration to this issue, in the absence of any certainty that such a body might ever exist, we have not felt able to make a recommendation attributing functions to that body.

---

[31] See paras 2.20 – 2.24 above.
[32] See paras 7.32 – 7.44 below.
[33] See para 2.13 above.

The final suggestion was that the Scottish Housing Regulator might take on the role, although this would seem a significant divergence from the usual functions of that organisation.

7.24 The range of comments set out above gives an indication of the breadth of feeling on this issue. As before, we acknowledge that the resource implications for local authorities of taking on this role may be significant, and we urge the government to give this matter serious consideration. Ultimately, however, the success of the owners' association legislation requires there to be some backstop which compels an association to function in tenements where owners refuse to engage. It will not always be the case that payment for this backstop service will be easy to obtain, and so relying on the commercial market to plug the gap seems unlikely to be successful. If it is accepted that a public body must take on the role, in the absence of a tenement-specific public agency, the local authority remains in our view the obvious body to act. Notwithstanding the range of opinions we received from consultees, we note that the majority ultimately agreed with that view.

7.25 Accordingly, we recommend:

42. (a) The Tribunal may appoint the local authority for the area in which the tenement is situated as a remedial manager of last resort.

(b) A local authority appointed as a remedial manager of last resort may:

(i) appoint a person to exercise the remedial manager's functions on behalf of the authority (but, where it does so, remains responsible for the exercise of those functions);
(ii) recover a fee for acting as the remedial manager, and any costs of so acting, from the association;

(c) Scottish Ministers may, by delegated legislation, make provision about the level of fees and costs recoverable from the association in this context.

(2004 Act, s 3F(3)(b) and 3G(2)-(6) inserted by Draft Bill, s 3)

7.26 The Discussion Paper also considered whether a local authority acting as a remedial manager of last resort should be regulated under the Property Factors (Scotland) Act 2011.[34] Under that Act, a local authority which operates as a factor must be entered on the Scottish Property Factor Register to avoid committing an offence. As discussed earlier,[35] an association manager will usually be a factor in the meaning of the Act, unless they are a "self-manager". It follows that a local authority appointed to act as a remedial manager would, as a consequence, be required to enter itself on the SPFR and comply with the regulatory regime applicable to registered factors unless an exemption is created.

7.27 In the Discussion Paper, we thought it was reasonable to suggest that when a local authority is compelled to act as a remedial manager, the higher standards that would be required under the 2011 Act where it chose to undertake factoring work should be suspended.

---

[34] For more detail on this legislation, see generally paras 4.92 – 4.95 above.
[35] See paras 5.58 – 5.68 above.

This would ease the overall burden on the local authority of being allocated this role, and would not leave owners entirely unprotected since the usual managerial duties would continue to be owed to the association and to owners themselves. A contrary argument can, however, be made that higher regulatory standards are more necessary than usual in relation to an association which is sufficiently dysfunctional that appointment of a remedial manager of last resort has been the only option left.

7.28 We asked consultees for views. Sixteen of the 31 consultees who responded thought that the 2011 Act should be suspended in relation to a local authority acting as a remedial manager of last resort. These consultees included the Faculty of Advocates, academics, non-legal stakeholder bodies such as RIAS, the Scottish Association of Landlords and Under One Roof, and six out of seven local authority respondents. Thirteen of the 31 consultees who responded disagreed with the suspension of the Act, including all five respondents from the property management sector and one local authority. In broad terms, consultees who thought the 2011 Act regime should continue to apply to local authorities in these circumstances cited the need to protect flat owners in these circumstances.

7.29 We recognise concerns that a local authority should be appropriately regulated while in the remedial manager role. However, bearing in mind the more limited function of a remedial manager in comparison to a non-remedial manager and the broader regulation of public bodies in general, we think the benefits of disapplying the 2011 Act provisions to local authorities acting as a manager of last resort outweigh the risks. This view is supported by a majority of consultees, albeit that the majority is relatively slim.

7.30 We would note that where a local authority chooses to discharge its duty in this respect by contracting with a commercial factor, that factor will remain bound by the 2011 Act regime. This outcome is, in our view, justified by the fact that the local authority is compelled to act, whereas persons who choose to contract with the local authority for this work are under no such compulsion.

7.31 We recommend:

43. When acting as a remedial manager of last resort, the application of the Property Factors (Scotland) Act 2011 to local authorities should be suspended.

(Property Factors (Scotland) Act 2011, s 2(2)(e), inserted by Draft Bill, Schedule para 25(1) & (2)(a))

Applying for a remedial manager appointment order

Who has title to apply?

7.32 An important aspect of the policy underlying the Working Group's recommendations was the recognition that Scotland's housing stock is a matter of concern not only to those who own or live in it, but to society more broadly. This is because the use and maintenance of our housing stock has society-wide impacts, most obviously in ensuring that people continue to have places to live when the current residents move on, but also in other ways. One pressing example is the need for our housing stock as a whole to become more energy efficient if we are to reduce the carbon emissions we generate through heating, an important strand in the "net zero" strategy. Another example is the significance of some Scottish tenements as a

matter of architectural or cultural heritage, with tenements in Edinburgh's New and Old Towns contributing to the area's designation as a UNESCO World Heritage Site.

7.33 Reflecting that wider interest in tenement maintenance, in the Discussion Paper we suggested that it should be possible for any person with an interest in the effective operation of an owners' association to apply to the Tribunal for an order appointing a remedial manager to that association.[36] Flat owners in the relevant tenement would obviously have such an interest, as would tenants. The owners' association for a neighbouring tenement or the owner of a neighbouring building may have such an interest, perhaps when seeking to coordinate broader maintenance works involving both buildings. The local authority in the area in which the tenement is situated would have an interest in connection with their role in enforcing building standards. Charities or third sector organisations may have an interest if the poor state of repair of the tenement is impacting on tenants' health or safety, for example, or if the absence of an operational association was a barrier to energy improvement works. Other examples could be imagined.

7.34 We asked consultees for views. Of the 34 consultees who responded to this question, 22 agreed with our proposed approach. Seven disagreed, generally suggesting a more limited list of persons should be able to apply to avoid the risk of abusive use of the remedial manager appointment process. Bearing in mind that an order can be made by the Tribunal only where there is evidence that an association is in breach of a key duty, and where it is reasonable in all the circumstances of the case, we think there are sufficient safeguards against abuse without the need to limit the persons who might apply for an order. Taking that into account alongside majority support from consultees, we recommend:

44. Any person with an interest in the management of a tenement by a tenement owners' association may apply to the Tribunal for an order appointing a remedial manager, and removing any existing manager of the association.

(2004 Act, s 3F(1) inserted by Draft Bill, s 3)

Application of last resort

7.35 Although it will be open to many people to apply for an order appointing a remedial manager, there will inevitably be cases in which no person is willing to do so. To cater for this circumstance, we think it is necessary to include a "safety net" duty on the local authority to act as "the applicant of last resort".

7.36 The approach we suggested in the Discussion Paper[37] mirrors that in relation to applications for appointment of a guardian to an adult with incapacity.[38] In that context, a local authority will generally become aware of the need for an application because the social work department will have been alerted by a health or care service worker, or a member of the public such as a neighbour, that an adult is having difficulty. The local authority is not under a general duty to monitor all adults in their area to identify capacity-related difficulties. Similarly, we suggest that the local authority should play a role in applying for a remedial manager

[36] Discussion Paper, para 4.30.
[37] Discussion Paper, paras 4.31 – 4.32.
[38] Adults with Incapacity (Scotland) Act 2000 s 57(2).

appointment order only where it is brought to the local authority's attention that an owners' association does not appear to have a manager, or is otherwise in breach of a key duty. Given the resource implications, an expectation or duty on the local authority to monitor associations is not feasible.

7.37 As with guardianship orders, the local authority should be empowered by the legislation to make its own assessment of whether the conditions requiring it to make an application are satisfied. In other words, where it appears to the local authority that:

- the association is in breach of a key duty;
- no other person has made, or is likely to make, an application for the order; and
- it is reasonable in all the circumstances of the case to make the application,

the local authority must apply for the order.

7.38 Consultees were generally supportive of this approach, although we note again that the majority here was slimmer than in relation to many other aspects of our recommendations. Of the 33 consultees who responded to our question on this issue, 19 agreed that the local authority should have a duty to be the applicant of last resort for a remedial manager appointment order, while six disagreed.[39]

7.39 An obvious concern, in terms of the practical effects of this provision, is that it may disincentivise owners or others from making an application themselves, considering that they can simply leave it to the local authority to do the work. To some extent, the measures necessary to avoid a culture in which everything is left to the local authority lie beyond the legislation, through the provision of advice and support to owners. We reiterate here our call on the government earlier in this Report to take action to that effect.[40] However, we think it should also be made clear in the legislation that the local authority is entitled to recoup the costs of the application from the association, to cover not simply fees payable to the Tribunal but also the cost of the administrative work undertaken by the local authority in putting the application together.[41]

7.40 Taking together all of the above, we recommend:

45. (a) The local authority should be under a duty to apply for an order appointing a remedial manager to an owners' association where:

(i) The association is in breach of a key duty;

[39] The remaining eight consultees provided responses which were neutral or unclear.
[40] See paras 2.25 – 2.29 above.
[41] In this regard we would note that section 68(1) of the Adults with Incapacity (Scotland) Act 2000 makes specific provision to allow a guardian to recover outlays from the estate of the adult whom they are guardian for. Where the guardian is the chief social worker of a local authority, this is limited to payment for items which would not normally be provided free of charge by the local authority (section 68(2)). More generally, a local authority's power to advance well-being under section 20 of the Local Government in Scotland Act 2003 would appear to be broad enough to allow a "local authority" to impose "reasonable charges" in respect of certain, non-excluded functions (see section 20(1) and section 22(7), (8)(b) and (9)).

(ii) No other person has made, or is likely to make, an application for the order, and;

(iii) It is reasonable in all the circumstances to make the application.

(b) The local authority may recover the costs of making the application from the association.

(2004 Act, s 3F(5) & (9) inserted by Draft Bill, s 3)

Content of the application

7.41 Our recommendations above set out the test which the Tribunal must apply when determining whether to order the appointment of a remedial manager, and deal with the eligibility criteria for appointment of persons to the role. The application for the order should therefore provide the Tribunal with the information necessary to determine whether these tests have been met.

7.42 First, the application must specify which of the key duties the owners' association has failed to meet. Second, as we suggested in the Discussion Paper, the application should include the name of the proposed remedial manager and confirm their willingness to act.[42] Twenty-eight of the 34 consultees who responded to our question on this point agreed that this would be appropriate.

7.43 In further developing the detail of the scheme, we have concluded that the application should also indicate the terms on which the intended manager has agreed to act in order to allow the Tribunal to make an assessment of their reasonableness, as discussed above. Alternatively, the applicant may seek to have the local authority in which the tenement is situated appointed as remedial manager of last resort. If so, the applicant should be required to provide evidence of unsuccessful attempts to engage other potential remedial managers. As noted above, this measure is designed to prevent applicants from simply leaving the work to the local authority in every case.

7.44 We recommend:

46. An application for an order appointing a remedial manager must:

(a) Specify any key duty in respect of which the applicant considers the association to be in breach; and

(b) Either:

(i) Identify the proposed remedial manager, confirm their willingness to act and specify the terms of their agreement; or

[42] Discussion Paper, para 4.36.

(ii) Seek the appointment of the local authority as remedial manager of last resort and provide evidence of unsuccessful attempts to engage other managers.

(2004 Act, s 3F(6)-(7) inserted by Draft Bill, s 3)

The role of the remedial manager

Function, powers and duties

7.45 Provision is needed to clarify the role of the remedial manager once appointed by the Tribunal. In this respect, it should be recalled that the remedial management scheme was designed as a mechanism for enforcing compliance by an owners' association with its key duties. In the Discussion Paper, we suggested this should be reflected by provision in the legislation that the function of a remedial manager is more limited than the function of an association manager appointed under normal circumstances.[43] We proposed that the remedial manager's function should be to support the association to meets its key duties. We suggested that, in order to meet this function, the remedial manager should have the same powers and duties as a non-remedial manager.[44]

7.46 We asked consultees for their views. Twenty-three out of 25 consultees who responded agreed with the function we proposed for the remedial manager. Twenty-one out of 29 consultees agreed with the powers and duties we proposed for the remedial manager. Those who disagreed generally suggested that the remedial manager should have more extensive powers than a manager appointed in normal circumstances, and in particular powers to carry out maintenance work without the need for a decision to be taken to that effect under the association rules. Later in the Report, we recommend that a manager (including a remedial manager) should be able to seek approval from the Tribunal for an annual budget where it has not been possible to obtain such approval from members.[45] Once a budget has been approved, the usual powers of a manager (including a remedial manager) will empower them to instruct relevant works, and impose a service charge to cover payment of the costs incurred as a result. We consider this route to the instruction of works by a remedial manager more appropriate than providing them with an automatic power to do so, bearing in mind the need to safeguard the property rights of flat owners.

7.47 We recommend:

47. (a) The function of a remedial manager should be to support the owners' association to comply with the key duties.

(b) In order to fulfil this function, the remedial manager should have the same powers and duties as a non-remedial manager.

(2004 Act, s 3G(1) inserted by Draft Bill, s 3)

---

[43] Discussion Paper, paras 4.41 – 4.42. On the function of a non-remedial manager generally see the discussion at paras 5.4 – 5.6 above.
[44] These powers and duties are discussed at paras 5.26 – 5.37 above.
[45] See paras 11.27 - 11.28 below.

Termination of appointment

7.48 Where a manager is appointed in normal circumstances, that appointment may come to an end under the terms of the appointment (for example, where it is for a fixed period), or because the general law of agency operates to end the appointment.[46] The appointment of a remedial manager may also be brought to an end in these ways. In addition, we suggested in the Discussion Paper that legislation should provide for the termination of a remedial management appointment where the association appoints a (non-remedial) manager. We noted that the same person may be appointed to the non-remedial management role where the association so decides.[47]

7.49 Consultees were content with this approach. In response to our question on this issue, some consultees suggested that a remedial management appointment should be brought to an end where the manager ceases to meet the eligibility criteria for the role outlined above, or where the Tribunal makes an order appointing a new remedial manager (which may be required if the initial appointee proves unsuccessful in bringing the association into compliance with the key duties). We agree that these additions are sensible.

7.50 We recommend:

48. The appointment of a remedial manager should be terminated:

(a) Where the association appoints a manager;

(b) Where the Tribunal makes an order appointing a new remedial manager;

(c) Where the remedial manager ceases to fulfil the eligibility criteria for the position;

(d) Where the appointment ends under the terms of the appointment.

(2004 Act, s 3F(8) inserted by Draft Bill, s 3)

[46] See the discussion at paras 5.49 – 5.50 above.

[47] We note that the appointment of a manager in normal circumstances can be brought to an end by an association decision to that effect regardless of any contrary term of the appointment contract: see para 5.48 above. The association does not have power to terminate the appointment of a remedial manager in this way unless it, at the same time, appoints a (non-remedial) manager.

Chapter 8 Association rules and association conditions

Introduction

8.1 The previous Chapters of this Report have set out our recommendations for the owners' association as a legal person, including its capacity and the limits on that capacity. We have considered the role of the association manager and identified the association membership. We have looked at the key duties on the association and how these can be enforced if necessary.

8.2 We now turn to consider the rules by which the owners' association will operate. Rules must be in place to determine how owners may take decisions to exercise the powers of the association, how liability for the costs incurred by those decisions is to be divided amongst owners, and how payment for those costs can be collected through an annual budget and service charge mechanism. We refer to provision on these matters using the term "association rules".

8.3 This Chapter of the Report addresses the preliminary question of whether owners should be free to make their own rules on these matters in relation to the association for their tenement. We consulted on these issues in Chapter 4 of the Discussion Paper. Our recommendation is that statute should provide a default set of association rules. It will be possible to disapply these rules from an association where provision on relevant matters is instead made by way of real burdens in the tenement titles. However, such burdens will have that effect only where they comply with certain, new statutory requirements. We refer to burdens which meet these requirements as "association conditions".

8.4 Existing tenement burdens on relevant matters will not meet the requirements of association conditions.[1] If flat owners wish to retain the effect of such burdens, they must recreate the burdens in the form of association conditions. To facilitate this process, the owners' association will have power to grant a deed creating association conditions, and can be compelled to do so by an individual flat owner seeking to retain the effect of existing burdens. In recognition of the fact that it will take some time for association conditions to be created in tenements across Scotland, transitional rules will apply for the first twenty years following the entry into force of the legislation. During this transition period, existing tenement burdens on relevant matters will operate to disapply the default association rules set out in statute. After that time, if association conditions have not been created, the default association rules will apply in full.

[1] The requirements of association conditions are explained at paras 8.22 - 8.35 below. One requirement is that burdens must be drafted in accordance with new regulations which mirror provisions of the draft Bill. In practical terms, existing burdens will not have been drafted in this way since the provisions of the Bill could not have been anticipated.

A note on terminology

8.5 In the Discussion Paper, our provisional proposals as to the default rules on operation of the owners' association referred to those rules collectively as the "Owners' Association Scheme" or OAS. As the project developed, it became apparent that this term did not make clear the limited scope of the default rules, which are intended to cover only decision making, liability for costs and financial administration within the association. As earlier Chapters of this Report have explained, if our recommendations are implemented, much of the new law on owners' associations will not be capable of modification in the tenement titles. However, the breadth of the term "owners' association scheme" risked giving the contrary impression. We have accordingly moved away from the use of that term in this Report and draft Bill. For the avoidance of doubt, however, references in the Discussion Paper to the Owners' Association Scheme or OAS can generally be understood as referring to the default association rules.

Default rules vs mandatory rules

8.6 Below, we recommend that statute should provide a set of default association rules. These rules should regulate the operation of an owners' association where no alternative provision has been made by way of association conditions in the tenement titles.

8.7 In the Discussion Paper, we considered whether a set of statutory association rules should have mandatory application in all tenements, or should apply as a default only where relevant provision had not been made in the tenement titles.[2] We explored how tenement law in Scotland evolved to allow for high degree of individualism, with each tenement having its own maintenance rules as provided for in the title conditions for flats in the building. Since the introduction of the 2004 Act, any gaps in this provision have been filled by the rules of the Tenement Management Scheme, meaning that maintenance may be regulated by a mixture of provisions set out in different sources.

8.8 The Discussion Paper acknowledged the challenges which arise from this approach, not least the difficulty for non-experts in making sense of the rules applicable in any particular tenement. However, we did not think that switching from this individualistic approach to a wholly mandatory set of rules would be possible. First, we took the view that legislation which overrode existing tenement conditions in their entirety, and removed the power of owners to create new title conditions on relevant matters, was likely to be a disproportionate interference with the rights of flat owners under A1P1.[3] Second, we considered that, taking into account the huge diversity of the tenement stock, producing a set of mandatory rules that would work well in every tenement was likely to be an impossible task.[4] Against that background, our provisional view was that a default set of rules was to be preferred.

8.9 We sought views from consultees,[5] and received 35 responses. Amongst these, 26 consultees agreed with our provisional view, with a small number qualifying their responses to suggest specific rules should be incapable of variation in the tenement titles. We consider the extent to which variation of the rules is permissible in more detail below.

---

[2] See generally Discussion Paper, paras 4.44 – 4.52.
[3] Discussion Paper, para 4.50.
[4] Discussion Paper, para 4.51.
[5] Discussion Paper, para 4.53.

8.10 Four consultees disagreed with our provisional proposal.[6] Three of these took the view that the statute should set out mandatory rules on the operation of the owners' association. Under One Roof set out a series of strong arguments in favour of this position, concluding that:

> "The confusing and inadequate [tenement] titles that currently exist are a significant reason why maintenance and repair do not go forward, and we would hope the Scottish Government would be forward thinking in their approach to address this, and soon-to-come retrofit efforts, by finding a solution that will satisfy the legal concerns expressed in the Commission's recommendation on this matter."

We recognise the seriousness of the concerns raised by these consultees. Ultimately, however, we do not think the obstacles to the imposition of a mandatory code which we outline above can be overcome. In particular, even if responses to the human rights issues could be envisaged, the practical difficulty of writing a set of rules which could apply equally well in every tenement seems insurmountable. This difficulty is not addressed by the respondents who disagreed with this question.

8.11 Accordingly, we do not recommend a wholly mandatory set of association rules. In the discussion which follows, however, we suggest certain restrictions on the extent to which it is possible for the default rules to be disapplied by provision on the tenement titles. For the moment, we recommend:

> **49. The default association rules should apply only where appropriate provision, in the form of association conditions, is not made in the tenement titles.**
>
> (2004 Act, s 3D(1), inserted by Draft Bill, s 2)

Disapplying the default rules: association conditions

8.12 Although we consider a degree of freedom in regulating tenement maintenance to be necessary, we recognise that it can cause difficulties for flat owners.[7] Under current law, owners are required to read their title conditions together with section 4 of the 2004 Act and the Tenement Management Scheme to understand which maintenance rules apply in their particular tenement. Title conditions may be lengthy and complex, or elderly and written in a style which is no longer familiar, and will generally be difficult to understand for a person without legal training. In addition, apart from the minimal requirements of validity,[8] there is no uniformity in the way that conditions are drafted. An owner who has made sense of the conditions applicable in one flat may find, should they move to a new flat, that the conditions there are written very differently in terms of style, format and content. This is frustrating for owners, and also makes it difficult for charities or other third sector bodies to provide general advice and support in relation to tenement maintenance matters.

8.13 To address this concern, we suggested in the Discussion Paper that, over a period of time, the law should require greater standardisation in the content and presentation of

---

[6] The remaining five consultees provided responses which were neutral or unclear.
[7] See Discussion Paper, paras 4.47 – 4.48.
[8] These requirements are now set out in the Title Conditions (Scotland) Act 2003 ss 2 – 6.

tenement title conditions intended to disapply the default statutory rules.[9] In particular, we suggested that, following the introduction into force of the legislation on owners' associations, any deed purporting to create a title condition which would modify the application of the default rules should set out those amended rules in full. The result would be that the association rules would be wholly contained within the tenement titles, in the form we now refer to as "association conditions". Alternatively, the default association rules in the statute would apply without modification. In either case, the rules would be available in full in one place – either in the titles or in the legislation – and there would be no need to read the titles and the legislation together to make sense of the position in any particular tenement.

Consultees' views

8.14 We asked consultees for their views. Of the 31 who responded, 22 supported our provisional proposal, with five disagreeing. Those who disagreed – particularly Professor Kenneth Reid and Stuart Russell, a solicitor with experience in the local authority housing sector – raised some important objections, which it is valuable to consider in full.

8.15 First, it was noted that relying on background law to "fill in the gaps" in the title provisions allows for amendments to the law to take effect in many tenements. For example, the definition of "maintenance" set out in rule 1.5 of the TMS was amended to include the installation of insulation by section 69 of the Climate Change (Scotland) Act 2009. In tenements where this element of the TMS applied, the maintenance rules were therefore "updated" in line with evolving societal requirements, potentially benefitting both owners themselves and society more generally. Under our proposals, this potential benefit would be lost. In a tenement where owners chose to create association conditions, the rules would be "frozen in time" at the point at which that deed was registered. Updates to the default association rules in the statute would have no effect on association conditions.

8.16 We accept that the potential benefits of legislative updates to the default rules will be lost if our proposal is adopted, except in tenements which choose to rely wholly on the default rules.[10] However, we think the difficulties here should not be overstated. First, it should be recognised that even under current law, many tenements already have extensive title conditions. Amendments to the default law have no effect in such tenements, since the titles have no gaps which the default law can fill. In that respect, the benefit of updates to the default law is already limited. Second, it is not obvious that amendments to the law will occur frequently. Since the TMS came into force in 2004, it has been amended twice – to include the installation of insulation within the definition of maintenance, as mentioned above, and to recognise the power of a local authority to recover payment from owners where it has paid a "missing share" of maintenance costs in certain circumstances.[11] If our draft Bill is enacted, this will obviously bring about a far more significant reform of the law. Naturally it seems unlikely at the moment that a further significant reform will be required in another 20 years, but no doubt the drafters of the 2004 Act took the same view. Nevertheless, the likelihood of significant ongoing reforms seems relatively low.

---

[9] See generally Discussion Paper, paras 4.54 – 4.61.

[10] It is difficult to predict to what extent this might happen. It may be that owners in tenements with few existing title conditions, usually those built prior to 1930, are content to rely on the default rules. Tenements constructed since that time, and particularly since the 1980s, are likely to have more extensive title conditions and an existing factor or manager. In such cases, a switch to reliance on the default rules seems unlikely.

[11] See the amendments to rules 5 and 8.4 of the TMS made by the Housing (Scotland) Act 2014 s 85.

8.17 It should also be kept in mind that the approach we recommend does not require the legislature to relinquish all control over the maintenance rules in tenements where association conditions have been created. If necessary, legislation could overrule the effect of such conditions. We note in this respect section 64 of the Title Conditions (Scotland) Act 2003, which provides for a majority of owners in a development to dismiss a manager and appoint a new one notwithstanding provision in the title conditions which reserve this power to the developer. Provision elsewhere in our draft Bill will also require action by owners which is not required by their title conditions in certain respects, for example by requiring an annual meeting of members to be called. If updates to the law of tenement maintenance are sufficiently important, they can be imposed on all tenements through legislation rather than relying on updates to the default rules.

8.18 Separately, we note that the approach we recommend is common in other jurisdictions.[12] In South Africa, for example, section 10 of the Sectional Titles Schemes Management Act 2011 provides that a sectional scheme must be regulated and managed subject to rules prescribed by statute or modified by the developer, with any modifications set out in writing and registered before any unit in the scheme can be sold. Model management rules are contained in Annexure 1 of the Sectional Titles Schemes Management Act Regulations, with extensive modifications competent in terms of section 10. Similarly, section 136 of the Strata Schemes Management Act 2015 applicable in New South Wales allows for registration of by-laws which may be made "in relation to the management, administration, control, use or enjoyment of the lots or the common property…of a strata scheme." Again, model by-laws are made available in the Strata Schemes Management Regulation 2016, and these must either be adopted wholesale or modified by the body corporate for the strata scheme (the equivalent of the owners' association) by way of registered deed before any units in the scheme can be sold.

8.19 A second, more practical, concern with our proposed approach concerns variations to association conditions after they have been created. We noted above that legislative amendments to the default association rules will have no impact on association conditions, which are fixed in the deed which creates them. If owners later wish to amend their association conditions, however, should they be required to incorporate any changes which have been made to the default rules in the meantime? Imagine, for example, that an association registers a deed creating association conditions in 2027, based on the version of the default association rules in force at that time. Ten years later, the default association rules are amended by the legislature. Fifteen years later, the association wishes to amend their association conditions. Must those amendments incorporate the changes to the default association rules made since the conditions were first created?

8.20 Again, comparative law may be of assistance. In New South Wales, the Strata Schemes Management Act 2015 provides that by-laws made under the earlier version of the legislation remain valid following the introduction of the new law. However, future variations must be made in accordance with the new provisions.[13] We suggest a similar approach should be adopted here. Where owners wish to vary an association condition, the variation must comply with the version of the default rules in force at that time. In other words, although changes by the legislature to the default association rules will not have any automatic impact

---

[12] See generally C G Van der Merwe, "Apartment Ownership" in K Zweigert (ed), *International Encyclopaedia of Comparative Law* (1992) Volume VI: Property and Trusts, paras 79 – 97; 278 – 303.
[13] Strata Schemes Management Act 2015 s 134 (New South Wales, Australia).

on association conditions, where owners themselves wish to vary their rules, they should only be permitted to do so in line with the legislation as it applies at that date. We would also note that, in practice, variations to deeds of conditions of this kind are fairly uncommon.

8.21 Taking into account all of the above, we remain of the view that, following the introduction into force of the legislation on owners' associations, any deed purporting to create a title condition which would modify the application of the default association rules should set out those amended rules in full. Here, we provide some further specification of how this is provided for in our draft Bill.

Association conditions: the requirements

8.22 Under current law, the TMS applies in relation to tenement scheme property only where relevant provision has not been made in the tenement titles. To determine whether there is an absence of such provision, regard must be had to section 4 of the 2004 Act, which sets out the types of provision which must be made in the titles to prevent the application of related TMS rules. For example, section 4(4) provides:

> "Rule 2 of the Scheme shall apply unless—
>
> > (a) a tenement burden provides procedures for the making of decisions by the owners; and
> >
> > (b) the same such procedures apply as respects each flat."

Assessing whether and how the provisions in section 4 interact with the titles to an individual tenement is often a difficult exercise, even for a person with legal training. The absence of any consistency in the way tenement burdens are drafted exacerbates the problem.

8.23 To prevent these difficulties persisting following the introduction of legislation on owners' associations, our aim is to require tenement titles to set out the association rules in full. This will allow flat owners to obtain a complete picture of the rules applicable in their tenement by virtue of reading their titles. We also seek to ensure that the rules are set out in the same order in every tenement title, with that order dictated by the presentation of the default association rules in statute. To explain further, under our draft Bill, new schedule A2 to the 2004 Act will contain the default association rules. Paragraph 1 of that schedule provides for key definitions. Paragraph 2 defines an association decision. Paragraph 3 provides for the allocation of votes to flat owners. Paragraph 4 sets out voting thresholds for decisions to be taken on various matters. Paragraph 5 sets out the procedures by which a vote can be taken, and so on. Our intention is to require deeds which create association conditions to follow the same structure. Accordingly, paragraph 1 of a relevant deed should provide for key definitions, paragraph 2 should define an association decision and so on. The content of these paragraphs may not be the same – the definitions provided for in paragraph 1 of the deed creating association conditions may be different than the definitions provided for in paragraph 1 of the default association rules – but paragraph 1 will contain the definitions in either case.

8.24 To achieve this outcome, our draft Bill provides that the rules of a tenement owners' association are the rules set out in association conditions which affect the tenement. Where there are no such conditions, the default association rules will apply. Association conditions are defined as real burdens to which each flat in the tenement is subject, contained in one

constitutive deed, and which (taken together) replicate in full the default association rules subject only to "permitted modifications".

8.25 By "replicate", what is required is that the whole text of the default association rules is included within the deed creating the association conditions. Incorporation by reference will not suffice. Equally, reproduction of certain default rules whilst other rules are absent will not suffice. Burdens which purport to regulate such matters but which do not replicate in full the text of the association rules will not be "association conditions", and therefore will not apply to the owners' association for the tenement.

8.26 The "permitted modifications" are the mechanism by which the freedom of owners to make individual provision for their tenement is retained. The intention is for detailed provision to be made in delegated legislation as to the nature and extent of the modifications possible in relation to each of the default association rules. An example can be given using paragraph 3 of the default association rules to be contained in new schedule A2 to the 2004 Act. Paragraph 3(1) provides that, for the purposes of making an association decision, one vote is allocated to each flat in the tenement. Future provision on permitted modifications may specify, for example, that this paragraph can be amended to provide for an alternative allocation of votes, so that some flats (perhaps those larger in size or bearing a larger share of liability for costs) have greater voting power than others. Paragraph 3(2) provides that a right to vote may be exercised by the owner of the flat or by a person nominated in writing by the owner to exercise the vote on their behalf. Future provision on permitted modifications may specify that this paragraph can be amended to delete the provision allowing a nominated person to vote on the owner's behalf, and/or to specify additional persons who may exercise a vote. Provision of this kind specifying which modifications are permitted will be made for every paragraph of the default association rules.

8.27 Our draft Bill does not make provision for the permitted modifications. Instead, it confers power on the Scottish Ministers to make this provision by way of delegated legislation. We have taken this approach in our draft Bill for pragmatic reasons. Drafting the permitted modifications will be a complex exercise in which consultation with a range of stakeholders on the detail will be essential. It will take some time. Undertaking that exercise during the course of our project, during which time it necessarily remains unclear whether any legislation on owners' associations will ultimately be enacted, seemed to us an inappropriate use of the limited resources available to the Commission. If and when the government take a decision to move forward with the legislation, work to develop the permitted modifications might more usefully proceed.

8.28 One important element of consultation which the government will require to undertake when drafting regulations on the permitted modifications will be with the Financial Conduct Authority and other stakeholders from the mortgage sector. As noted above, one effect of our recommendation on association conditions is that, after the 20-year transition period outlined below, existing tenement burdens on relevant matters will cease to have effect. Where owners wish to preserve the effect of the existing burdens, they will have to create new burdens which achieve those effects whilst also meeting the requirements of association conditions. One difficulty which may arise here is that, where a flat is subject to a standard security, it will generally be a term of that security that the owner cannot make changes to the real burdens without first obtaining the security holder's consent. We would urge the government to work with banking industry stakeholders to agree a protocol under which blanket consent is available from security holders in relation to changes resulting from owners putting into place

new association conditions. Engaging with these stakeholder during the process of preparing the permitted modifications should enable parties to understand, and if necessary limit, the risk to which security holders may be subject as a result of changes to the burdens affecting relevant flats.

8.29 While this Report does not recommend the final form any delegated legislation might take, what we anticipate is a set of regulations which work through the default association rules paragraph by paragraph, indicating the ways in which each paragraph can be modified in framing real burdens. The regulations will therefore effectively require burdens on these matters to be drafted in a particular style, although the regulations will not contain a "statutory style" as such. For example, paragraph 3 of new schedule A2 will set out the default rules on allocation of votes. Regulations could potentially provide that a burden which aims to disapply this rule must be drafted in line with the following,[14] in which the italicised words indicate the permitted modifications:

Allocation of votes

(1) For the purposes of any association decision to be voted on by the members of the association, *[one vote is allocated to each flat in the tenement, or an alternative allocation of votes may be specified]*.

(2) A right to vote allocated to a flat may be exercised by—

(a) *[the owner of the flat, or an alternative person may be specified]*

(b) *[a person nominated in writing by the owner to exercise the vote on behalf of the owner, or this provision may be deleted]*

(c) *[any further person or persons who may exercise a vote may be specified].*

(3) Where there are two or more owners of a flat, *[the vote allocated to that flat may be exercised by any of the owners or an alternative rule on exercise of the vote in these circumstances may be specified]*.

(4) But if the owners of the flat disagree as to how the vote is to be cast, the vote is not to be counted [*unless*—

(a) *where one of the owners owns more than a half share of the flat, the vote is exercised by that owner,*

(b) *in any other case, the vote is the agreed vote of the owners who together own more than a half share of the flat*

or alternative rules may be specified if a vote is to be counted in these circumstances].

8.30 The general law on creation of real burdens will otherwise apply in the usual way. For an existing tenement, burdens may in principle be created by flat owners acting collectively.

[14] We do not aim here to prejudge which modifications will be permitted – the intention is simply to expand on how we anticipate the regulations will operate.

The government may wish to consider bringing the default association rules and regulations on the permitted modifications into force prior to the remainder of the owners' association legislation, in order to allow motivated owners to put in place burdens meeting the requirements of association conditions. These can take effect immediately when the remainder of the legislation – including the provisions which will bring to life the owners' association – are brought into force. Once the owners' association is established, it will also have the power to grant burdens which meet the requirements of association conditions on the basis of a special majority vote.[15]

8.31 For tenements constructed after the legislation is in force, it is anticipated that burdens meeting the requirements of association conditions will form part of a larger deed of conditions granted by the developer in the usual way. However, within that deed, it will be possible to identify a section that sets out the association rules (with permitted modifications) in full.

8.32 Once burdens which are association conditions are in place for a tenement, there may come a time when owners wish to amend them. The rules set out above will apply in relation to amendment of the burdens in the same way as they apply to initial creation of the burdens. In other words, a minute of amendment purporting to change one term of the association conditions will not be effective. Instead, a new burden deed will require to be registered setting out all of the conditions in full. Ultimately this should make the process of identifying and understanding the rules in any particular tenement relatively straightforward for owners, their advisers and other interested parties, which addresses a significant concern amongst consultees about the state of the law at present.

8.33 Burdens which are intended to be association conditions but do not meet the requirements above will not regulate the operation of the owners' association in question. However, some leniency is required to allow for minor errors in drafting which might create small discrepancies between the text of the default association rules and the intended association conditions. The Bill accordingly provides that a difference (other than a permitted modification) between the text of relevant burdens and the default association rules does not prevent the burdens being association conditions, unless the difference causes the burden to have a different effect than it would have without the difference, or is misleading. This provision is modelled on Section 21 of the Interpretation and Legislative Reform (Scotland) Act 2010, which applies to statutory forms.

8.34 Provision is also made in the Bill for the validity of actions taken in good faith in accordance with burdens which turn out not to meet the requirements of association conditions.

8.35 Drawing together the threads above, we recommend:

50. (a) The rules of an owners' association are the rules set out in association conditions which affect the tenement, or where there are no such conditions, the default association rules set out in statute.

(b) Association conditions are real burdens to which each flat in the

[15] Paragraph 4(3)(j) of Schedule A1 sets out this capacity of the association. Paragraphs 2(a) and 3(d) of Schedule A2 set out the need for a special majority vote for the exercise of this capacity.

tenement is subject, contained in one constitutive deed and which replicate the default association rules in force when the burdens are created (or varied) subject only to permitted modifications.

(c) The Scottish Ministers should have power to specify the permitted modifications by way of regulations.

(d) The Scottish Government should engage with the Financial Conduct Authority and other mortgage industry stakeholders when preparing regulations on the permitted modifications to agree a protocol on consent to the grant of burdens which are association conditions.

(e) A difference between real burdens and association rules (other than a permitted modification) does not prevent the real burdens being association conditions, unless the difference causes the real burdens to have a different effect than they would without the difference, or are misleading.

(f) The validity of anything done in good faith in accordance with a real burden which purports to be an association condition is not affected by its not being an association condition.

(2004 Act, s 3D(1)-(5)&(7), inserted by Draft Bill, s 2)

Interpretation of association rules and association conditions

8.36 Real burdens which are association conditions will be subject to the usual rules on interpretation of real burdens. In this respect, section 14 of the Title Conditions (Scotland) Act 2003 provides that real burdens shall be construed in the same manner as other provisions of deeds which relate to land and are intended for registration.

8.37 The default association rules set out in statute will not be real burdens. Accordingly, they will be subject to alternative rules of legislative interpretation. The risk accordingly arises that, over time, case law may develop a different interpretation of rules which are set out in association conditions by comparison with the default association rules, even where the text is largely the same in both cases. Taking into account the intentions underlying our recommendations on association conditions above, such an outcome would be obviously undesirable.

8.38 To mitigate that risk, it seems sensible to make provision for the default association rules to be interpreted using the same rule of construction applicable in the case of real burdens. We accordingly recommend:

51. The default association rules should be construed in the same manner as provisions of deeds which related to land and are intended for registration.

(2004 Act, s 3D(6), inserted by Draft Bill s 2)

Discharging association conditions

8.39 Taking into account the intentions underlying the provisions on association conditions outlined above, it would obviously be undesirable if the burdens forming such conditions could be discharged on a piecemeal basis. Once a set of conditions has been created, the set must remain complete, or else be discharged in full.

8.40 This runs counter to the general law of real burdens, under which any individual burden is capable of variation or discharge by the person or persons with capacity to grant the variation or discharge. For example, real burdens which meet the requirements of association conditions will necessarily be community burdens within the meaning of section 25 of the Title Conditions (Scotland) Act 2003. Provision is made for the variation and discharge of community burdens where supported by a majority of the affected community in sections 33 of the 2003 Act.[16] In principle, this would allow for a majority to discharge a sole association condition, contrary to our policy intention here.

8.41 The Bill accordingly makes provision to the effect that a deed of discharge in relation to a real burden which is an association condition is of no effect unless it discharges all the burdens which constitute those conditions. This provision should ensure that, once created as a complete set, association conditions remain a complete set.

8.42 We recommend:

52. A deed of discharge in relation to a real burden which is an association condition is of no effect unless it discharges all the burdens which constitute those conditions.

(2004 Act, s 3E(1), inserted by Draft Bill s 2)

Restricting the power of the Lands Tribunal

8.43 The Title Conditions (Scotland) Act 2003 also confers on the Lands Tribunal various powers in relation to the construction, variation and discharge of real burdens and other title conditions.[17] Under current law, this results in a slightly unusual situation in which tenement burdens which regulate the management and maintenance of common parts are subject to interpretation by both the Lands Tribunal (since they are title conditions), and by the sheriff court under section 6 of the 2004 Act (since they are part of the management scheme which applies in relation to a tenement).

8.44 This overlap was identified in our Report on Tenement Law which preceded the introduction of the 2004 Act. There, we noted:[18]

> "We have considered whether the rules of management schemes ought to be excluded from the Lands Tribunal jurisdiction. [The default rules of the TMS and what became

[16] Section 35 of the 2003 Act makes provision for the variation or discharge of community burdens with the consent of the owners of all units adjacent to the units to be affected by the variation or discharge. This provision does not, however, apply in relation to facility and service burdens as defined in section 122 of the Act. Since real burdens which form association conditions will inevitably be facility burdens, this provision will not apply.
[17] Title Conditions (Scotland) Act 2003 ss 90 – 104.
[18] Scottish Law Commission, Report on the Law of the Tenement (Scot Law Com No 162, 1998), available at https://www.scotlawcom.gov.uk/files/4512/7989/7476/rep162.pdf, para 5.87.

the DMS] can already be varied by agreement of a majority of owners. Further, the three grounds on which the Lands Tribunal is permitted to vary or discharge obligations seem remote from the typical content of a management scheme. On balance, however, we think it is better to leave matters as they are, if only because management rules and real burdens may sometimes be so closely intertwined within a single deed that it may be difficult to separate them, or even to distinguish them."

8.45 Under the provisions on association conditions in our draft Bill, the risk of a close intertwining between burdens which form association conditions and those which do not falls away. As noted above, it is also desirable to prevent burdens which form association conditions from being varied or discharged in a piecemeal way, since they are intended to operate as an identifiable "set". Moreover, the types of concerns which tend to animate arguments in relation to variation or discharge of title conditions before the Lands Tribunal – that burdens are elderly and do not align with changes in the community, for example – seem less likely to have purchase in the case of association conditions. Finally, as under current law, there is recourse to an alternative forum to the Lands Tribunal where disputes in relation to association conditions arise, namely to the First-tier Tribunal under section 6 of the 2004 Act as amended by our draft Bill.

8.46 Taking the above points together, and with the support of our Advisory Group, we have come to the view that the jurisdiction of the Lands Tribunal should not apply in relation to real burdens which are association conditions. Removing this jurisdiction should help to ensure association conditions remain "complete", and streamline case law in this area by ensuring that all relevant disputes are dealt with in the same forum.

8.47 We accordingly recommend:

53. The jurisdiction of the Lands Tribunal in relation to title conditions should not apply to burdens which are association conditions.

(2004 Act, s 3E(3), inserted by Draft Bill s 2)

Extinction of association conditions

8.48 Finally, when an owners' association is dissolved as a result of demolition of the tenement or otherwise, association conditions cease to have any purpose. Such burdens should be removed from the property registers in the interests of keeping those registers as accurate as possible. To make this process simpler, we recommend provision that, on the dissolution of an owners' association, any burdens meeting the requirements of association conditions which affected the related tenement are extinguished. The effect of this provision is that the Land Register will be inaccurate within the meaning of section 65 of the Land Registration etc (Scotland) Act 2012 where it continues to include these burdens following the dissolution of the owners' association, and can be rectified by the Keeper deleting the burdens.[19] We recommend that the manager of an owners' association should be under a duty to notify the Keeper of any such inaccuracy during the process of winding up the association.[20]

[19] 2012 Act s 80.
[20] Inaccuracies can be reported to the Keeper of the Registers of Scotland by way of the Title Inaccuracies Enquiry Service. Details of this service can be found at https://www.ros.gov.uk/services/public-title-inaccuracy-enquiry.

8.49 We recommend:

54. (a) Where an owners' association is dissolved, any burdens affecting the tenement which are association conditions are extinguished.

(b) The manager of the association should be under a duty, during the association winding up period, to notify the Keeper of any inaccuracy arising as a result of the extinction of such burdens.

(2004 Act, s 3B(5)(e) inserted by Draft Bill s 1 and 3E(2), inserted by Draft Bill s 2)

Transitional arrangements for existing tenement burdens

8.50 In future, the rules of an owners' association will be set out in association conditions in the tenement titles, or else the default association rules will apply. As noted above, however, it will take some time for association conditions to be put in place for tenements throughout Scotland. Taking that into account, we recommend that existing tenement burdens on relevant matters should operate to provide owners' association rules, in combination with the default association rules, during a transition period of 20 years following the entry into force of the owners' association legislation. At the conclusion of the transition period, burdens which do not meet the requirements of association conditions will cease to have that effect. In this section, we recommend how existing burdens should interact with the association rules during the transition period.

8.51 Our recommendation here follows on from provisional proposals in the Discussion Paper,[21] in which we suggested that existing tenement burdens should disapply the default association rules for a fixed period of 20 years. After the fixed period had passed, existing burdens would cease to have that effect.

8.52 We noted that the rights of flats owners under A1P1 might require a statutory mechanism to be created by which an owner could unilaterally register a new deed of conditions replicating, in so far as possible, the effect of existing burdens in relation to all the flats in the tenement. Such a mechanism should be available to protect the rights of that owner in the face of apathy from their fellow owners. We propose such a mechanism below.

Consultees' views on a deadline for existing real burdens

8.53 We asked consultees a series of questions in relation to these matters.[22] Amongst the responses, 18 of 28 consultees agreed that existing real burdens should cease to disapply the default rules on operation of the owners' association after a fixed period,[23] and ten out of 23 consultees agreed that 20 years was an appropriate period, with eight consultees suggesting a shorter period (5 or 10 years) and two consultee suggesting a longer period (30 years).[24]

8.54 Amongst consultees who disagreed with our proposed approach, one concern raised was that it may not be clear whether or how existing burdens vary the default rules. Drafting a deed in line with the new requirements for association conditions might therefore be

[21] See generally Discussion Paper, paras 4.63 – 4.70.
[22] Discussion Paper, para 4.71.
[23] Five consultees disagreed with this proposal, and the remaining five gave a neutral or unclear response.
[24] The remaining three consultees gave responses which were neutral or unclear.

challenging. From our perspective, addressing these challenges is very much an intended outcome of the proposal. We accept that it is not always clear how existing burdens interact with the background law. This is precisely the kind of difficulty that leaves tenement flat owners unclear about the rules applicable in their building. The process of drafting association conditions will flush out these ambiguities and force a resolution, through agreement between owners as to what the terms mean or, if necessary, through a determination by the Tribunal. We recognise that this process will be challenging in some cases, but these challenges address the ambiguities in current titles rather than ignoring them, and must be faced if progress is to be made towards more universally accessible tenement maintenance rules.

8.55 Professor Kenneth Reid also expressed concern about the penalty of disapplication of existing burdens in cases where association conditions are not created by the conclusion of the transition period. He thought it likely that many associations simply would not register a new deed, leaving them to be regulated by the default association rules in circumstances where those rules are inadequate. The difficulty we noted earlier about drafting a single set of rules which could apply appropriately in every tenement is salient here. Professor Reid queried whether an alternative approach could be taken, for example that failure to create association conditions would result in a higher level of Land and Buildings Transaction Tax being imposed on sale of a flat in the relevant building, or more dramatically that power of sale in relation to flats in the building could be suspended at the conclusion of the transition period if no association conditions were in place. In the meantime, the existing tenement burdens would continue to regulate the operation of the association.

8.56 While we accept that disapplication of burdens may produce non-optimal results in some buildings, we are not sure that the alternatives suggested by Professor Reid are preferable. Where a penalty for failure to create new burdens is connected to sale of a flat, the weight of that penalty will fall only on an owner who is looking to sell, and for that owner, the effect could be severe. By contrast, the disapplication of existing burdens will affect all owners in the building, and while a switch to the default association rules may represent a change, the effect seems likely in most cases to be less dramatic than the loss of the power of sale. Similarly, an increase in LBTT is unlikely to be sufficient to prevent a sale of a desirable property, and where it does prevent sale of a less desirable property, the effect again falls only on one flat. A consequence which impacts on all owners in the building seems both more equitable, and more likely to incentivise action.

8.57 A separate concern raised by Registers of Scotland amongst others was that, no matter how far into the future the relevant deadline is set, human nature dictates that associations will not generally act to create new conditions until the deadline is close. There may be an absence of capacity amongst practitioners to deal with a sudden rush of demand for new deeds of conditions at that time, and Registers of Scotland may also struggle with a rush of applications. We think part of the solution to this difficulty lies in government initiatives to incentivise earlier action along the lines discussed in Chapter 2. However, we consider that it might also be appropriate to provide the government with a power to extend the deadline by delegated legislation if it proves necessary as a result of concerns of this kind.

8.58 A few consultees noted (here and elsewhere) that, should existing burdens cease to have effect at the conclusion of the transition period, defunct burdens will not automatically be cleansed from the property registers. Deleting old deeds may not be feasible in any event, since they may contain burdens which are not relevant to or affected by the default association rules. We accept that this is the case. Nevertheless, we consider that requiring inclusion of a

standard set of association conditions within the titles should make it easier for owners to understand the rules in their own tenement, even if the effect of other burdens in their titles remains difficult to discern. A broader review of burdens in property titles is obviously beyond the scope of our project.

8.59 Taking into account all of the above, we remain of the view that, following the introduction into force of the legislation on owners' associations, existing burdens on relevant matters should have the effect of disapplying the default rules on operation of the owners' association for a fixed period only. Here, we provide some further specification of how this is provided for in our draft Bill.

Effect of existing tenement burdens during the transition period

8.60 The Bill makes provision for tenement burdens on relevant matters which are in place when the owners' association legislation is introduced ("pre-commencement burdens") to disapply the default association rules during the transition period. The drafting of the provision is based on the current section 4 of the 2004 Act. The Bill provides that:

- The default rules on making association decisions shall apply except to the extent that a tenement burden: (i) makes provision for decision-making by owners on matters which, following the introduction of the legislation, will fall within the capacity of the owners' association; (ii) the provision made relates to some or all matters covered in the default rules on association decision making; and (iii) the provision is the same for each flat in the tenement;

- The default rules on liability for association costs shall apply except to the extent that a tenement burden provides that the entire liability for specified costs which, following the introduction of the legislation, will be costs incurred by the owners' association, is to be met by one or more of the flat owners;

- The default rules on redistribution of liability for association costs where a member has been exempted should apply except to the extent that a tenement burden provides how liability for specified costs which, following the introduction of the legislation, will be costs incurred by the owners' association, is to be redistributed in this situation;

- The default rules on redistribution of an unrecoverable share of association costs should apply except to the extent that a tenement burden provides how a share of specified costs which, following the introduction of the legislation, will be costs incurred by the owners' association is to be redistributed in this situation;

- The default rules on the annual budget process and the service charge shall apply except to the extent that a tenement burden makes provision for some or all of the matters covered in these default rules in relation to costs which, following the introduction of the legislation, will be costs incurred by the owners' association.

8.61 This provision will remain applicable for a period of 20 years following from the date on which the section is brought into force. However, the Bill also confers on Ministers the power, by delegated legislation, to extend the period during which this provision applies (provided that the extension is put into place prior to the expiry of the original 20 year period), and for it to be possible to further extend the relevant period as many times as Ministers wish.

This seems to us to strike the right balance between the views expressed by consultees on the appropriate period during which existing title conditions should continue to have effect, and concerns about the dangers of a "rush to the deadline."

8.62. Drawing together the matters dealt with above, we recommend:

55. (a) The default association rules should be disapplied by provision on relevant matters in existing tenement burdens for a fixed period following the entry into force of the legislation;

(b) After the fixed period, existing burdens will cease to have that effect;

(c) The duration of the fixed period should be 20 years;

(d) Scottish Ministers should have power by way of regulations to change the fixed period prior to its expiry.

(2004 Act, s 3D(8) and schedule A3 paras 1-2, inserted by Draft Bill, s 2)

Unilateral approval of a preservative deed of conditions

8.63 Under our recommendations above, the effect of existing real burdens on the maintenance rules in a tenement will be preserved for the duration of the transition period. Owners who wish to preserve those effects beyond the end of the transition period will require to create new burdens, meeting the requirements of association conditions, which make use of the permitted modifications to replicate the effect of their existing tenement burdens insofar as that is possible. We think it is likely that the permitted modifications will almost always allow for replication of the effect of existing burdens. We refer to a deed intended to create association conditions having this effect as a "preservative deed of conditions".

8.64 Under our recommendations, the owners' association will have capacity to register a deed which creates association conditions. Alternatively, owners could take unanimous action to grant such a deed in their own names. A potential issue arises here in relation to the rights of individual flat owners to peaceful enjoyment of their possessions under A1P1. The grant of a preservative deed of conditions by the association will normally require a special majority of owners to take a decision in favour of doing so, or owners doing so in their own names will require to act unanimously. However, it may be the case that the majority of owners in the building are apathetic in relation to this issue. They may simply not respond to a proposal concerning the grant of a preservative deed. The effect would be that an individual owner who wishes to preserve the effect of existing burdens would, despite their best efforts, be unable to do so.

8.65 We do not think the power of an individual owner to preserve their position under existing burdens should be defeated by the apathy of other owners. Accordingly, we recommend that a mechanism should be available by which an owner can unilaterally authorise the grant and registration by the association of a preservative deed of conditions in circumstances where other owners fail to vote.

8.66 It should be emphasised that the power to act unilaterally should be available to an owner only where a special majority cannot be obtained due to a lack of engagement by other

owners. The general policy embodied in our recommendations is that a special majority of owners should be able to decide on changes to the rules on operation of their association. This includes deciding *against* the grant of association conditions, such that the default association rules will apply. The unilateral power of an owner to authorise registration of a preservative deed of conditions is not intended to provide a veto power. It should not allow a single owner to overrule a special majority vote in favour of a set of association conditions which do not preserve the effect of existing burden. It should not allow a single owner to overrule a special majority vote *against* the grant of any association conditions.[25] The unilateral power is a guard against apathy, not against disagreement.

Consultees' views on a duty to register a preservative deed of conditions

8.67 We sought views from consultees in the Discussion Paper on the concept of a unilateral right to registration of a preservative deed of conditions.[26] Ten out of 18 respondents agreed that the association should be under a duty to register a preservative deed of conditions on request by an individual owner, with four disagreeing.[27] Eleven out of 17 respondents agreed that it should be possible for a special majority decision to be taken that a preservative deed of conditions should *not* be registered. In supporting the proposals, Under One Roof suggested government subsidy should be available in respect of legal fees for the new deeds. We note our suggestion that the government should consider what financial support can be made available to support the implementation of the new legislation in Chapter 2.[28]

How can the unilateral power be exercised?

8.68 Our draft Bill includes provision to the effect that any owner may require the association to prepare and register a preservative deed of conditions against the titles to all the flats in the tenement. A preservative deed of conditions is defined as a deed which incorporates the default association rules in full, subject insofar as permitted to the modifications necessary to retain the effect of existing tenement burdens in relation to the operation of the association. An owner has the right to request registration of such a deed unless:

- the association, or owners acting collectively, have already registered a deed creating association conditions in relation to the tenement; or
- an association decision has already been taken to refuse to register a preservative deed of conditions. Such a decision can be taken by a special majority of owners.

8.69 In relation to the second bullet point above, owners must be given an opportunity to decide whether to refuse to register a preservative deed. The Bill accordingly provides that, where a manager receives a request from an owner to register a preservative deed, the manager must notify all owners as soon as reasonably practicable thereafter that: (i) a request has been made; (ii) the manager will prepare a preservative deed of conditions unless the

[25] We recommend later in our Report, however, that an individual owner may apply to the Tribunal to have a majority decision annulled where it is not in the best interests of all the owners or causes undue hardship to any owner: see paras 9.69 – 9.72 below.
[26] Discussion Paper, para 4.71.
[27] The remaining four consultees provided responses which were neutral or unclear.
[28] See paras 2.30 – 2.32 above.

association decides, within 28 days of the notification being given, not to register such a deed. Such a decision requires a special majority.

8.70 If the association does not decide during this period against registration of a preservative deed, the manager must prepare the preservative deed, then circulate a copy of the deed to all owners. When circulating the deed, the manager must notify owners that the deed will be registered after 28 days of the notification being given unless an association decision is taken not to register the deed. Such a decision will, again, require a special majority. We think it is necessary to provide owners with this second opportunity to decide against registration of a preservative deed to allow for objections to the terms in which the deed has been drafted, even where owners have no objection in principle to the registration of such a deed.

8.71 If the association does not decide during this period against registration of a preservative deed, the manager must register it on behalf of the association.

8.72 Where a special majority decides against registration of a preservative deed, the unilateral power of any owner to authorise registration of such a deed falls away. In other words, the decision against registration of a preservative deed need only be taken once. If that decision is taken, it does not prevent owners at some later point deciding that a deed creating association conditions should be granted. That deed may even have the effect of a preservative deed, should owners so decide. The point is that an owner cannot unilaterally authorise the registration of such a deed once an association decision has been taken not to do so. From then onwards, a deed can be registered only where a decision to that effect has been taken by a majority in line with the usual association rules. In practice, we would hope that notification of a request to register a preservative deed might trigger discussions amongst owners about the rules of the association. These could potentially lead to registration of a relevant deed in due course. If no such deed is registered prior to the conclusion of the transition period, the default association rules will apply in full.

8.73 We recommend:

56. (a) During the transition period, any owner may request that the association registers a preservative deed of conditions, unless association conditions already apply to the tenement or a request for registration of a preservative deed has already been made.

(b) The manager of the association must, as soon as reasonably practicable after the request is made, notify members that the request has been made, and that, unless an association decision is taken not to register a preservative deed within 28 days, the manager will prepare a preservative deed.

(c) Unless an association decision is taken during this period not to register a preservative deed, the manager must prepare a preservative deed.

(d) The manager must circulate the preservative deed to all members and notify them that, unless an association decision is taken not to register

a preservative deed within 28 days, the manager will register the preservative deed.

(e) Unless an association decision is taken during this period not to register a preservative deed, the manager must register the preservative deed on behalf of the association.

(f) An association decision not to register a preservative deed requires a special majority.

(2004 Act, s 3D(8) and schedule A3 para 3, inserted by Draft Bill, s 2)

Chapter 9 Default association rules: decisions

Introduction

9.1 Like any legal person, an owners' association needs human beings to make decisions about what it should do. Owners of flats in the tenement will take collective decisions about when and how their owners' association should exercise its powers. We refer to such decisions as "association decisions". This Chapter focuses on how association decisions can be taken.

9.2 Every association will have rules in relation to decision making. These rules will cover the allocation of votes to owners, the voting thresholds required for decisions on different matters, and the process by which decisions can be taken at a meeting of members or otherwise. The rules must also make provision as to the effect of an association decision, the consequences of any irregularity in the decision-making process and the circumstances in which a decision may be annulled by an owner. The rules for a particular association may be set out in association conditions applicable to the tenement.[1] Where there are no such conditions, the default association rules set out in the legislation will apply.[2]

9.3 This Chapter sets out the default association rules we recommend in relation to association decisions. These issues were originally considered in Chapter 8 of the Discussion Paper.

Relationship between ownership, voting rights and liability for costs

9.4 A preliminary matter to which we gave some consideration in the Discussion Paper concerns the relationship between ownership of the common parts of the tenement, the right to make decisions about those parts of the building, and the liability to pay for the costs of work to those parts.[3] We noted the "unit allocation" or "participation quota" approach to this issue adopted in some jurisdictions, whereby a flat in its title deeds is allocated a "participation quota", usually expressed as a percentage. That quota determines the flat's percentage share of: (i) ownership of the common parts of the building; (ii) voting rights in relation to those parts; and (iii) liability for the cost of works to those parts. We noted that tenement law in Scotland did not evolve to distribute ownership of parts of the building on the basis of a percentage share. It is not unusual for some structurally significant parts of a tenement, like the roof or the foundations, to be in sole ownership of one or two flats, while other parts like the stairwell or close are in shared ownership of all the flats. It would be very difficult to disturb these established ownership rights in order to impose an integrated "participation quota" type of approach now, not least when owners' rights to peaceful enjoyment of their possessions under A1P1 is taken into account.

---

[1] See Chapter 8 for discussion of association conditions.
[2] During the transition period of twenty years following the introduction of legislation on owners' associations, existing tenement burdens may regulate these matters to a certain extent: see paras 8.50 – 8.62 above.
[3] Discussion Paper, paras 8.6 – 8.14.

9.5 Instead, the reform of tenement law in 2004 decoupled ownership from both decision making power and liability for costs in relation to structurally important parts of the building, subject to alternative provision in the tenement titles. This means that, for example, every flat in a tenement building may have one vote in respect of maintenance works to the roof, and an equal share of liability with other flats for the cost of that work, even where the roof is in sole ownership of the top flat. We consider this separation between ownership on the one hand, and voting rights and liability for costs on the other hand, to remain the only workable solution in Scotland.

9.6 However, an argument could be made for a closer connection in a reformed law between voting rights and liability for costs. The TMS provides that where a scheme decision is to be taken, each flat which has liability for the costs incurred by the decision holds one vote.[4] The flats with liability also generally share the costs equally.[5] However, there are exceptions to the general rule on costs where scheme property is owned in common in unequal shares or where there are significant size differences between the flats. Where an exception applies, one flat will pay a larger share of costs than others, yet will continue to hold only a single vote.[6]

9.7 In the Discussion Paper, we noted that this might be perceived as unfair, particularly where the uneven distribution of liability has come about as a result of renovations to the building. An increase in liability could result from renovations which increase the size of a flat, and yet the owner in question would have no increase in voting rights in relation to works. Alternatively, an owner may divide what was originally a single flat into two flats. Each of the smaller flats created by the renovation will have its own right to vote, effectively diluting the voting power of the other, unrenovated flats, but it may not be the case that their share of liability is diluted in the same way.

9.8 Special rules could be introduced to deal with such circumstances – for example, where one flat is divided into two, it could be provided that each new flat only has half a vote. However, in the Discussion Paper we took the view that the need for simplicity in the voting process argued against such an approach. A "one flat, one vote" rule makes the process of casting and counting votes straightforward, and reduces the scope for disputes about whether decisions have been made. On that basis, we considered that where the number of flats in a building changes, the number of votes must change with it. Owners with a higher share of liability for costs can be protected in other ways, for example through a power of veto as discussed later in this Chapter.[7]

9.9 We asked consultees whether there should be a strict link between allocation of voting rights and allocation of liability for costs under a reformed law. Of the 31 consultees who responded to this question, 22 opposed a strict link, generally citing the need for simplicity and a desire to maintain the status quo. The seven consultees who supported a strict link generally suggested that this was necessary to ensure fairness for those incurring the greatest financial

[4] TMS rules 2.2 and 2.3.
[5] TMS rule 4.2(b)(ii). Exceptions apply where the scheme property is owned in common in unequal shares or where there is a significant difference between the floor area of the largest flat and the smallest: see Discussion Paper, para 8.9.
[6] For a more detailed explanation see the Discussion Paper at para 8.9.
[7] See paras 9.66 – 9.68 below.

costs, though we note that consultees who opposed a link also cited fairness as a reason for their response.

9.10 In light of the views of consultees, we do not recommend any provision setting out a stricter link between allocation of voting rights and allocation of liability for costs within the default association rules. Owners would, of course, be free to make alternate provision for their association by way of association conditions should they wish.

Voting rights

Allocation of votes

9.11 The association rules must specify how votes are allocated to owners. In the Discussion Paper, we suggested a default rule that each flat in a tenement should be allocated one vote.[8] This mirrors the equivalent provisions in the TMS and the DMS,[9] and is consistent with comparator jurisdictions.[10] Of the 32 consultees who responded to our question on this issue,[11] 30 supported our proposed approach. Many consultees emphasised this approach is clear, simple, and practical.

9.12 Accordingly, we recommend:

57. In the default association rules in relation to association decisions, each flat should be allocated one vote.

(2004 Act, s 3D(1) and schedule A2 para 3(1), inserted by Draft Bill, s 2)

9.13 Renovations can result in changes to the number of flats in a tenement over time. A single flat may be divided into two, for example, or two flats merged into one larger flat. In the Discussion Paper, we suggested that the default rules should provide for votes to be allocated based on the number of flats in the building at the point in time when a decision is being taken.[12] This approach is straightforward and mirrors the position under current law. By comparison, fixing the allocation of votes at a specific point in time, then requiring future owners to refer back to that allocation notwithstanding any intervening changes to the composition of the building, becomes increasingly difficult over periods of years and decades.

9.14 We asked consultees for views. Of the 29 consultees who responded to this question,[13] 20 agreed that no special rule was required to deal with changes to the number of flats in the building. The total number of votes available would therefore increase or decrease if flats were divided or merged. Amongst the six consultees who suggested special rules might be appropriate, there was no consensus about which rule, or rules, would be appropriate.[14]

---

[8] Discussion Paper, paras 8.17 – 8.18.
[9] TMS rule 2.2; DMS rule 11.1.
[10] See Discussion Paper, para 8.17.
[11] Discussion Paper, para 8.19.
[12] Discussion Paper, para 8.18.
[13] Discussion Paper, para 8.19.
[14] For example, the Faculty of Advocates suggested an application to the Tribunal for a reallocation of votes in such circumstances, whereas the Scottish Empty Homes Partnership suggested that where two flats are created through dividing a larger property, they should be allocated one vote each only where they have different owners.

9.15 Based on the above, we have concluded that no special rule is required to deal with changes to the number of flats in the tenement. Under the default association rules, each flat in existence at the time the decision is to be taken will simply be allocated one vote.

Who can cast a vote?

9.16 The association rules must make provision as to how a vote can be cast. In the Discussion Paper, we suggested the default rule that it should be possible for a vote to be cast by the owner of a flat or by someone they have nominated to vote on their behalf.[15] This mirrors the position under current law.[16] In their responses to this question, 28 out of 30 consultees agreed with our suggested approach. However, several consultees from the property management sector suggested that an owner should not be entitled to vote where they have outstanding debts in relation to their service charge. We think such an approach may be incompatible with the rights of owners under A1P1.

9.17 Where an owner wishes to nominate a person to vote on their behalf in a development subject to a DMS, the nomination must be made in writing.[17] We asked whether equivalent provision was needed in the default tenement owners' association rules.[18] Of the 31 consultees who responded to this question, 28 were in favour of such a requirement in the interests of certainty, and in particular to make the position clear for the association manager. We agree that this is sensible. We note a nomination in writing may be made, if the owner wishes, using electronic forms of writing such as email under our recommendation earlier as to the rules on provision of information under the legislation.[19]

9.18 We recommend:

58. In the default association rules, a right to vote allocated to a flat may be exercised by the owner of the flat, or by a person nominated in writing by the owner to exercise the vote on their behalf.

(2004 Act, s 3D(1) and schedule A2 para 3(2), inserted by Draft Bill, s 2)

9.19 Where a flat is co-owned by two or more persons, the TMS and the DMS allow the vote for that flat to be cast by any owner.[20] If there is a disagreement between or amongst co-owners, the TMS allows a co-owner (or combination of co-owners) whose share of ownership is greater than 50% to cast the vote for the flat. The DMS, however, does not allow a vote to be cast unless all co-owners can reach an agreement.

9.20 The benefit of the TMS rule is that it protects the rights of owners by allowing a vote to be exercised in respect of the flat. It is also consistent with the broader policy of decision making by way of majority rather than unanimity for maintenance matters which underpins the current law as a whole. On the other hand, allowing for a vote by one co-owner adds complexity to the scheme. The weakness of the DMS rule, by contrast, is that it may have the result that no vote can be exercised for the flat.

---

[15] Discussion Paper, para 8.35.
[16] TMS rule 2.2; DMS rule 11.1.
[17] DMS rule 11.1.
[18] Discussion Paper, para 8.38.
[19] Para 3.57 above.
[20] TMS rule 2.4; DMS rule 11.2.

9.21 We sought consultees' views as to which rule should be preferred in relation to the exercise of votes by co-owners under the default tenement owners' association rules.[21] Of the 28 consultees who responded to this question, 23 preferred the approach in the TMS. We therefore recommend:

59. (a) In the default association rules, where there are two or more owners of a flat, the vote allocated to that flat may be exercised by any of the owners.

(b) If the owners disagree as to how the vote is to be cast, no vote is to be counted unless the vote is exercised by an owner or owners who own more than a half share of the flat.

(2004 Act, s 3D(1) and schedule A2 para 3(3)-(4), inserted by Draft Bill, s 2)

9.22 We note that, where a flat is co-owned by two persons, the consequence of this rule is that no vote can be cast without consensus. The view of one co-owner in such a circumstance accounts for 50% of the vote, but a share of more than 50% is necessary for the rule to apply.

Voting thresholds

9.23 Under the current law, most decisions in relation to tenement maintenance can be taken by a simple majority of owners. However, in some cases a special majority or a unanimous vote will be required.[22] In this section, we consider the appropriate voting thresholds for different types of decisions within the default tenement owners' association rules.

Simple majority

9.24 The Discussion Paper suggested that, in most cases, a simple majority of votes should be sufficient for a decision to exercise any powers held by the owners' association.[23] This mirrors the position under the TMS, where "scheme decisions" can generally be taken by a simple majority of owners, albeit that the range of decisions which can be taken under that scheme is narrower than the range of powers available to the owners' association.

9.25 Under the TMS, a simple majority is achieved if more than 50% of the allocated votes are in favour of the decision.[24] We asked consultees for their views on equivalent provision in the default owners' association rules.[25] Of the 34 consultees who responded to this question, 26 considered an equivalent provision was desirable.

9.26 Most of the consultees who disagreed indicated that decisions should be taken by a majority of votes *cast,* rather than votes *allocated.* This is consistent with the position under the DMS, where a simple majority of votes cast at a meeting is sufficient for most decisions notwithstanding the total number of votes allocated in the development.[26] Consultees reasoned that requiring a majority of votes allocated would allow apathy amongst owners to

---

[21] Discussion Paper, para 8.38.
[22] Discussion Paper, paras 8.20 – 8.33.
[23] Discussion Paper, para 8.25.
[24] Tenements (Scotland) Act 2004 Explanatory Notes at para 147.
[25] Discussion Paper, para 8.34.
[26] DMS rule 11.3.

prevent necessary maintenance. If a majority of members simply did not engage with maintenance matters and accordingly failed to vote on a relevant decision, work would not be able to proceed.

9.27 We recognise the risk that a focus on votes allocated may favour apathy over action.[27] However, we have concerns as to the extent to which a departure from this approach might interfere with owners' rights under A1P1. The problem of apathy can be better addressed, in our view, by provision elsewhere in the legislation. In Chapter 11, we recommend that the Tribunal should be able to approve an annual budget covering works necessary for owners to comply with the statutory duty to maintain their property.[28] This provides a route to the instruction of maintenance by the owners' association irrespective of owners' apathy.

9.28 We consider one further tweak to the simple majority rules under the TMS might also be useful in addressing owner apathy in the default owners' association rules. Under the TMS, no majority is reached where a vote is tied.[29] In practice, a tied vote is unlikely to occur because half the owners are in favour and half opposed to a course of action. The more likely scenario is that half the owners are in favour of a course of action and the other half, lacking any interest in maintenance matters, simply do not vote at all. The result is that apathy prevents maintenance from proceeding.

9.29 In the Discussion Paper, we suggested that this rule might be modified somewhat in the default association rules to tip the scales in favour of action. We proposed that, where 50% of votes by members are in favour a decision, that should be sufficient to carry the vote.[30] Although this would alter the rights of owners slightly by comparison with current law, we considered that it would be a proportionate interference in A1P1 terms, not least since the default association rules will contain two separate mechanisms to safeguard the rights of owners who voted against a decision.[31]

9.30 We asked consultees for their views.[32] Of the 34 consultees who responded to this question, 21 consultees expressed support for our proposal. Amongst consultees who opposed the proposal, the concern usually expressed was that such a rule would be unfair if 50% of votes were against a decision (rather than 50% of owners having failed to vote), but we note again here the power of owners who vote against a decision to challenge it. Taking that into account, and in light of broader consultee support, we recommend:

60. In the default association rules, an association decision is made where at least 50% of the votes allocated are cast in favour of the decision, unless a special majority rule applies.

(2004 Act, s 3D(1) and schedule A2 para 4(1), inserted by Draft Bill, s 2)

---

[27] Discussion Paper, paras 8.26 – 8.27.
[28] Tenements (Scotland) Act 2004, s 8. See paras 3.21 – 3.30 above for discussion of this duty, and paras 11.27 – 11.28 below on our recommendation that the Tribunal be empowered to approve a budget.
[29] Discussion Paper, para 8.21.
[30] Discussion Paper, para 8.28.
[31] An owner who voted against a decision can apply to the Tribunal for it to be annulled (see the discussion at paras 9.69 – 9.72 below), or in certain circumstances may annul the decision through a notification process (see the discussion at paras 9.66 – 9.68 below).
[32] Discussion Paper, para 8.34.

Special majority

9.31 Under the current law, decisions in relation to scheme property which fall beyond the scope of the TMS are regulated by the general law of ownership. Improvements to scheme property, or demolition of certain areas of scheme property, will therefore require the unanimous consent of everyone who shares ownership of that property.[33] In the Discussion Paper, we suggested that the introduction of the owners' association framework for tenement management might justify a move away from the requirement of unanimity in relation to such decisions, and allow for the introduction of special majority decision making.[34] Again, this change would lessen the impact of apathy amongst owners where a consensus could be formed in favour of action in relation to tenement improvements. The DMS already allows for decisions to be taken by a special majority in some circumstances.

9.32 In the Discussion Paper, we set out a list of the decisions we considered might appropriately be taken by a special majority.[35] In addition to decisions on improvements to or partial demolition of association property, we also suggested a special majority could decide to register a deed granting or varying association conditions, or to authorise a payment from any reserve fund established by the association. These suggestions were drawn from the special majority rules in the DMS.

9.33 We suggested that the special majority threshold should be 75% of votes allocated. In cases where the decision relates to a part of the association property which is not commonly owned, we suggested that the consent of the owner of that part should be required in order for work to proceed.[36] This rule, together with the rights of owners who did not vote in favour of a decision to seek an annulment from the Tribunal, serve to protect the interests of owners notwithstanding the change from unanimity to special majority voting.

9.34 In response to our consultation questions on these issues,[37] 27 out of 32 consultees supported provision for special majority decision making in relation to the matters proposed in the Discussion Paper, and 24 out of 33 consultees agreed that 75% was an appropriate threshold for a special majority. Consultees who opposed special majority decision making generally suggested that the lower threshold of a simple majority should be applicable to all decisions in the interests of overcoming apathy. Bearing in mind the status quo, and the approach taken in the DMS, we think a change of this kind might be disproportionate in A1P1 terms.

9.35 Of the 28 consultees who expressed a view on the requirement that the owner consent to a special majority decision in relation to association property not in common ownership, 16 were in favour, with seven opposed and five giving a neutral or unclear response. Those opposed generally considered that the majority should overrule the individual, but we again think this change may be too significant a break from the status quo to be proportionate in A1P1 terms. Some consultees seemed to be concerned that this rule might enable an owner to prevent essential repairs and maintenance to association property, but we note that the rule would apply only in relation to special majority decisions. Essential repairs and maintenance

---

[33] Discussion Paper, para 8.21.
[34] Discussion Paper, paras 8.29 – 8.31.
[35] Discussion Paper, para 8.32.
[36] Provision is made to this effect in DMS rule 13.2.
[37] Discussion Paper, para 8.34.

would require only a simple majority vote, in relation to which there is no equivalent rule requiring an owner's consent.

9.36 Drawing together all of the above, we recommend:

61. In the default association rules:

(a) An association decision which requires a special majority is made if at least 75% of the votes allocated are cast in favour of it;

(b) A special majority decision should be required in relation to:

(i) Improvements and alterations to, or replacement of, association property;

(ii) Demolition of a part of association property;

(iii) Payments from any reserve fund maintained by the association;

(iv) Execution of a deed which creates, varies or discharges association conditions, or applies a DMS deed of application to the tenement;

(c) Where a special majority decision relates to a part of the tenement not in common ownership, the owner's consent to the decision should be required.

(2004 Act, s 3D(1) and schedule A2 para 4(2)(a) & (3)-(5), inserted by Draft Bill, s 2)

Unanimity

9.37 Finally, the Discussion Paper suggested that unanimity should continue to be required for demolition of the tenement building as a whole in order to protect the rights of owners.[38] Twenty-two of the 29 consultees who responded to this question agreed.[39] Several consultees noted that existing powers under housing or planning law may result in the demolition of (for example) an unsafe tenement building even if owners are not in favour.[40] For the avoidance of doubt, nothing in our recommendations alters the effect of existing housing or planning law in this respect.

[38] Discussion Paper, para 8.33.
[39] Discussion Paper, para 8.34.
[40] See, for example: Housing (Scotland) Act 1987 s 85 on the general duty of a local authority in respect of houses not meeting tolerable standard; Housing (Scotland) Act 2006 Pt 1 Ch 5 on repair, improvement, and demolition of houses; Buildings (Scotland) Act 2003 Pt 4 on defective and dangerous buildings.

9.38 We recommend:

62. In the default association rules, an association decision to demolish the tenement building is made if all the votes allocated are cast in favour of it.

(2004 Act, s 3D(1) and schedule A2 para 4(2)(b), inserted by Draft Bill, s 2)

Voting process: meetings

9.39 Owners should be able to take association decisions by voting either at a meeting or during an informal consultation process.[41] This is consistent with the voting processes available under current law. In this section, we set out the default association rules we recommend in relation to calling meetings of members and how those meetings should operate. These rules will apply in relation to the annual meeting of members which the association is under a key duty to hold,[42] and in relation to any other meetings which an association chooses to hold. The section which follows considers how votes may be taken through an informal consultation process.

Who can call a meeting?

9.40 In line with the approach taken in the DMS,[43] the Discussion Paper suggested that an association manager should be required to call a general meeting of members at least once per year, and at any other time if asked to do so by members holding not less than 25% of the total vote share.[44] Twenty-eight out of 32 consultees who responded to our question on this matter agreed that the manager should have a duty to call the annual meeting, and 25 out of 31 consultees agreed that the manager should also have a duty to call a meeting in the circumstances described.

9.41 The DMS also empowers the manager to choose to call a meeting at any time they think is appropriate.[45] Separately, any member may call a general meeting if the manager fails to do so when required, or where there is no manager.[46] Of the 29 consultees who responded to our proposal that there be equivalent default rules for meetings of association members,[47] 25 agreed, and none disagreed.

9.42 The Discussion Paper also asked whether there were other circumstances in which a member should have the power to call a meeting.[48] Thirteen consultees made suggestions here. Several consultees suggested the power to call a meeting is necessary in the context of facilitating emergency repairs. Others suggested the power to call a meeting should be available where owners are concerned about the manager's performance, or where owners with at least 25% of the votes allocated want a meeting to be arranged. These circumstances are covered by our recommendations above – owners having not less than 25% of the voting

---

[41] Discussion Paper, paras 8.39 – 8.57 (on meetings) and paras 8.58 – 8.62 (on consultation).
[42] See paras 6.17 – 6.21 above for discussion of this duty.
[43] DMS rules 9.2 and 9.3.
[44] Discussion Paper, paras 8.45 – 8.46.
[45] DMS rule 9.3.
[46] DMS rule 9.6.
[47] Discussion Paper, para 8.46.
[48] *Ibid.*

allocation can require the manager to hold a meeting, and any owner can call a meeting themselves if the manager fails to comply with this requirement.

9.43 We are looking to balance the entitlement of owners to organise themselves against the risk that any individual owner might make vexatious use of a power that is too readily available by calling meetings unnecessarily and perhaps repeatedly. Our recommendations below on decision making by way of informal consultation remove the need for owners to have a broad, unilateral power to call meetings, in our view. Owners will nevertheless be able to make use of the meeting mechanism in most cases if they think it appropriate under our general proposals in the Discussion Paper.

9.44 Accordingly, we recommend:

63. In the default association rules:

(a) The manager must call the annual general meeting of members, to be held in accordance with the relevant key duty on the association;

(b) A member of the association may call the annual general meeting where the manager fails to do so or there is no manager;

(c) The manager may call a general meeting at any time, and must do so when required by owners who have at least 25% of the votes allocated;

(d) A member of the association may call a general meeting if the manager has failed to do so when required, or if there is no manager.

(2004 Act, s 3D(1) and schedule A2 para 9-10, inserted by Draft Bill, s 2)

Procedure for calling a meeting

9.45 The Discussion Paper suggested that the default association rules should mirror the provision in the DMS for calling a meeting. The DMS provides that notice must be given to all members and the manager[49] by the person calling the meeting (the manager or a member) at least 14 days in advance of the meeting date.[50] The notice must specify the date, time, location, and business to be conducted.[51] Thirty out of the 32 consultees responding to this question agreed that the same rules were appropriate for meetings of tenement owners' association members, though only 24 out of 31 agreed that a 14 day notice period was appropriate. A common concern was that emergency and other urgent issues may necessitate a shorter period of notice. We consider that such cases might be more effectively dealt with through the power to instruct emergency work available to the manager and to members, or else by way of a decision taken through informal consultation, for example over email or in a group chat.

[49] DMS rules 9.4 and 9.7. There is no need to give notice to the manager where there is no manager.
[50] DMS rule 9.4.
[51] *Ibid.*

9.46 In light of consultee support, we recommend:

64. In the default association rules:

(a) A general meeting is called by notice of the meeting being given not later than 14 days before the date fixed for the meeting;

(b) Notice must be given to each member and, if necessary, the manager;

(c) The notice must state:

(i) the date and time fixed for the meeting;

(ii) where the meeting is to be in person, the place at which the meeting is to be held;

(iii) where the meeting is to be by electronic means, the means by which the meeting is to be held;

(iv) where the meeting is to be both in person and by electronic means, the place at which and the means by which the meeting is to be held;

(v) the business to be conducted at the meeting.

(2004 Act, s 3D(1) and schedule A2 para 12, inserted by Draft Bill, s 2)

Proceedings at meetings

9.47 We do not think it is necessary to include a comprehensive set of provisions on how meetings should be run. Our provisional view in the Discussion Paper was that there should be a limited number of default rules on key aspects, with members then free to run meetings as they prefer, or to make more detailed prescription by way of provision in their title deeds.

9.48 The rules we did suggest were that, first, it should be possible to hold meetings in person, virtually, or in a hybrid of the two. Meeting online or in a hybrid fashion (where some attendees are physically present in the meeting room and others are present via a video call on a device) has become increasingly common since the Covid-19 pandemic. Allowing for this flexibility in relation to association meetings will make it easier for members who are not resident in the tenement to engage with the work of the association. To this end, our provisional proposal was the association manager should have a duty to facilitate different forms of attendance.[52] We asked consultees for their views.[53] Of the 32 consultees who responded to this question, 28 supported our proposal.

[52] Discussion Paper, para 8.51.
[53] Discussion Paper, para 8.54.

9.49 We recommend:

65. In the default association rules:

(a) A person may attend an annual or other general meeting of the association either in person or by electronic means;

(b) The manager must take reasonable steps to ensure that a person who wishes to do so may attend the meeting by electronic means.

(2004 Act, s 3D(1) and schedule A2 para 11, inserted by Draft Bill, s 1)

9.50 Second, the DMS requires members to elect a meeting convenor from amongst their own number.[54] Twenty of the 27 consultees who responded to our question on this issue agreed that the same rule would be appropriate for meetings of tenement owners' association members.[55] Several of the consultees who opposed the rule suggested the manager should be the convenor by default. Since the meeting is intended in part as a forum in which the manager can be held accountable to members, we do not think this is an appropriate default rule.

9.51 Last, under the DMS the manager is responsible for recording the business transacted at the meeting and circulating a copy of this record to each member.[56] We suggested an equivalent default rule should be made for meetings of members of the association.[57] Of the 32 consultees who responded to this question, 26 agreed with this proposal. The record will include details of any votes cast and any decisions made, and circulation of the record will amount to notification of relevant decisions.[58]

9.52 Separately, we note that we did not consider it necessary for a quorum to be specified for meetings of association members.[59] This follows from our recommendation earlier that association decisions can be taken only where a fixed percentage of the votes allocated to members is in favour of that decision.[60] The purpose of a quorum is to ensure a minimum number of members is involved in decisions taken by a majority of votes *cast* at a meeting. Since association decisions can be taken only by a percentage of votes allocated, not by a percentage of votes cast, a quorum is unnecessary for meetings of association members. Requiring a quorum might actually *prevent* a small number of engaged members meeting to discuss matters. Thirty-three consultees responded to our question on whether a quorum was necessary,[61] with 20 suggesting that it was, though few explained why. For the reasons set out earlier in this paragraph, we do not think consultee support for a quorum can sensibly be given effect within the default rules proposed here, and therefore make no recommendation to that effect.

---

[54] DMS rule 12.1.
[55] Discussion Paper, para 8.54.
[56] DMS rule 12.3.
[57] Discussion Paper, para 8.54.
[58] Any owner who did not vote in favour a decision may make an application to the Tribunal for annulment of the decision under section 5 of the 2004 Act within 28 days of notification: see paras 9.69 – 9.72 below.
[59] Discussion Paper, paras 8.47 – 8.48.
[60] See, generally, the discussion at paras 9.23 – 9.27 above.
[61] Discussion Paper, para 8.49.

9.53 Drawing together the issues canvassed above, we recommend:

66. In the default association rules:

(a) The manager must attend any general meeting unless they have a reasonable excuse for not attending;

(b) Members in attendance at the meeting must select a person to chair the meeting;

(c) The chair is to be one of the members in attendance;

(d) The manager, or where the manager is not at the meeting, a member nominated by the chair, must keep a record of the business conducted at the meeting including any votes cast and any decisions made, and give a copy of that record to each member as soon as practicable after the meeting as notification of relevant decisions.

(2004 Act, s 3D(1) and schedule A2 para 13(1)-(3) & (5)-(6), inserted by Draft Bill, s 2)

How should a vote be conducted?

9.54 The Discussion Paper asked whether there should be a default rule on how a vote is to be conducted during a meeting, and if so, what that rule should be.[62] The DMS allows for voting by a show of hands, or by private ballot where the convenor determines that to be appropriate.[63] Of the 30 consultees who responded to this question, 14 supported the inclusion of a rule, though there was no consensus on what the rule should be. Ten opposed a rule, mainly suggesting it should be left to members to decide how a vote is to be conducted.

9.55 In the interests of certainty, and in light of the (small) majority of consultees in favour, we think it would be sensible to include a default rule similar to that in the DMS. However, we suggest the chair should have a broader discretion than under the DMS to determine how a vote should be taken, which recognises the view of a significant minority of consultees that members should be free to choose their own voting method.[64] As with all default rules, members could make alternative provision through association conditions should they prefer.

9.56 We recommend:

67. In the default association rules, a vote on any matter at a general meeting is to be taken by a show of hands, or by such other method as the chair considers appropriate.

(2004 Act, s 3D(1) and schedule A2 para 13(4), inserted by Draft Bill, s 2)

---

[62] Discussion Paper, para 8.57.
[63] DMS rule 11.4.
[64] We note our recommendation at para 9.18 above that members should be entitled to vote by proxy, which would include a vote being cast by their proxy at a meeting.

Voting process: consultation

9.57 It is likely that many important association decisions, including approval of the annual budget, will be taken at the annual meeting of members. However, we think it should also be possible under the default rules for association decisions to be taken outwith a meeting by way of consultation. The TMS allows for decisions to be taken in this way,[65] and envisages the consultation taking place by one flat owner "knocking on the door" of each of the other flats to obtain that owner's view on whether works should proceed. In the present day, it is perhaps more likely that owners will consult with one another via email or in a group chat on a platform like Facebook or WhatsApp, particularly where some of the owners are not resident in the building. Under our recommendation earlier,[66] consultation via these mechanisms will be possible where members have provided contact details to the manager which clarify they can be contacted in these ways.

9.58 In relation to our questions in the Discussion Paper,[67] 29 out of 32 consultees agreed that it should be possible for members to take association decisions by way of consultation, with the large majority supportive of the series of rules modelled on the TMS which we recommend below. In relation to the question of whether there should be rules specifying how consultation should occur, only 17 out of 30 consultees agreed, with six disagreeing, usually on the basis that greater prescription should be required than under the TMS. As with our recommendation in relation to the voting process at meetings outlined above, we think a basic rule combined with flexibility for members is appropriate here. There was also some division amongst consultees as to whether the person who initiated the consultation exercise – which could be a member of the association – should be responsible for notifying members of the outcome of that process,[68] or whether that task should always fall to the manager.[69] We could not see a justification for preventing a member carrying out this task when the same approach does not appear to have caused difficulties under the TMS, but we note that a member could ask the manager to undertake this task on their behalf should they wish.

9.59 We recommend:

68. In the default association rules:

(a) An association decision can be taken by way of consultation;

(b) A decision is taken this way where the manager or a member of the association consults with each owner about the matter to be decided and counts the votes cast;

(c) An owner need not be consulted if it is impractical to do so due to the owner's absence or some other good reason;

---

[65] TMS rule 2.7.
[66] See para 5.81 above. The manager is under a duty to share contact details with members where necessary in connection with the management and maintenance of the building or the effective operation of the association. The intention of one member to consult with others on an association decision would seem clearly to be a situation where the sharing of details is necessary.
[67] Discussion Paper, para 8.62.
[68] 17 out of 28 consultees favoured this approach. Any owner who did not vote in favour a decision may make an application to the Tribunal for annulment of the decision under section 5 of the 2004 Act within 28 days of notification: see paras 9.69 – 9.72 below.
[69] Seven out of 28 consultees preferred this approach.

(d) Where an association decision is made, the person who undertook the consultation must, as soon as practicable after counting the votes, record the votes cast and the decision made, and give a copy of the record to each member of the association or instruct the manager to do so.

(e) Consultation with one owner is sufficient to count a vote for a co-owned property.

(2004 Act, s 3D(1) and schedule A2 para 5(1)(b) and (2)-(5), inserted by Draft Bill, s 2)

Irregularity in the voting process

9.60 Under the TMS, a procedural irregularity in the making of a scheme decision does not affect the validity of that decision.[70] However, an owner directly affected by the irregularity who was not aware costs were being incurred, or who objected immediately to the incurring of those costs on becoming aware, is not liable for the costs. Their share must be redistributed amongst the other owners.[71] In the Discussion Paper, we suggested adopting the same approach in the default association rules.[72]

9.61 Nineteen out of 32 consultees who responded to our question on this issue[73] agreed that a procedural irregularity should not invalidate a decision. However, only 13 agreed that an affected owner should escape liability for costs, with 12 disagreeing. It was suggested that, since all owners would benefit from the work, all should bear liability for the costs.

9.62 We consider a balance is needed between encouraging compliance with procedural rules and not unduly sanctioning errors. Generally, an owner will become aware of a procedural irregularity (for example, that they have not been consulted) at the point at which they are notified that an association decision has been taken. At that point, they can object and require the decision to be retaken before any costs are incurred. If they choose not to object, they will be responsible for the costs in the usual way. However, if costs are incurred before the owner has knowledge of the irregularity and has therefore lost any chance to object, we think some consequence is necessary. Without it, there is nothing to prevent owners from routinely failing to consult with the minority, or failing to notify them of decisions, so long as a majority has voted in favour. Allowing an owner in this position to escape liability for costs seems to strike the appropriate balance in this respect.

9.63 We accordingly recommend:

69. In the default association rules:

(a) A procedural irregularity in the making of an association decision does not affect its validity;

(b) Where an owner is directly affected by procedural irregularity in the making of an association decision, and was not aware that costs were being incurred, or objected immediately on becoming aware that costs

[70] TMS rule 6.1.
[71] TMS rule 6.2.
[72] Discussion Paper, para 8.63.
[73] Discussion Paper, para 8.64.

were being incurred, that owner is not liable for those costs, and is left out of account for the purposes of determining the share of costs for which the other owners are liable.

(2004 Act, s 3D(1) and schedule A2 para 6, inserted by Draft Bill, s 2)

Annulling a decision

9.64 The approach we recommend above generally allows for association decisions to be taken by majority. Such an approach facilitates maintenance by preventing one or two contrarian owners from bringing the process to a halt. However, it also gives rise to the risk that a minority of members may be treated unreasonably by the majority, particularly where the disadvantages of the majority decision may be felt most keenly (in terms of cost, disruption or otherwise) by the minority.

9.65 To protect against unreasonable use by the majority of their powers in this respect, it is important that the default association rules include some minority protection measures. In line with the approach taken under the TMS, we recommend two such rules. First, where a minority of owners is responsible for 75% or more of the costs of an association decision,[74] that minority may annul the decision by serving notice on the other owners. Secondly, an owner who has not voted in favour of a decision may apply to the Tribunal to have the decision annulled.

Annulling a decision through notice

9.66 Under the TMS, an owner (or group of owners) with liability for at least 75% of the costs incurred by a scheme decision to carry out or authorise maintenance may veto that decision, so long as they did not vote in favour of it.[75] To annul the decision, the owner must send notice to all other owners within 21 days of the decision being taken.[76] The Discussion Paper suggested a similar power would be appropriate in the default association rules,[77] and 24 out of 33 consultees agreed.

9.67 Some consultees expressed concern that the veto power may prevent essential maintenance from being carried out, or suggested exceptions to the veto in such cases. We note that owners are under a statutory duty to maintain the parts of the tenement which they own,[78] and under our recommendations, if a budget which covers such works cannot be approved by members, approval can instead be sought from the Tribunal.[79] The duty could also be directly enforced against a recalcitrant owner. An owner attempting to use the veto to escape liability for essential works could be prevented from doing so by one of these mechanisms.

---

[74] This situation might occur where, for example, a commercial unit on the ground floor of a tenement bears a disproportionately large share of the costs of maintaining commonly owned parts of the building. In such circumstances, the commercial unit will generally only have one vote, notwithstanding their liability share.
[75] TMS rule 2.10.
[76] TMS rules 2.10 and 2.11.
[77] Discussion Paper, para 8.65.
[78] Tenements (Scotland) Act 2004 s 8. We recommended earlier in our Report that section 8 should be amended to include a duty on owners to maintain any part of the tenement which they own so as to prevent damage to any part of the tenement, or in the interests of health and safety: see paras 3.21 – 3.30 above.
[79] See paras 11.27 – 11.28 below.

9.68 We recommend:

70. In the default association rules, where an association decision is made to carry out or authorise maintenance to association property, and an owner (or a group of owners) who did not vote in favour of that decision have liability for at least 75% of the costs which will arise from it, they may annul the decision by giving notice to the manager and other members within 21 days of the decision being taken.

(2004 Act, s 3D(1) and schedule A2 para 7, inserted by Draft Bill, s 2)

Annulling a decision by applying to the Tribunal

9.69 The 2004 Act provides for a decision made under the TMS to be challenged by an owner who did not vote in favour of it by way of summary application to the Sheriff Court.[80] The Sheriff may annul the decision, in whole or in part, if satisfied the decision is not in the best interests of the owners taken as a group or is unfairly prejudicial to one or more owners.[81] Where the decision relates to maintenance, improvements or alteration to scheme property, the Sheriff must take into account certain factors in determining whether either of these tests is satisfied, including the age and condition of the tenement and the reasonableness of the cost of the work.[82] Similar provision is made for an owner to challenge a decision made by members under the DMS.[83]

9.70 In the Discussion Paper, we consulted on whether an equivalent process should be available for association decisions.[84] Twenty-three out of 30 consultees agreed that the Tribunal[85] should have the power to annul association decisions at least in some circumstances, with 16 out of 28 agreeing that this should be possible where the decision is not in the best interests of all members or is unfairly prejudicial to one or more members. Amongst the six who disagreed, there was no consensus on other relevant tests.

9.71 The Discussion Paper suggested some factors the Tribunal might be required to take into account in determining whether either test for annulment of a decision was satisfied, including those factors included under current law.[86] Consultees broadly agreed with the list of factors we had suggested subject to some important qualifications. The Discussion Paper had suggested that the financial situation of the affected owner and the ability of the owner and their family to find alternative accommodation should be taken into account by the Tribunal when considering an annulment application. This was intended to recognise that the decision may impose a debt on an owner which, should they be unable to pay, may result in enforcement action against them ultimately resulting in the forced sale of their home.[87] Consultees pointed out that the risk of homelessness will be considered by the court as part of any debt enforcement process, so that considering it also at this earlier stage of creating

---

[80] Section 5.
[81] Section 5(5).
[82] Section 5(6).
[83] Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order (SSI 2009/729), art 14.
[84] Discussion Paper, paras 8.67 – 8.76.
[85] We recommend later in our Report that the Tribunal should have jurisdiction to hear tenement maintenance disputes in future: see paras 11.37 – 11.41 below. Our discussion and recommendation here is framed with that in mind.
[86] Discussion Paper, para 8.75.
[87] This outcome could follow from the use of tenement-specific land attachment, which we recommend should be introduced: see paras 11.29 – 11.36 below.

the debt seems premature. Separately, it was noted that the eventual risk of one owner becoming homeless should not prevent essential repairs to the building, to the detriment of all other owners and the building itself. We are persuaded by these arguments, and consider that the appropriate protections against homelessness are already in place in the debt enforcement legislation. Some consultees suggested other factors the Tribunal might be directed to consider, but since there was no consensus and the list of factors is in any event non-exhaustive, we do not recommend any additions to the list.

9.72 We recommend:

71. (a) An owner who did not vote in favour of an association decision may apply to the First-tier Tribunal for an order annulling that decision;

(b) An application must be made within 28 days of the meeting at which the decision was taken were the applicant was in attendance, or within 28 days of the date on which notice was given of that decision otherwise;

(c) The Tribunal may annul a decision in whole or in part if satisfied that the decision is not in the best interests of the owners as a group, or where it is unfairly prejudicial to one or more of the owners;

(d) Where the decision concerns maintenance, improvements, or alterations to association property, the Tribunal should take into account:

(i) The age of the property;

(ii) The condition of the property;

(iii) The likely cost of the work;

(iv) The reasonableness of the cost.

(e) The provisions of section 5 of the 2004 Act should otherwise be replicated in relation to a Tribunal application in this respect.

(2004 Act, s 5 as amended by draft Bill, s 6(1)-(3) and Schedule para 4)

9.73 The Discussion Paper also asked whether the Tribunal should have power to authorise a decision in respect of which the required majority had not been achieved.[88] This is not possible under the TMS or DMS. Our provisional view was that conferring such a power on the Tribunal would not be an appropriate way to address the obstacle that owner apathy presents to effective tenement maintenance. In short, we considered that the Tribunal is not equipped to act as a property manager for a tenement building, and should not be required to do so. Later in this Report,[89] we recommend one exception to this rule – namely, that power be conferred on the Tribunal to authorise a maintenance budget where members fail to

[88] Discussion Paper, para 8.76. The power to make a positive order for specific action to be taken was considered at paras 8.72 – 8.73 of the Discussion Paper.
[89] See paras 11.27 – 11.28 below.

approve an annual budget – which we think suffices to address the problem of owner apathy without the need for a broader Tribunal power.

9.74 Consultees did not agree with our provisional view, with 23 out of 30 respondents to this question suggesting the Tribunal should have the power to authorise action. In some cases, the support was qualified, suggesting the power should only be available in relation to decisions on budget setting and necessary repairs. We think this is dealt with by our recommendation in relation to a minimum maintenance budget referenced above. More broadly, consultees did not address our arguments in the Discussion Paper about the difficulty in practical terms for the Tribunal of being assigned this role, or the inappropriateness in principle of the Tribunal having power to order owners to take action which they are under no legal obligation to take. We continue to consider these obstacles too significant for us to be able to recommend a power of this kind being held by the Tribunal. Accordingly, we make no recommendation to this effect.

Effect of a decision

9.75 Decisions under the TMS are binding on current owners and their successors as owners.[90] This means any incoming owner is bound by a decision (for example, to undertake certain works or take out an insurance policy) in the same way as a person who was an owner at the time the decision was taken. In the Discussion Paper, we suggested equivalent provision was necessary in the default association rules to enable the association to operate effectively.[91] In their responses to this question,[92] 30 out of 31 consultees agreed with our proposal.

9.76 We recommend:

72. In the default association rules, an association decision should be binding on current and future members of the association.

(2004 Act, s 3D(1) and schedule A2 para 8, inserted by Draft Bill, s 2)

[90] TMS rules 8.1 and 8.2.
[91] Discussion Paper, para 8.77.
[92] Discussion Paper, para 8.78.

Chapter 10 Default association rules: liability for costs and financial administration

Introduction

10.1 In Chapter 9, we recommended default association rules on decision making. Owners will decide which actions the association will take in terms of managing and maintaining the association property. When undertaking these actions, the association will incur costs. The association rules must make provision for how liability for these costs is to be divided amongst flat owners. The rules must also set out how payment for those costs is to be collected by way of an annual budget and service charge mechanism, in line with the key duty on the association to approve an annual budget.[1]

10.2 In this Chapter, we recommend default association rules on liability for association costs and financial administration including budget setting and collection of the service charge. These matters were generally considered in Chapter 10 of the Discussion Paper.

Liability for costs

Allocation of liability

10.3 Flat owners will be liable for the costs incurred by the association. In the Discussion Paper, we proposed that the default rules on liability for association costs should broadly mirror the liability rules for costs incurred under the TMS.[2] We considered continuity to be desirable insofar as possible since the TMS rules had been designed with fairness to owners in mind. In addition, minimising interference with current arrangements in relation to costs helps to ensure the compliance of our recommended legislation with the A1P1 rights of owners. Twenty-seven out of 30 consultees who responded to our question on this point agreed that this was the correct approach.[3]

10.4 Adopting the TMS provision means that the default association rules are not entirely straightforward. The basic rule is that liability for association costs is divided equally between flat owners. An exception applies, however, where costs are incurred through maintenance, repair or improvement works. Where those works are carried out to association property in common ownership of two or more flats, each co-owner's share of liability is determined by their share of ownership of the property in question.[4] Where the works are carried out to association property which is not in common ownership, liability is shared equally, unless the largest flat in the tenement building has a floor area more than 1.5 times the size of the smallest flat, in which case each owner's share of the total floor area of all the flats in the

[1] For discussion of this key duty, see paras 6.22 – 6.26 above.
[2] Discussion Paper, paras 10.13 – 10.14.
[3] Discussion Paper, para 10.15.
[4] TMS rule 4.2(a).

building determines their share of liability for those costs.[5] This latter rule also applies to liability for relevant works to the roof over the close, if that area of roof is in common ownership only by virtue of section 3(1)(a) of the 2004 Act.[6]

10.5 For completeness, we note that where a flat is in common ownership, each co-owner has joint and several liability for costs allocated to that flat.[7] Under the general law of common ownership, where one co-owner pays in full, they have a right of relief against the other co-owner(s) for their share of those costs.

10.6 The default rules outlined above will have the result that one owner's share of liability for association costs may differ from the share of another. This has implications for the calculation of the service charge which an owner will be under a duty to pay following approval of the annual budget. We consider this further below.

10.7 We recommend:

73. In the default association rules:

(a) Owners are liable for association costs in equal proportions, subject to the exceptions below;

(b) Where association property is owned in common by two or more owners, liability for maintenance and running costs incurred in relation to that property is divided amongst the common owners in proportion to their shares of that ownership;

(c) Where association property is not owned in common by two or more owners, and the floor area of any flat in the tenement is more than one and a half times that of another flat in the tenement, liability for maintenance and running costs incurred in relation to that property is divided amongst the owners in proportion to the floor areas of their flats;

(d) The rule in (c) above also applies where the association property in question is the portion of the roof above the close, where that portion of the roof is in common ownership by virtue of the 2004 Act s 3(1)(a).

(2004 Act, s 3D(1) and schedule A2 para 14, inserted by Draft Bill, s 2)

---

[5] TMS rule 4.2(b).

[6] TMS rule 4.3. To expand, section 3(1)(a) of the 2004 Act provides that, unless the titles otherwise provide, the close is common property of all owners who take access through it. In some tenements, the ground floor and/or basement flats may be "main door" flats, meaning that they have direct access to the street, and do not make use of the close. In such tenements, where section 3(1)(a) applies, the close is accordingly in common ownership of all flats except those with main doors. The close is defined to include the roof over the close in section 2(5). Liability for maintenance of commonly owned property is usually determined by the share of common ownership. Strict application of that rule in this case would mean that liability for maintenance of the roof over the close would be shared only amongst owners who take access through the close. However, since liability for maintenance to the other parts of the roof (meaning the parts of the roof over flats rather than the close) would be shared by all flats, that outcome would be unwieldy. Accordingly, this exception to the usual rule on liability for maintenance of commonly owned property is necessary.

[7] 2004 Act s 28(7).

Exempting an owner from liability

10.8 In certain circumstances, owners may wish to exempt one of their number from their share of liability for association costs. This decision may be taken for example on compassionate grounds, or perhaps for practical reasons where it is recognised that an owner will be unable to pay the share which they would usually be allocated. The TMS allows owners to take a scheme decision that an owner is not required to pay their share (or part of their share) of scheme costs.[8] The vote of the owner who stands to benefit from such a decision is not to be counted when that decision is being taken.[9] Similar provision is made within the DMS.[10] We suggested that an equivalent power should be available in the default owners' association rules.[11] Twenty-seven of the 32 consultees who responded agreed that owners should be able to exempt one of their number from a share of liability for costs, and 28 out of 31 agreed that the vote of an owner[12] who stands to benefit from such an exemption should not be counted.[13]

10.9 Accordingly, we recommend:

74. In the default association rules:

(a) The association may decide that an owner is not liable for specified association costs;

(b) A vote in favour of such a decision is not to be counted if the owner exercising the vote would not be liable for costs as a result, or is exercising a vote on behalf of the owner who would not be liable as a result.

(2004 Act, s 3D(1) and schedule A2 para 15(1)-(2), inserted by Draft Bill, s 2)

Redistribution of exempt shares

10.10 Where an association decision is taken to exempt an owner from liability for certain costs, the effect of that exemption on the liability of other owners should be clear. Under the TMS, liability for an exempt share is divided equally amongst the other owners who are liable for the same costs.[14] In the Discussion Paper, we suggested equivalent provision in the default association rules.[15] Twenty-one out of 32 consultees agreed, with a further five giving qualified agreement.[16]

---

[8] TMS rule 3.1(g).
[9] TMS rule 3.5.
[10] DMS rule 19.2.
[11] Discussion Paper, para 10.17.
[12] For the avoidance of doubt, this includes a vote exercised by a proxy on an owner's behalf.
[13] Discussion Paper, para 10.17.
[14] TMS rule 5. This rule also covers the liability of owners in relation to missing shares, an issue which we consider in connection with payment of the service charge below: see paras 10.38 – 10.41.
[15] Discussion Paper, para 10.20.
[16] Three consultees suggested redistribution should occur only in cases of hardship, but this would leave a gap where a share is exempted for other reasons. Two consultees suggested liability should be shared on the basis of the usual liability rules, but these rules allow for uneven distribution of liability to account for the fact that some members (i.e. those in larger flats) benefit more from maintenance works than others – no member receives a particular benefit from exempting another from a share of liability.

10.11 We note that, as with all default association rules, owners would be free to agree to alternative treatment of exempt shares in association conditions. We recommend:

75. In the default association rules, liability for an exempt share of costs is divided equally amongst other owners liable for the same costs.

(2004 Act, s 3D(1) and schedule A2 para 15(3), inserted by Draft Bill, s 2)

Financial administration

10.12 The association must approve an annual budget, in line with its key duty in this respect.[17] One function of the budget is to provide a mechanism by which payment for association costs can be collected from owners through imposition of an annual service charge. Below, we consider the content of the budget and how the service charge for each owner should be calculated with reference to that budget, taking into account the individual liability of each owner for association costs. We also consider the process by which the service charge can be collected.

10.13 The introduction of a budget requirement is an interference with the rights of owners under A1P1, since no such requirement exists under current law. However, we think this interference is likely to be proportionate. Although it removes a degree of the freedom currently enjoyed by owners in organising maintenance, the absence of a defined system at present appears to operate as a barrier to routine works, which contributes to the ongoing degradation of the tenement stock. This has negative consequences both for owners and for society as a whole. A budget requirement represents a new type of administrative work for owners, but it is not clear that their administrative burden as a whole will increase as a result: systematic maintenance planning may ultimately prove more efficient than the piecemeal approach often employed at present. In this respect, as highlighted in Chapter 2, the provision of advice and support to owners, coupled with an appropriate lead-in time for the new legislation to enable owners to prepare, should help to ensure the proportionality of the legislative scheme as a whole.

10.14 In developing our recommendations in relation to the budget and service charge, we were strongly influenced by the equivalent provisions in the DMS.[18] Our recommendations do not require an association to have a reserve fund, or assume that any such fund is in place. Should associations become subject to a requirement to establish such a fund as a result of broader government work in this area,[19] however, the rules we recommend below should provide a mechanism by which contributions to that fund can be collected.

Content of the annual budget

10.15 Our proposal that the content of the annual budget should be largely modelled on equivalent provision in the DMS was supported by 20 out of 32 consultees. Those who disagreed generally did so for two main reasons. First, some consultees argued that the budget should be set by reference to the findings of the tenement condition inspection report which the Working Group recommended should be required every five years, with service

[17] This duty is discussed at paras 6.22 – 6.26 above.
[18] DMS rules 18 – 21. We outlined these rules in the Discussion Paper at paras 10.30 – 10.35.
[19] See para 1.9 above for discussion of the Working Group recommendation that every tenement should have a reserve fund.

charge payments connected to contributions to the reserve fund also recommended by the Working Group. As discussed in Chapter 2, these Working Group recommendations lie beyond the scope of our project, but we suggest there that the government may wish to consider whether a unified approach to introduction of all three Working Group requirements is preferred.[20] Second, some consultees noted that local authority and RSL budgets are generally prepared on a five-year cycle to cover the works required across their housing stock as a whole, making the requirement of an annual budget for tenements an awkward and potentially inefficient fit. In Chapter 2, we urge the government to consider as a matter of housing policy the extent to which local authority and RSL-owned housing might be exempted from elements of our recommended legislation.[21]

10.16 Under the DMS, the duty to prepare the annual budget lies with the manager.[22] The budget must set out an estimate of the expenditure of the association over the budget year, the total service charge, the date (or dates) on which the service charge will be due for payment, and an estimate of any funds other than the service charge which the association is likely to receive in the budget year together with an explanation of their source.[23] Where the budget includes payments to be made into a reserve fund, the amount should be specified.[24]

10.17 Taking into account support from the majority of consultees, our recommendations for the default rules in relation to the owners' association budget start from the DMS rules. However, as work on the project has continued, it has become clear that more detailed provision is required for tenement owners' associations. We explain these more detailed proposals throughout the remainder of this Chapter.

10.18 To begin, we recommend that the manager of a tenement owners' association should, as with a DMS manager, have responsibility for preparation of the annual budget. However, we now consider that the content of the budget requires to be somewhat more detailed in the case of a tenement owners' association than it is in the case of the DMS. This is necessary because the manager of the tenement owners' association does not have the broad discretion available to a DMS manager to act on the association's behalf.[25] The budget for a tenement owners' association should, in our view, therefore be clear about the basis on which the manager is proposing the inclusion of various costs, to enable owners to make informed decisions as to whether the different elements of the budget should be approved.

10.19 The matters which we think need to be included in the budget are as follows. First, owners are under a duty to maintain parts of the tenement which they own under section 8 of the 2004 Act.[26] Accordingly, it seems sensible to require the budget to include details of any maintenance works which the manager considers it will be necessary to carry out to association property in the coming year to ensure compliance with that duty. Under our earlier recommendations, the manager has authority under statute to do anything necessary to ensure compliance by the association with its key duties.[27] This would enable the manager to, for example, instruct an inspection of an area of association property or seek estimates for

---

[20] See the discussion at paras 2.14 – 2.17 above.
[21] See para 2.22 above and the subsequent discussion at paras 4.18 – 4.20 on the establishment of an owners' association for tenements wholly owned by local authorities or RSLs.
[22] DMS rule 18.1.
[23] DMS rule 18.2.
[24] *Ibid.*
[25] For discussion, see paras 5.20 – 5.31 above.
[26] For discussion of the duty under section 8, see paras 3.21 – 3.30 above.
[27] See paras 5.26 – 5.32 above.

work to association property in order to make an assessment of the work likely to be required in this respect. Later in this Report, we recommend that the Tribunal should have power to approve a budget covering these works if owners fail to do so.[28] A requirement to set these works out in the budget should also assist in the exercise of that remedy by the manager if necessary.

10.20 Second, the manager must also be entitled to propose works in the budget which go beyond what is necessary for compliance with the section 8 duty. Such works may be included on the basis of a direction by the association to investigate these matters, for example where an association wishes to explore the potential to carry out upgrading of certain association property. Even in the absence of a relevant direction, we consider that the manager has discretion to include such proposals in line with the general function of the association, which is to manage the tenement for the benefit of members.[29] Where matters of this kind are included in the budget, the manager cannot proceed to instruct the work without a relevant association decision in the form of approval of these items in the budget. The Tribunal has no power to approve elements of the budget going beyond the section 8 duty.

10.21 Third, the budget should also contain details of any other costs which the association is expected to incur during the coming year, and the nature of those costs. This may be necessary to cover, for example, the reimbursement of the cost of emergency work instructed by the association or a member in the absence of an association decision.[30]

10.22 Finally, the budget should detail any other amount to be included in calculation of the service charge, and the reason why that amount is included. This will allow for the budget to include, for example, contributions to a float which the manager may be given discretion to use to pay for minor repairs, or contributions into a reserve fund should an association have decided to establish such a fund. The inclusion of such amounts in the draft budget creates no compulsion on owners to pay them unless and until that budget is approved by association decision.

10.23 The Discussion Paper also suggested that the budget for a tenement owners' association should be somewhat more detailed than the equivalent in the DMS in another sense, namely that it should include the estimated costs of each proposed item of maintenance work, how the estimated cost of that work was arrived at, and the likely timescale for completion of work.[31] This aligns with the approach taken where payment is collected in advance for planned work under the TMS.[32]

10.24 Of the 33 consultees who responded to our question on this point,[33] 25 agreed the draft budget should be required to include this information. A further six agreed subject to certain amendments, principally that it should be possible for the budget to include payment towards the costs of works likely to be carried out some years hence (essentially allowing an

[28] See paras 11.27 – 11.28 below.
[29] For discussion of the manager's discretionary powers under the statute, see paras 5.26 – 5.32 above.
[30] We recommend that members should have the power to instruct emergency work at paras 5.82 – 5.85, and that the manager should have the power to instruct emergency work at para 5.30 above.
[31] Discussion Paper, para 10.37.
[32] See generally TMS rules 3.3 and 3.4.
[33] Discussion Paper, para 10.39.

association to "save up" over a number of years for larger tasks). That issue is now covered in our discussion of the budget content above.

10.25 Drawing together the threads above, we accordingly recommend:

> **76. In the default association rules, the association's budget for each financial year must set out:**
>
> **(a) Details of maintenance work to association property which, in the reasonable assessment of the manager, is necessary to ensure compliance by owners with the duty under section 8 of the 2004 Act during that year, including the estimated cost of that work, how that estimate was arrived at and the estimated timeline;**
>
> **(b) Details of any other work which it is proposed should be carried out to association property during that year, including the estimated cost of that work, how that estimate was arrived at and the estimated timeline;**
>
> **(c) Details of any other costs expected to be incurred by the association during that year, including the nature of those costs;**
>
> **(d) Details of any other amount to be included in the service charge and the reason for that amount;**
>
> **(e) An estimate of any other funds which the association is likely to receive during the year and the source of those funds;**
>
> (2004 Act, s 3D(1) and schedule A2 para 16(1)(a)-(d) & (g), inserted by Draft Bill, s 2)

Calculation of the service charge

10.26 The service charge is the mechanism by which payment will generally be collected from owners in relation to their liability for association costs. In the DMS, the service charge is calculated simply by dividing the total costs covered by the budget equally amongst the units in the development.[34] As we noted in the Discussion Paper, calculation of the service charge is likely to be more complex for tenement owners' associations, since liability for association costs (whether determined under the default association rules or by provision in association conditions) will not necessarily be shared equally amongst owners.[35] With that in mind, we now suggest the default rules should include provision which makes explicit how the service charge payable by an owner is calculated with reference to that owner's individual liability for association costs. Later, we recommend provision clarifying how service charge payments made by an owner will be applied to discharge their liabilities for association costs.

10.27 In relation to calculation of the service charge, we recommend that the annual budget should be required to set out, in respect of each owner, the service charge payable for that budget year. It should also include, in respect of each owner, details of how that service charge was calculated. The calculation will be based on that owner's liability for the costs which, per the budget, the association will incur in the coming year, together with the owner's share of

[34] DMS rule 19.
[35] Discussion Paper, para 10.14.

any additional contribution (for example, payment into a float or reserve fund) which is included in the budget. In tenements where the association property is in common ownership of all the flats in equal shares, or where all the flats have an equal responsibility to maintain the association property, calculation of the service charge will be straightforward, and will be the same for every flat. However, in flats where alternative liability rules apply – for example, because some parts of the association property are in common ownership of some flats in the tenement but not all, or where there are significant differences in the sizes of flats such that liability for costs is divided on the basis of floor area[36] – the calculation will be more complex. This is a necessary outcome of maintaining the existing rules on liability for costs, as we recommended above.

10.28 Requiring a service charge calculation to be included in the budget will increase the complexity of that budget. However, setting out the detail of the calculation should assist owners in making an informed decision as to whether the budget should be approved. It will also clarify the extent of each owner's liability to the association, which will be essential should debt enforcement action be taken against the association or owners themselves by third party contractors, as discussed further in Chapter 11. It will also assist in ensuring liabilities are correctly attributed when an owner sells or otherwise transfers ownership of their flat during the budget year.

10.29 Finally, we suggest that, as under the DMS, the budget should set out the date or dates on which service charge payments will fall due. There is nothing to prevent payment being made in instalments over the course of the year should the owners approve that approach in the budget.

10.30 We recommend:

77. In the default association rules:

(a) The association's budget for each year must set out:

(i) In respect of each owner, the service charge payable and how that charge was calculated;

(ii) The date or dates on which the service charge will be due for payment;

(b) The service charge for each owner should be calculated by reference to the owner's share of liability for costs expected to be incurred by the association over the coming year, and any other amount to be included in the service charge.

(2004 Act, s 3D(1) and schedule A2 para 16(1)(e)-(f) & (2), inserted by Draft Bill, s 2)

Approval of the budget

10.31 The draft budget must be prepared by the manager, who must give each member a copy of the draft. It is anticipated, in line with the intention of the Working Group, that members

[36] See the discussion at para 10.3 – 10.7 above.

will generally decide whether to approve the annual budget at the annual meeting. We note, however, that this is not a requirement under the default rules we recommend, and members may choose to discuss and vote on the budget by way of informal consultation should they prefer.

10.32 When considering the draft budget, owners may take various decisions. Most obviously, they may decide to approve the budget in full. It should be noted that some elements of the budget may require a higher voting threshold for approval than others depending on the association rules. Under the default rules we recommend,[37] for example, a special majority is required to approve the instruction of improvement works. Owners may alternatively approve the budget subject to certain revisions.

10.33 Alternatively, owners may reject the budget. In this case, the manager is under a duty to prepare a revised draft to be circulated not later than 6 weeks following the decision to reject. As under the DMS, we consider that a service charge based on the previous year's figure should be payable where no budget has been approved at the start of the financial year.

10.34 For completeness, we note that where a budget fails to be approved because an insufficient number of members have voted, or where a budget is rejected, we recommend in Chapter 11 that the manager may seek an order from the Tribunal to approve a budget covering maintenance to association property required under section 8 of the 2004 Act over the financial year.[38]

10.35 We recommend:

78. In the default association rules:

(a) The manager must prepare a draft budget for the association for each financial year and give each member a copy;

(b) The association may approve the draft budget, approve the draft budget with such variations as members may specify, or reject the draft budget;

(c) Where a budget is rejected, the manager must prepare and circulate a revised draft budget within the period of 6 weeks beginning with the day on which the draft budget is rejected;

(d) Where, at the start of the financial year, no budget has been approved for that year, the service charge due by each owner is the same as the service charge due by the owner under the budget for the previous financial year, and is to be paid on the anniversary or anniversaries of the date or dates on which the charge was due for payment in the previous financial year.

(2004 Act, s 3D(1) and schedule A2 para 17, inserted by Draft Bill, s 2)

---

[37] The voting thresholds for different types of decisions under the default association rules are discussed at paras 9.23 – 9.38 above.
[38] See paras 11.27 – 11.28 below.

Imposition of an additional service charge

10.36 The DMS allows for the imposition of an additional service charge by the manager, without approval of an additional budget, in circumstances where the owners' association requires funds. This would usually occur because the cost of planned works carried out over the course of the financial year turn out to be higher than the estimated cost of those works included in the budget. The manager may impose an additional service charge of up to 25% of the original service charge.[39] If a figure greater than 25% is required, the manager must seek approval of an additional budget in order to impose an additional service charge at that level.[40]

10.37 In line with the views of consultees referenced above, these provisions should be replicated in the default association rules. We therefore recommend:

79. In the default association rules:

(a) The manager may from time to time determine that an additional service charge is payable by some or all of the owners;

(b) An additional service charge may be imposed only in respect of:

(i) association costs which were not set out in the budget for that year or which exceed the amount estimated in the budget;

(ii) an amount for which an owner becomes liable following an association decision to exempt a different owner from liability, or a service charge payable by a different owner proving to be unrecoverable;

(c) The additional service charge due by each owner is to be calculated by reference to the owner's liability for the costs to which the charge relates;

(d) The total amount of any additional service charge cannot exceed 25% of the service charge for that owner set out in the annual budget unless the manager submits to the association at a general meeting a draft supplementary budget;

(e) In calculating the total amount of any additional service charge, no account is to be taken of any additional charge payable in respect of emergency work.

(2004 Act, s 3D(1) and schedule A2 para 18, inserted by Draft Bill, s 2)

[39] DMS rules 20.1 and 20.2.
[40] DMS rules 20.1, 20.3 and 19.3(b).

Redistribution of service charge which cannot be recovered

10.38 Where an owner does not pay their service charge, the association may enforce payment through the usual legal processes.[41] In some cases, however, enforcement will be unsuccessful, most obviously in circumstances where the owner has been sequestrated and their debts "written off". A rule is needed to clarify who has liability for such a missing share.

10.39 Under the TMS, liability for an unrecoverable share of costs resulting from a scheme decision is divided equally amongst the other owners who are liable for the same costs.[42] The owner whose share cannot be recovered becomes liable to these other owners for the amount paid by each of them. Similar provision is made within the DMS in relation to unpaid service charges.[43] In the Discussion Paper, we suggested equivalent provision in the default association rules.[44] Twenty-one out of 32 consultees agreed, with a further five giving qualified agreement.[45] Taking into account the support of the majority support, we consider a rule to this effect to be appropriate.

10.40 We note for completeness that the local authority in which the tenement is located will have a power (but not an obligation) to pay a "missing share" of association costs owed by a defaulting owner.[46] Where an owner's liability is satisfied by such a payment, there is no basis on which any element of a service charge referable to that liability can be recovered from other owners.

10.41 We recommend:

80. (a) Where a service charge cannot be recovered for some reason such as that the owner due to pay is insolvent or cannot by reasonable inquiry be identified or found, the other owners become liable for that amount in equal proportions.

(b) The owner in default becomes liable to each other owner for any amount paid in relation to the unrecoverable share.

(2004 Act, s 3D(1) and schedule A2 para 19, inserted by Draft Bill, s 2)

Liability for, and collection of, the service charge

10.42 Once the budget has been approved, owners will become liable to pay the service charge as calculated in the budget. Under the DMS, the manager must send to each owner a notice requiring payment of the service charge by a specified date, or a number of specified dates if, for example, the charge is to be paid in instalments over the course of the year.[47] The

---

[41] We consider these processes further in Chapter 11 below.
[42] TMS rule 5. This rule also covers the liability of owners in relation to exempt shares, an issue which we considered earlier in connection with the allocation of liability for financial costs incurred by the association: see paras 10.8 – 10.11 above.
[43] DMS rule 19.4.
[44] Discussion Paper, para 10.20.
[45] Three consultees suggested redistribution should occur only in cases of hardship, but this would leave a gap in the law where hardship cannot be shown. Two consultees suggested liability should be shared on the basis of the usual liability rules, but these rules allow for uneven distribution of liability to account for the fact that some members (i.e. those in larger flats) benefit more from maintenance works than others – no owner receives more benefit than another for covering an unpaid share.
[46] Housing (Scotland) Act 2006 s 50; 2004 Act s 4A.
[47] DMS rule 19.3(a).

manager can send a further notice requiring payment of interest on the service charge if it remains outstanding not less than 28 days after the payment was due.[48] In line with the views of consultees referenced above, these provisions should be replicated in the default association budget rules.

10.43 We recommend:

81. In the default association rules, following approval of the annual budget, or a determination that an additional service charge should be paid:

(a) Each owner is liable for the amount of the service charge payable as detailed in the budget or determination of additional service charge;

(b) The manager must give each owner a notice requiring payment of their service charge due by the owner on a specified date or dates;

(c) Where any service charge remains outstanding not less than 28 days after it became due for payment, the manager may give a notice to the owner concerned requiring payment of interest on the sum outstanding at such reasonable rate and from such date as the manager may specify.

(2004 Act, s 3D(1) and schedule A2 para 20, inserted by Draft Bill, s 2)

Discharge of owners' liabilities for association costs

10.44 Above, we recommended that the budget should set out how the service charge payable by each owner has been calculated by reference to that owner's liability for association costs and any other payment that owner is asked to make to the association. We think it is also necessary for provision to be made within the association rules as to how service charge payments will be applied to discharge that owner's liabilities. This was not a matter on which we consulted. However, provision to this effect will make clear which liabilities remain outstanding if the owner does not pay their service charge in full. Clarity in this respect is essential in circumstances where debt enforcement action is required, and also to facilitate the sale of tenement flats where doubt may arise as to whether the seller or the buyer has liability for certain association costs.[49]

10.45 The default rule we recommend is simply that service charge payments discharge the owner's liabilities for association costs in the order in which the costs become payable by the association. Where two or more debts fall due on the same day, if the service charge payments made are insufficient to discharge them all, the liabilities are discharged in the proportions which those debts bear to the owner's overall liabilities to the association.

10.46 Where the service charge calculation includes a contribution towards association funds which does not relate to the owner's liabilities – for example, a contribution to a float or reserve fund – that amount is not to be treated as having been paid by the owner until all of the owner's liabilities for association costs in that year have been discharged. That ensures that costs already accrued are satisfied before additional payments to association funds are made, which

[48] DMS rule 19.5.
[49] We consider the liability of successor owners at paras 11.19 – 11.25.

seems the most logical approach. The example statement of account included later in this Report[50] gives an illustration of how these rules will work in practice for an individual owner. The statement shows money "paid in" (instalments of the service charge paid by the owner to the association) and money "paid out" (how those payments are applied to discharge that owner's liability for costs), and clarifies the financial position of the owner in relation to the association on various dates over the course of the year.

10.47 We recommend:

82. In the default association rules:

(a) An owner's liabilities for association costs are discharged by the payment of the owner's service charge for that year;

(b) Liabilities are discharged in the order in which costs become payable by the association;

(c) Where more than one cost becomes payable on the same day, and the service charge balance paid is insufficient to discharge all in full, liabilities are discharged in the proportions which those debts bear to the owner's overall liabilities to the association;

(d) Any amount payable by an owner under the service charge which is not referable to a liability is not to be treated as having been paid until all liabilities for that year have been discharged.

(2004 Act, s 3D(1) and schedule A2 para 21(1)-(6) & (9)-(10), inserted by Draft Bill, s 2)

Surplus funds

10.48 Above, we recommended that the manager should have power to impose an additional service charge in the situation where the association has insufficient funds to pay its costs during the budget year. The contrary situation may also arise, however, in which the service charge payments made by some or all members exceed their liability for the association costs actually incurred over the course of the year. Our provisional view in the Discussion Paper was that, as under the DMS,[51] surplus funds accrued in this way should remain with the association for use in relation to future costs,[52] rather than being returned to the owner. This approach facilitates future maintenance and limits the administrative work that would be required if the association were to make reconciliation payments of this kind each year.

10.49 Twenty of the 30 consultees who responded to our question on this point[53] agreed with our provisional view, with a further seven offering qualified agreement, generally on the basis that funds should be returned where they exceeded a certain level or on request by owners. Since a surplus balance paid by an owner in one year will be offset against their liability the following year, we do not anticipate that it will be possible for a large surplus to be accrued for

[50] See page 173.
[51] Discussion Paper, paras 10.35 and 10.38.
[52] Discussion Paper, para 10.38.
[53] Discussion Paper, para 10.39.

long, and accordingly do not consider such qualifications to be necessary within the default rules.

10.50 We recommend:

83. In the default association rules, where the total service charge paid by the owner exceeds the owner's liability for association costs accrued that year and any contribution to association funds not referable to a liability, the association is to retain the excess amount, and offset that against the owner's service charge for the following year.

(2004 Act, s 3D(1) and schedule A2 para 21(7) & (8), inserted by Draft Bill, s 2)

Liability for service charge on transfer of ownership of flat

10.51 Although not a matter on which we consulted, we think provision is required in the default association rules to deal with liability for the service charge where ownership of a flat is transferred. Section 12 of the 2004 Act makes provision about the liability of a flat owner and their successor as owner in relation to costs incurred under the management scheme applicable in the tenement or the 2004 Act itself. In Chapter 11, we explain that this section will apply instead to liability for association costs or costs incurred under the 2004 Act once the owners' association legislation is introduced.[54] Section 12 provides that an owner remains liable for any relevant costs even after they cease to be an owner. However, their successor as owner takes on several liability for any costs which remain outstanding, subject to a right of relief against the former owner should the successor end up having to satisfy those liabilities. An exception to this general rule applies to liability for maintenance work carried out before the date on which the successor owner acquired the flat, however. The successor owner will take on several liability for these costs only where a "notice of potential liability for costs" including this work has been registered against the flat in question at least 14 days prior to the acquisition date.[55]

10.52 Under the owners' association legislation, payment of an owner's liability for association costs will usually take place through payment of the service charge. In line with the provision in section 12 on a successor owner's several liability for association costs, we think it would be sensible to provide that a successor owner takes on several liability for any service charge payment due by the former owner which has not been paid. However, this several liability for the service charge should not include any portion of the service charge referable to an association cost for which the successor is not severally liable under section 12. Accordingly, where a successor escapes liability for costs of work carried out prior to the acquisition date because no notice of potential liability has been registered, the successor will also escape liability for payment of any element of the service charge referable to that work.

10.53 We explained above that service charge payments which exceed an owner's liabilities for association costs will, under the default association rules, be retained by the association,

---

[54] Para 11.21. This change to the application of section 12 largely results from amendments we recommend to section 11, as explained at para 11.16 - 11.18. However, we also recommend an amendment to section 12 to provide a successor owner with a right to repayment from the former owner of any amount of a service charge payment which is not referable to an association cost. This would apply where the service charge includes a contribution towards a float or reserve fund, for example.

[55] 2004 Act ss 12 and 13.

and set off against the owner's service charge payment in the following budget year. Where ownership of the flat is transferred, we recommend a default rule that any sum retained by the association on this basis should be treated as if it had been paid by the successor owner, and accordingly set off against the successor owner's service charge in the following year. This rule again accords with the general policy of facilitating maintenance and limiting the administrative burden for the association. Where an outgoing owner knows or anticipates that such a surplus may be held by the association, this can be addressed in the sale transaction, perhaps through an equivalent increase in the purchase price.

10.54 This general rule should, however, again be subject to an exception in relation to any liability of the outgoing owner in relation to which the successor owner does not have several liability. The portion of the service charge paid by the outgoing owner in relation to such a liability may exceed the total cost actually incurred for the work in question. This might occur, for example, where the estimated cost of the work set out in the budget was higher than the actual cost of the work once complete. In such circumstances, we consider that the outgoing owner should be entitled to return of any surplus, since the cost in question is not a cost in respect of which the successor owner shares liability. Although we think such cases will be unusual, in the interests of fairness, we think a default rule to this effect is required.

10.55 Finally, we consider that the manager of the association should be under a duty to provide, on request by the outgoing owner, a statement of that owner's account as at the date on which transfer of ownership is anticipated to occur. The statement should detail the outgoing owner's liability for association costs in that year, and the extent to which those liabilities have been discharged by any service charge payment already made. It should also detail the amount of the service charge which remains to be paid by the outgoing owner in that year and the dates on which payment is due, together with an estimate of any extent to which payments made will exceed liabilities at the point of transfer. We understand that such statements are commonly provided by factors in relation to common charges under current law, and help to ensure that the successor owner is aware of potential liabilities, which can then be taken into account during the transfer transaction.

10.56 Drawing together the threads of the above, we recommend:

84. In the default association rules:

(a) A successor owner should be severally liable with an outgoing owner for any service charge payment outstanding at the date of transfer, subject to a right of relief against the outgoing owner;

(b) But if any portion of the service charge is referable to an association cost for which the successor is not severally liable, the successor has no liability for that portion of the service charge;

(c) Any surplus service charge paid by the outgoing owner and retained by the association should be treated as if it were paid by the successor;

(d) Where any surplus is referable to payment for an association cost in relation to which the successor did not have several liability, the association should repay that surplus to the outgoing owner.

(e) Where an owner anticipates transferring ownership of their flat, and requests from the manager a statement of their account as at the anticipated date of transfer, the manager is under a duty to provide that statement within a reasonable time.

(2004 Act, s 3D(1) and schedule A2 para 22 & 23, inserted by Draft Bill, s 2)

Treatment of association funds

10.57 Since the budget system outlined above anticipates service charge payments being made by members in advance of association costs being incurred, it will be necessary for the association to hold the relevant funds until payments for works fall due. Provision should therefore be made in the rules of the association to ensure the funds are dealt with appropriately. Under the DMS,[56] association funds must be held in the name of the association in a bank or building society account.[57] Where funds are likely to be held for some time, the manager must ensure that they are deposited in an account which is interest bearing or invested otherwise in line with a decision taken by owners.[58] Where a reserve fund is established, the manager must ensure that these funds are kept separately from association funds.[59]

10.58 In the Discussion Paper, our provisional view was the DMS rules should be replicated in the default rules for tenement owners' associations.[60] Out of the 30 consultees who responded to our question on this point,[61] 26 agreed with this view. Several consultees noted that preparatory work must be undertaken with the financial sector to ensure that banks and other financial institutions are willing to offer maintenance accounts to owners' associations following the introduction of any legislation. The difficulties for owners in opening an account for tenement funds at present was highlighted. We discuss the need for coordination with the financial sector on the introduction of owners' associations in Chapter 2.[62]

10.59 The Discussion Paper also asked consultees for any further comments on the treatment of funds by associations.[63] Three consultees suggested that it should be open to associations to hold funds in non-traditional financial institutions, with two suggesting an app such as Novoville might serve this purpose. Users of the Novoville app agree to tenement repair funds being stored in an electronic money account provided by an electronic money institution[64] called Modulr. Electronic money institutions, though carefully regulated, are not subject to the same regulatory regime as banks. We think, in recommending default rules on treatment of funds by a new form of legal person, that a cautious approach must be preferred. However, as clarified earlier, members may take an association decision to hold funds elsewhere.

---

[56] DMS rule 21.
[57] DMS rule 21.1.
[58] DMS rule 21.2.
[59] DMS rule 21.3.
[60] Discussion Paper, paras 10.40 – 10.42.
[61] Discussion Paper, para 10.43.
[62] See para 2.32 above.
[63] Discussion Paper, para 10.43.
[64] An explanation of these institutions can be found on the Financial Conduct Authority's website at https://www.fca.org.uk/consumers/using-payment-service-providers. Further information on the FCA's regulatory regime is available at https://www.fca.org.uk/firms/electronic-money-payment-institutions.

10.60 We accordingly recommend:

85. In the default association rules:

(a) Association funds must be held in the name of the association in a bank or building society account;

(b) Where association funds are likely to be held for some time, the manager must ensure that they are deposited in an account which is interest bearing or invested otherwise in line with an association decision;

(c) The manager must ensure that any association funds forming a reserve fund are kept separately from other association funds.

(2004 Act, s 3D(1) and schedule A2 para 24, inserted by Draft Bill, s 2)

Para 10.46: Discharge of owner's liabilities - example account statement

An association approves an annual budget. Under the association rules, all costs are shared equally, meaning each flat owner's share of liability is as follows: Building insurance - £250; Stair cleaning - £25 x 10 instalments; Roof repairs - £250; Reserve fund payment - £250 (£1000 in total).

The service charge is therefore £1000 per owner, payable in quarterly instalments on 1st of April, July, October and January. The table below shows the owner's position in relation to association costs on each of the dates listed.

Date	Service charge payment	Liabilities				Balance of owner's account
		Outstanding	New	Discharged	Remaining	
1st Apr	250	0	0	0	0	250
10th Apr	0	0	(25) Stairs	25	0	225
10th May	0	0	(25) Stairs	25	0	200
10th June	0	0	(25) Stairs (250) Insurance	18.18 181.82	(6.82)[1] (68.18)	(75)
1st July	250	(6.82) Stairs (68.18) Insurance	0	6.82 68.18	0	175
10th Aug	0	0	(25) Stairs	25	0	150
10th Sept	0	0	(25) Stairs	25	0	125
1st Oct	250	0	0	0	0	375
10th Oct	0	0	(25) Stairs	25	0	350
20th Oct	0	0	(250) Roof	250	0	100
10th Nov	0	0	(25) Stairs	25	0	75
1st Jan	250	0	0	0	0	325
10th Jan	0	0	(25) Stairs	25	0	300
10th Feb	0	0	(25) Stairs	25	0	275
10th Mar	0	0	(25) Stairs (250) Reserve fund	25 250	0	0

[1] On 10th June, £275 of liabilities become payable, but there is only £200 in the owner's account. The stair cleaning debt of £25 represents 1/11 of the owner's overall liability of £275 for association costs on that date (275/25 = 11), so 1/11 of the owner's £200 balance (or £18.18) is applied to that debt. The insurance debt of £250 represents the remaining 10/11 of the owner's overall liability for association costs on that date, so 10/11 of the owner's £200 balance (or £181.82) is applied to that debt.

Chapter 11 Enforcement of maintenance obligations

Introduction

11.1 In this Chapter we look at the processes and mechanisms by which certain tenement maintenance obligations can be enforced. We consider the obligations owed by flat owners to one another and suggest a new role for the owners' association in enforcing these duties. We consider the provisions in the 2004 Act regulating the liability of owners to one another in relation to maintenance costs, including the position on liability where an owner sells their flat whilst their share of the cost of works remains outstanding, and consider how these should be amended in light of the introduction of the owners' association into the maintenance framework. We recommend the introduction of two new remedies which should be available to the association in relation to the obligations owed by owners, namely the budget approval order and tenement-specific land attachment. We also recommend a change in forum for tenement disputes and consider the place of non-judicial dispute resolution in relation to such disputes.

11.2 Separately, we consider the position of third parties such as tradespersons who may need to enforce obligations owed to them by the association. We recommend that third parties have a direct right of recourse against members in respect of association debts that cannot be recovered from the association. We also consider the power of local authorities to order property maintenance, and recommend that the government consider whether this scheme should be reformed to allow for an owners' association to be made subject to such an order in future.

11.3 These issues were generally considered in Chapter 11 of the Discussion Paper.

Enforcing obligations within the tenement

Obligations on owners under the 2004 Act

11.4 Our draft Bill, if enacted, will impose a number of obligations on owners within the context of their owners' association. The most significant of these is likely to be the obligation on each owner to pay their service charge following approval of the annual budget,[1] but other duties do arise, such as the duty on members to provide the manager with their contact details.[2] In our Bill, the manager has power to enforce any duty owed to the association by a member.[3]

---

[1] We explained this obligation earlier in our Report as part of our discussion on the default association rules for financial administration: see generally paras 10.12 – 10.47 above.
[2] See the discussion at paras 5.76 – 5.81 above.
[3] See our recommendation at para 5.32 above. Under our Bill, this power falls within the manager's statutory discretion, meaning that the manager can exercise the power on behalf of the association even in the absence of an association decision to that effect.

11.5 Under the 2004 Act, owners also owe one another a number of duties without a specific connection to the owners' association. An important example, discussed earlier in the Report, is the duty on owners under section 8 of the 2004 Act to maintain any part of the tenement which they own, and which provides support or shelter to another part of the building, so as to continue to provide that support or shelter.[4] The other duties are as follows:

- Section 9 prohibits an owner (or occupier) from doing anything in relation to a part of the tenement which they own (or occupy) which would be reasonably likely to impair to a material extent the support and shelter provided to any part of the tenement building, or the natural light enjoyed by any part of the tenement building;

- Section 17 places a duty on an owner of any part of the tenement to allow reasonable access through it for the listed purposes, including to enable repairs to be carried out to another part of the tenement;

- Section 18 places a duty on an owner to take out insurance against prescribed risks for the reinstatement value of their flat and any common parts of the tenement in which they share ownership.

11.6 These duties can be enforced by owners against one another (and where relevant, against an occupier of the property). The introduction of owners' associations into the framework for tenement maintenance gives rise to the question of whether the association should also have enforcement rights in relation to these duties. The benefit of conferring this role on the owners' association is that it avoids the need for one owner to take action directly against another, which can obviously have undesirable consequences for neighbourly relations. There is also some logic in the association taking on this enforcement role in relation to obligations concerning association property, since the association will (for example) be coordinating the work required to maintain these parts of the building, or seeking access to allow for work to be completed.

11.7 It is important to recognise, however, that the scope of these duties is not limited to association property. For example, a leak into a lower flat from an upper flat resulting from a cracked pipe or faulty shower lining is unlikely to involve association property. The association is not responsible for maintaining non-association property, and has no power to carry out repairs to it. Accordingly, the power of the association to enforce duties connected with maintenance would seem appropriately to be restricted to cases in which those duties concern association property.

11.8 We canvassed views on this issue in the Discussion Paper.[5] We asked, first, whether owners should continue to have the right to enforce the obligations set out in the sections of the 2004 Act mentioned above against one another. Of the 31 consultees who responded to this question, 27 agreed that owners should continue to have this right, and a further two consultees offered qualified support. We agree that owners should continue to have this right. Since this is a continuation of the status quo, no provision in our Bill or amendment to the 2004 Act is required here.

---

[4] See paras 3.2 – 3.30 above. We recommend an extension of this duty to include work required to prevent damage to any part of the tenement, or in the interests of health and safety.
[5] Discussion Paper, paras 11.24 – 11.27.

11.9 We also asked whether the manager, acting on behalf of the association, should have the right – or even the duty – to enforce these obligations. We received 31 responses. Twenty-five agreed that the manager should have a right of enforcement in relation to obligations owed by owners to one another. A further two consultees suggested this right should take priority over the individual enforcement rights of owners, which could be exercised only where the manager declined to do so.

11.10 It is important to recognise that the association could take enforcement action against an individual owner only where a majority of owners decided it should do so, whether by way of a specific association decision or by conferring a general authority on the manager to take such action in the manager's terms of appointment.[6] If action was taken by the association, liability for the costs incurred would be shared amongst owners on the basis of the association rules.

11.11 Some consultees noted, however, that the risk of conferring such power on the association is that it opens up the prospect of an individual owner being "bullied" by a majority. It should be recognised that this risk does not arise under current law. In our view, this risk is addressed by provisions elsewhere in the legislation designed to provide minority protection. In particular, any owner has the right under section 5 of the 2004 Act to seek annulment of a majority association decision before the Tribunal where it is unfairly prejudicial to one owner. Taking that into account, on balance, we consider the potential dangers here to be outweighed by the potential benefits.

11.12 In relation to the suggestion that the manager should have a duty to enforce these obligations against owners, only 14 of 31 consultees offered support. Amongst those disagreeing, several consultees pointed out that placing a *duty* on the manager to enforce relevant obligations would seem to contradict the individual rights of owners to do so. The right to enforce must include the power to choose not to do so for whatever reason. If the manager had a duty to enforce, that choice would be removed from owners. We accept the logic of this argument, and make no recommendation in relation to any duty on the manager in this respect.

11.13 Drawing together the threads of the above, we recommend:

86. (a) The owners' association should have the right to enforce the obligations owed by any owner (or, where relevant, occupier) under sections 8, 9, 17 and 18 of the 2004 Act.

(b) The obligations owned by any owner under sections 8 and 9 should be enforceable by the association only insofar as those duties relate to association property.

(2004 Act ss 8, 9, 17 and 18 as amended by draft Bill s 8 and Schedule paras 6, 7, 13 and 14)

[6] See the discussion of the manager's powers at paras 5.26 – 5.32 above.

Provisions on liability for costs

11.14 Sections 11 to 15 of the 2004 Act contain a number of provisions in relation to liability for costs incurred under the legislation or the management scheme applicable in the tenement. These provisions do not regulate how liability for costs should be divided amongst owners, but touch on matters such as the date on which liability for particular costs can be said to arise, and how the liability of an owner is affected when that owner sells their flat or otherwise transfers it to a new owner. In the Discussion Paper we asked whether any changes to these sections of the 2004 Act would be required by the introduction of owners' associations.[7] Twenty-eight consultees responded, nineteen of whom said that no changes were necessary, whilst two suggested a change to section 13 which we discuss further below.

11.15 No other changes of note were suggested. However, as work on the project has continued, we have realised that some further amendment to these sections is required to recognise the introduction of the owners' association within the maintenance framework, and to ensure that the new arrangements in relation to the budget and service charge operate as intended.

11.16 First, section 11 determines when liability for relevant costs arises, with the aim of ensuring the same rules apply regardless of how such costs are incurred. "Relevant costs" is defined in section 11(9) to mean any costs for which an owner is liable under the management scheme applicable in the tenement, and any other costs for which the owner is liable by virtue of the Act. Costs for which an owner is liable under the management scheme applicable in the tenement will necessarily include all "scheme costs" within the meaning of TMS rule 4.1, but may also include wider costs (most obviously, the cost of improvement works to scheme property) if provided for in tenement burdens forming part of the applicable management scheme. Under the owners' association regime, any such work to association property will be carried out by the owners' association, and any such costs incurred will therefore be "association costs".

11.17 Costs for which an owner is liable by virtue of the Act separate from the management scheme may arise under section 10 (where an individual owner carries out work to scheme property to comply with the duty under section 8) or section 21 (where an owner or owners incur costs in relation to the demolition of a tenement). Under the owners' association regime, costs incurred under these sections must be reimbursed by the association. The reimbursement will also amount to an association cost. Accordingly, under the new regime, any cost incurred in a tenement with an owners' association will be an association cost. However, in tenements subject to a DMS, there is no change in relation to costs arising under section 10 or section 21, so provision in this respect in section 11 requires to be maintained.

[7] Discussion Paper, para 10.24.

11.18 Accordingly we recommend:

87. Section 11 of the Tenements (Scotland) Act 2004 should be amended to replace references to "scheme costs" with "association costs", and references to the "Tenement Management Scheme" with the "rules of the tenement owners' association".

(2004 Act s 11, as amended by draft Bill s 8 and Schedule para 9)

11.19 Where an owner of a flat sells or otherwise transfers ownership of that flat, section 12 of the 2004 Act makes provision in relation to the liability of the transferor and their successor for relevant costs. An owner who is liable for such costs continues to be liable even after they have transferred ownership of their flat. However, section 12(2) provides that their successor – the "new" owner – will be severally liable for the same costs. This is subject to the proviso that the new owner will not have liability for costs relating to maintenance or work carried out before the date on which the new owner acquired the property unless a notice of potential liability for those costs was registered against title to the flat in question at least 14 days before the acquisition date. Provision is made in section 13 for the content of such a notice, which may be registered by the outgoing owner, any other owner in the same tenement, the tenement manager or the local authority in which the tenement is situated. Where the new owner pays any maintenance costs for which the outgoing owner was liable, the new owner may recover the amount so paid from the outgoing owner.

11.20 We do not seek to revisit the policy underlying these provisions, which aims to ensure speedy payment of maintenance costs, and recognises that a potential new owner may protect themselves, during the contractual negotiations leading to the transfer, against the risk of non-payment by an outgoing owner. (By contrast, the owners of other flats in the tenement may not even be aware that a transfer of ownership is in contemplation until after it has occurred, at which point pursuing the outgoing owner for unpaid costs will be very difficult.)

11.21 Following the introduction of the owners' association regime, relevant maintenance costs will be owed to the owners' association rather than arising under the management scheme applicable in the tenement. Under the amendments to section 11 we recommend above, "relevant costs" will be redefined to include association costs, so that section 12 will apply in relation to the liability of owners for association costs without any amendment to section 12 itself being required. This includes the right of a new owner to recover from the outgoing owner payment for any association costs for which the outgoing owner was liable. However, in Chapter 10 we recommend that a new owner should also have several liability for any outstanding service charge payment due by the outgoing owner, except insofar as it relates to a cost in respect of which the new owner does not have several liability with the outgoing owner. The service charge payable by an owner will largely be calculated by reference to the owner's liability for association costs, so a new owner will be able to recover payments made in respect of such costs from the outgoing owner under section 12. However, a service charge may also include a payment that is not referable to liability for an association cost, such as a payment into a float or reserve fund. The new owner should have a right to recover payments of this kind from the outgoing owner, just as if they were association costs for which the outgoing owner was liable. We recommend an amendment to section 12 to this effect.

11.22 We also recommend an amendment to section 13 to allow for a notice of liability for costs to be registered in future by the tenement owners' association. As two of the respondents to our consultation question on this issue noted, it is most likely to be the association to whom an owner will have a liability for maintenance costs in future, so it seems sensible to allow the association to register a notice where appropriate.

11.23 We recommend:

88. (a) Section 12 of the Tenements (Scotland) Act 2004 should be amended to allow for recovery by a new owner of payment of any amount of service charge not referable to an association cost for which the outgoing owner was liable.

(b) Section 13 of the Tenements (Scotland) Act 2004 should be amended to allow for the registration by a tenement owners' association of a notice of potential liability for costs.

(2004 Act s 12 and 13, as amended by draft Bill s 8 and Schedule para 10 and 11)

11.24 Finally, section 14 of the 2004 Act provides that an owner who has a right to recover costs from the other flat owners continues to hold that right even after they have transferred ownership of their flat to someone else. To recognise the position of the owners' association within the maintenance framework, this section must be amended to allow for the recovery of costs from the association itself under the rules of the owners' association.

11.25 We recommend:

89. Section 14 of the Tenements (Scotland) Act 2004 should be amended to provide for the continuing right of an owner to reimbursement of costs owed by the owners' association under the legislation or the association rules notwithstanding the fact that person ceases to be an owner.

(2004 Act s 14 as amended by draft Bill, s 8 and Schedule para 12)

New remedies in relation to maintenance disputes

11.26 Owner apathy or recalcitrance toward common repairs, and difficulties with recovering tenement-maintenance related debts, are problems that have been raised with us consistently throughout the life of the project. There are no easy or "magic bullet" solutions to these problems. However, we consulted on the introduction of two tenement-specific remedies which we considered may be of assistance in this regard.

Budget approval order

11.27 The Discussion Paper proposed that any new legislation should allow the association manager to seek approval from the Tribunal for an annual budget where approval cannot be obtained by way of an association decision.[8] In this context, the budget must cover only the work that will be required during the budget year to ensure compliance by members with their

[8] Discussion Paper, paras 11.46 – 11.47.

duty to maintain association property which they own.[9] Approval of the budget allows the manager to instruct the necessary work,[10] and imposes a duty on members to pay their service charge for the costs of that work.[11] A budget approval order would therefore provide a straightforward way of enabling enforcement of the section 8 duty by the manager.

11.28 In response to our consultation question in relation to this proposal,[12] 28 out of 32 consultees supported the introduction of a budget approval order. Accordingly, we recommend:

90. (a) The association manager may apply to the Tribunal to approve a budget for the association for a financial year;

(b) The manager may make such an application where the manager has attempted to obtain the approval of the association for a budget for that year in accordance with the association rules, and the association has not approved a budget;

(c) The manager must notify members that such an application has been made;

(d) The Tribunal may approve the budget only if satisfied that the budget only includes costs which relate to work required for the owners to comply with section 8 or the running of the association, and it is reasonable to do so in the circumstances.

(2004 Act s 6A, inserted by draft Bill s 4)

Tenement-specific land attachment

11.29 The Discussion Paper provisionally proposed that the diligence of land attachment should be made available for the enforcement of financial obligations arising under the 2004 Act or the association rules.[13] Provision is made for land attachment in the Bankruptcy and Diligence etc. (Scotland) Act 2007,[14] but the relevant sections of the statute have yet to be brought into force.

11.30 In the Discussion Paper, we outlined how the diligence is intended to work.[15] Where a debtor has failed to pay a debt notwithstanding a court order requiring them to do so, a creditor may register a notice of attachment against land or buildings owned by that debtor. After six months have passed, if at least £3,000 of the debt remains outstanding, the creditor can apply to court for warrant to sell the land or buildings without the need for the debtor's consent to the sale. The debt can then be recouped from the proceeds of the sale, while any further proceeds are retained by the debtor.[16] Section 98 of the 2007 Act makes special provision for

[9] This duty is set out in section 8 of the 2004 Act, as discussed at paras 3.21 – 3.30 above.
[10] For discussion, see paras 5.26 – 5.38 above.
[11] See generally the discussion at paras 10.15 – 10.33 above.
[12] Discussion Paper, para 11.48.
[13] Discussion Paper, paras 11.49 – 11.54.
[14] Sections 81 – 128.
[15] Discussion Paper, para 11.50; 2007 Act ss 81, 83 and 92.
[16] In practice, the debtor may have creditors other than the attacher, such as a mortgage loan provider, who are entitled to some or all of these proceeds.

attached land which comprises or includes a dwellinghouse which is the sole or main residence of: the debtor; the owner (if they are not the same person as the debtor); the debtor or owner's spouse, civil partner or cohabitant; or the parent of any child of the debtor or owner who lives in that house with the child (for example, a former spouse of the debtor who lives in the debtor's home with their child, while the debtor lives elsewhere.) In that case, the court must have regard to specific factors when considering the grant of warrant to sell, including the ability of those occupying the dwellinghouse to secure reasonable alternative accommodation, and whether warrant to sell would be "unduly harsh" to the debtor.[17]

11.31 As explained in the Discussion Paper,[18] these provisions have not been brought into force due to political concerns about the risk of an individual losing their home as a result of a debt enforcement process. A review of debt enforcement solutions being taken forward by the Accountant in Bankruptcy at present includes consideration of the treatment of the family home within insolvency process, but it is unclear at the time of writing what recommendations may follow from this, or whether these recommendations will take into account the land attachment provisions in the 2007 Act.[19]

11.32 Given the state of uncertainty surrounding this diligence, we provisionally proposed that land attachment should be made available on a restricted basis to tenement owners' associations. The attachment could be used only to enforce debts owed to the association under the association rules or arising under the 2004 Act. The attachment could not be registered against any property other than the flat in the tenement owned by the member in debt to the association. Taking into account the political and human rights concerns referred to above, we suggested that the attachment should not confer on the association the power to sell the flat without the owner's consent where it is used as a sole or main residence as defined in section 98 of the 2007 Act. In these circumstances, the attachment would entitle the association to recoup its debt from the proceeds of a sale conducted voluntarily by the flat owner or, where the owner was in default on their mortgage loan repayments, by the holder of a standard security (mortgage) over the property. The association would, however, have power of sale where a flat is not used as a primary residence, for example where the flat is used for short-term lets, or where the flat is a commercial unit.

11.33 We asked consultees whether the provisions on the diligence of land attachment should be brought into force, subject to the restrictions outlined above.[20] Of the 30 consultees who responded to this question, 26 supported the introduction of these provisions.

11.34 We also asked whether the power to sell attached property should be excluded where the property in question is used as a family home as defined in section 98 of the 2007 Act. Of the 27 consultees who answered this question, 15 agreed that the power of sale should *not* be exercisable in relation to the debtor's home. Seven disagreed, all but one of whom argued that the power of sale *should* be available for family homes. Taking into account the broader political concerns in relation to this issue, and the ongoing review of the law in this area, we remain of the view that it would be appropriate to make a recommendation to this effect.

---

[17] Discussion Paper, para 11.51; 2007 Act s 98.
[18] Discussion Paper, para 11.53.
[19] Accountant in Bankruptcy, *Review of Scotland's statutory debt solutions*, available at https://aib.gov.uk/policy-and-legislation/review-of-scotland-s-statutory-debt-solutions. The second consultation within stage 3 of the review closed in June 2025.
[20] Discussion Paper, para 11.55.

11.35 We note that our draft Bill does not make any provision in relation to this recommendation. Scottish Ministers already have the powers necessary to bring into force and modify the application of the relevant land attachment provisions in the manner that we suggest.[21]

11.36 We recommend:

91. (a) The provisions on the diligence of land attachment should be brought into force, subject to the restriction that the diligence can be used only by an association in relation to heritable property forming part of the tenement in connection with debts owed in respect of association costs;

(b) The power to sell attached property should be excluded where the property in question is used as a sole or main residence as defined in section 98 of the Bankruptcy and Diligence etc. (Scotland) Act 2007.

A change of forum for tenement disputes

11.37 Under current law, proceedings in relation to enforcement of tenement law obligations are split across a number of courts and tribunals, as outlined in the Discussion Paper.[22] Disputes between tenement owners arising from the 2004 Act are dealt with principally in the Sheriff Court.[23] In the Discussion Paper, we set out our preliminary view that, under any new legislation, maintenance disputes should fall primarily within the jurisdiction of the Housing and Property Chamber of the First-Tier Tribunal.

11.38 Two main arguments favour this change of jurisdiction.[24] First, the flexibility and pragmatism of the tribunal system make it a better fit for the types of disputes likely to arise amongst flat owners. The inquisitorial approach to decision making adopted by the Tribunal is more likely to provide an appropriate resolution for owners, who must continue to have a relationship beyond the life of the dispute, than the adversarial approach employed in the Sheriff Court. Additionally, an application to the Tribunal does not require payment of a fee, legal representation may not be necessary, and parties are generally expected to bear their own costs no matter the outcome of the cases.[25] Second, the Tribunal already has jurisdiction for a range of housing-related disputes, so the addition of tenement maintenance matters has a certain logic for the organisation of the legal system more generally.[26]

11.39 One possible counter-argument is that enforcement action against an owner who has failed to pay their service charge will inevitably be a common reason for raising proceedings under the new legislation. Debt enforcement processes are generally dealt with in the Sheriff Court. However, the Tribunal has jurisdiction in relation to private tenancy disputes which will frequently involve non-payment of rent, and is empowered to make payment orders and consider time to pay applications in this respect.[27] If this is considered appropriate in tenancy

---

[21] 2007 Act ss 224 – 227.
[22] Discussion Paper, para 11.32.
[23] 2004 Act ss 5 and 6.
[24] Discussion Paper, paras 11.36 – 11.37.
[25] Discussion Paper, para 11.39; The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 Schedule rule 40.
[26] Discussion Paper, para 11.37.
[27] Discussion Paper, para 11.38; Private Housing (Tenancies) (Scotland) Act 2016 s 71.

law, it may be equally so in tenement law, albeit that diligence or insolvency proceedings required to ensure performance of these orders must be dealt with in the sheriff court.

11.40 We asked consultees whether enforcement action in relation to obligations arising under the 2004 Act or the management scheme applicable to the tenement should be dealt with by summary application to the sheriff court or by application to the Housing and Property Chamber of the First-tier Tribunal.[28] Twenty-eight consultees responded to this question. Twenty-two favoured enforcement action being dealt with by the Tribunal, and no consultee disagreed that the Tribunal should have jurisdiction in this respect.

11.41 Given the above, we recommend:

92. (a) The association, or any owner, may make an application for an order relating to any matter concerning the operation of the owners' association, the association rules or any provision of the 2004 Act;

(b) The application must be made to the Housing and Property Chamber of the First-Tier Tribunal;

(c) The Tribunal should have competence to make any order in connection with such proceedings as would be competent if the proceedings were civil proceedings.

(2004 Act s 6, as amended by draft Bill ss 6(1), (4)-(5) & 8 and Schedule para 5)

The role of non-judicial dispute resolution

11.42 Legal action is a significant undertaking in any context and a formal judicial process may be particularly unappealing where a dispute arises between neighbours. It had been suggested to us in early consultation for our project that an alternative form of dispute resolution, such as mediation, should be permissible – or even mandatory – for tenement disputes under any new legislation.

11.43 The Discussion Paper recognised the potential benefits of non-judicial dispute resolution in the tenement context, particularly where such processes focus on collaboration-building and compromise. However, our preliminary view was that it would not be appropriate to compel the use of such a process in legislation, principally due to the absence of a national mediation service or similar body that would ensure equal and equitable access to a relevant process for flat owners throughout Scotland.[29]

11.44 Instead, we considered other ways in which alternative dispute resolution methods could be integrated into the treatment of tenement law disputes.[30] In particular, we suggested

---

[28] Discussion Paper, para 11.40.

[29] Discussion Paper, para 11.43. The Scottish Government has indicated an intention to develop a draft model for the delivery of mediation services across sheriffdoms: see the letter from the First Minster to the Cabinet Secretary for Justice and Home Affairs published on 5 September 2023, available at https://www.gov.scot/publications/justice-and-home-affairs-fm-letter-to-cabinet-secretary/. As at the time of writing, a draft model has not been published.

[30] The Discussion Paper sought views on the powers that should be available to a "court or tribunal" in relation to alternative dispute resolution processes. In light of our recommendation at para 11.41 above that the Tribunal should have jurisdiction to deal with tenement disputes, we have framed our discussion and recommendations here in terms of the powers of the Tribunal.

that the Tribunal should have the power to refer a dispute for mediation if that was thought to be appropriate in all the circumstances of the case.[31] Of the 28 consultees who responded to this question, 22 agreed. We also asked whether the Tribunal should have discretion, when determining an award of expenses, to take account of attempts by any party to the dispute to engage with an alternative dispute resolution process.[32] Of the 27 consultees who responded to this question, 21 agreed, with one further consultee agreeing that this should be the case if mediation had been ordered by the Tribunal.

11.45 While we are content to make recommendations in line with the views of consultees here, in light of our recommendation above that the First-tier Tribunal should have jurisdiction in relation to tenement disputes, it is not necessary to make specific provision in our draft Bill. The Tribunal rules already place a duty on the Tribunal to bring the availability of mediation to the attention of parties in suitable cases, to provide information on what mediation involves and, if parties consent to mediation, adjourn or postpone the hearing to enable parties to access mediation.[33]

11.46 In a related vein, the rules of the Housing and Property Chamber allow for an award of expenses in relation to an application only where "[a] party through unreasonable behaviour in the conduct of the case has put the other party to unnecessary or unreasonable expense." It seems to us that the unreasonable refusal by one party to engage with an alternative dispute resolution process proposed by another or raised by the Tribunal could be taken into account under this rule. Our understanding is that this rule applies only to the behaviour of the parties once the case is underway, however, meaning that attempts to engage with alternative dispute resolution prior to that time could not be taken into account. The rule is therefore not entirely in line with the approach provisionally proposed in the Discussion Paper. Despite this difficulty, we do not recommend any changes to the Tribunal rules. The introduction of an expenses-related rule specifically for applications relating to tenement disputes would disturb provision which currently applies consistently to all disputes heard by the Chamber, and may cause confusion for parties and Tribunal members. On balance, we do not consider this risk worth taking given that the number of cases in which it might influence any award of expenses is likely to be small.

11.47 Taking account of the above, we recommend that:

93. Rules 19 (mediation) and 40 (expenses) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 shall apply without amendment to cases concerning the operation of the management scheme which applies as respects a tenement or any provision of the 2004 Act.

Enforcement of financial obligations owed by the owners' association to third parties

11.48 A separate issue explored in the Discussion Paper was the enforcement by third parties of obligations owed to them by the association.[34] Where a tradesperson has contracted with the association to carry out maintenance work, for example, how might they pursue

[31] Discussion Paper, paras 11.44 – 11.45.
[32] *Ibid.*
[33] The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 Schedule rule 19.
[34] Discussion Paper, paras 11.56 – 11.63.

payment for that work if payment is not made by the association voluntarily? Debt enforcement proceedings could be raised against the association in the usual way, and if the association has funds in a maintenance account or reserve fund, the contractor may be able to seize those assets to recoup their debt. If the association holds no such funds, however, the contractor is likely to be left without an effective remedy. This outcome seems undesirable. Owners who have benefited from the contract should not be able to shelter behind the legal personality of the association to avoid financial liability. We considered fairness to dictate that the third party should have a right of recourse against the members of the association directly. An equivalent right is given to third parties under the DMS.[35]

11.49 We provisionally proposed that each owner should be directly liable to a third party contractor for that owner's individual share of the relevant costs.[36] We considered this preferable to the third party having a right to recover the whole debt from one owner, leaving that owner to recover relevant shares from the others. The third party is in a better position to protect themselves at the time of entering a contract (for example, by requiring payment up front or ringfencing funds) than owners are able to protect themselves against one another.

11.50 We also proposed that a third party should be able to enforce this liability by levying a service charge directly against members, following the process set out in the association rules[37] which would more usually be used by the manager subsequent to approval of the annual budget.[38] A similar proposal was made in relation to the DMS in our Report on Real Burdens,[39] but did not make its way into the DMS legislation as enacted.

11.51 In relation to our consultation questions on this topic, 28 out of 30 respondents agreed that, where proceedings against the association have proved ineffective, a third party should have a direct right of recourse against the members of the association. All 27 respondents agreed that the right of the third party should be limited to each member's individual share of the money owed.

11.52 On the question of whether a third party should be able to make use of the service charge mechanism, 17 out of 28 respondents agreed with our provisional view. However concern was raised about the practicality for a third party of using this mechanism. Levying a service charge would require the third party to be familiar with the association rules on division of liability for costs incurred. It is not a given that a third party would have this knowledge. Moreover, if the third party, by accident or through lack of care, levied an incorrect service charge, it is not clear how easily an individual owner would be able to challenge that charge. Taking account these difficulties, we no longer recommend the inclusion of such a power within the legislation.

---

[35] DMS Order art 12 and 13.
[36] Discussion Paper, para 11.60.
[37] We recommend default rules on the collection of the service charge at paras 10.42 – 10.43 above.
[38] Discussion Paper, paras 11.61 – 11.62.
[39] Scottish Law Commission, Report on Real Burdens (Scot Law Com No 181, 2000), available at https://www.scotlawcom.gov.uk/files/8712/7989/7470/rep181.pdf, paras 8.66 – 8.68.

11.53 We recommend:

94. Where a debt owed to a third party by an owners' association has been constituted by decree or registration for execution, and the third party has executed diligence without recovering the debt or it does not appear that the association has any assets which reasonably could be recovered by diligence:

(a) The third party can recover a proportion of the debt from each owner who is liable for the costs to which the debt relates under the association rules;

(b) The proportion recoverable from each owner is the proportion for which that owner is liable under the association rules;

(c) Where the proportion owed by any owner proves unrecoverable, the creditor is entitled to recover from each other owner liable for the cost an equal share of that proportion, subject to a right of relief by each other owner against the owner whose proportion was unrecoverable.

(2004 Act s 13A, introduced by draft Bill, s 5)

Local authority powers under the Housing (Scotland) Act 2006

11.54 Finally, we note local authorities have a range of powers in relation to building maintenance.[40] Most importantly for the purposes of the current project, local authorities can impose a work notice under sections 30 to 32 of the Housing (Scotland) Act 2006 requiring an owner or owners to bring a property into a reasonable state of repair in line with the tolerable standard or where there is a risk to health and safety.[41] In the Discussion Paper,[42] we noted that these powers (which do not apply solely in relation to tenements) lie beyond the scope of the project. However, we think it would be beneficial for the Scottish Government to consider whether reform to the powers of local authorities in this respect would be appropriate to account for the introduction of owners' associations into the tenement law framework. In particular, we think it may be sensible to consider whether, in future, it should be possible to impose a work notice in relation to association property on an owners' association itself, rather than on the owners of flats.

11.55 Since this issue lies beyond the scope of our project, the draft Bill does not include any provision in relation to these matters. We note, however, that some provision for amendment to the 2006 Act will require to be included in the Bill before it can be introduced into Parliament, in particular as regards sections 45 and 50 of that Act. It will not be possible to propose appropriate consequential amendments to these provisions until a decision is reached on the

---

[40] These are summarised in a digestible format by the Scottish Parliament Information Centre (SPICe) in their briefing on "Flats: management, maintenance and repairs": SPICe, *Flats: Management, Maintenance and Repairs* (SB 21-59) (2021) pp 45-49 available at https://bprcdn.parliament.scot/published/2021/9/9/e001b7a4-97b4-11e7-b57f-000d3a23af40/SB%2021-59.pdf.

[41] The City of Edinburgh Council has powers to serve notices requiring tenement repairs to be carried out by owners, failing which the council can carry the repairs out and recover the costs incurred: City of Edinburgh District Council Order Confirmation Act 1991 Part VI.

[42] Discussion Paper para 2.51.

broader policy question of reform to local authority powers to account for the introduction of owners' associations.

11.56 Accordingly, we recommend:

95. The Scottish Government should consider appropriate reforms to the powers held by local authorities in relation to building maintenance in light of the introduction of owners' associations into the tenement maintenance framework.

Chapter 12 Summary of recommendations

1. Section 8 of the 2004 Act should be amended to include a duty on owners to maintain any part of the tenement which they own so as to prevent damage to any part of the tenement, or in the interests of health and safety.

(Para 3.26; 2004 Act, s 8 as amended by Draft Bill, s 7 and Schedule para 6)

2. The "association property" to be managed by the owners' association should be defined in the same way as "scheme property" under the TMS.

(Para 3.39; 2004 Act, s 3A(4) and Schedule A1 para 6, inserted by Draft Bill, s 1)

3. In the 2004 Act, maintenance should be defined to include:

(i) any work to association property required to comply with the duty set out in section 8 of the 2004 Act;

(ii) routine maintenance as per in TMS rule 1.5, with that definition expanded to include work to remove, deter or control vermin or other pests, mould, harmful plants or any similar potentially harmful thing.

(Para 3.50; 2004 Act, s 3A(4) and Schedule A1 para 7, inserted by Draft Bill, s 1)

4. Where the association rules require information to be provided:

(a) To a member, and that member has given contact details to the manager, then information must be provided using those contact details by post, by delivery or by any reasonable electronic means;

(b) To a member, and that member has not given contact details to the manager, or to any other person, then information may be provided by post, by delivery or by any reasonable electronic means;

(c) Providing information to the agent of a person should be deemed to meet any requirement to provide it to that person;

(d) Where a member (or their executor, if the member has died) cannot be identified or found after reasonable enquiry, it should suffice to send information to the flat they own in the tenement addressed to "the owner" or equivalent term.

(Para 3.57; 2004 Act, s 3A(4) and Schedule A1 para 23, inserted by Draft Bill, s 1)

5. The owners' association should be a bespoke body corporate.

(Para 4.7; 2004 Act, s 3A(4) and Schedule A1 para 1, inserted by Draft Bill, s 1)

6. (a) An owners' association should be established for every tenement, subject to the exception in part (b) below.

(b) An owners' association should not be established for a tenement subject to a DMS.

(Para 4.17; 2004 Act, s 3A(1) - (3), inserted by Draft Bill, s 1)

7. (a) For tenements in existence on the introduction of the new legislation, an owners' association should be established on the date when the relevant provisions of the legislation are brought into force;

(b) For tenements which come into existence after the introduction of the new legislation, an owners' association should be established on the date on which a tenement in the meaning of section 26 of the Tenements (Scotland) Act 2004 first exists;

(c) Where the DMS ceases to apply to a tenement, an owners' association should be established on the day on which the DMS ceases to apply.

(Para 4.33; 2004 Act, s 3A(1) - (3), inserted by Draft Bill, s 1)

8. On application by any person with an interest, the Tribunal should have power to determine the date on which a tenement or an association first existed, and to determine whether a tenement or an association existed on any particular date.

(Para 4.35; 2004 Act, s 3C(a)(i) and (iii) & (b), inserted by Draft Bill, s 1)

9. (a) The name of an owners' association should be "The Tenement Owners' Association of" followed by the address of the tenement building.

(b) The address of an association should be the address of the tenement building, and where a manager is in post, the address of the association manager.

(Para 4.39; 2004 Act, s 3A(4) and schedule A1 para 3, inserted by Draft Bill, s 1)

10. (a) The function of an owners' association should be to manage the tenement for the benefit of members of the association;

(b) The association should have power to do anything which appears to it to be necessary or expedient for the purpose of, or in connection with, the performance of its function, or to be otherwise conducive to the performance of its function.

(Para 4.45; 2004 Act, s 3A(4) and schedule A1 para 4(1) & (2), inserted by Draft Bill, s 1)

11. (a) The general power of the owners' association should be supplemented by a non-exhaustive list of specific powers which it may wish to exercise;

(b) The non-exhaustive list of powers exercisable by the association should include the power to –

(i) Carry out maintenance, improvements, or alterations to association property;

(ii) Carry out inspections of association property to determine whether maintenance is necessary;

(iii) Enter into a contract of insurance in respect of the tenement or any part of it (for which purposes the association is deemed to have an insurable interest in the tenement);

(iv) Purchase or otherwise obtain the use of moveable property;

(v) Open and maintain an account with any bank or building society;

(vi) Invest any money held by the association;

(vii) Borrow money;

(viii) Engage employees or appoint agents.

(Para 4.50; 2004 Act, s 3A(4) and schedule A1 para 4(3)(a)-(h) and 4(5), inserted by Draft Bill, s 1)

12. (a) An owners' association should have the power to instruct demolition of all or part of the tenement building;

(b) An owners' association should have the power to seek approval from the Tribunal for sale of the demolition site and distribution of the proceeds under section 22 of the 2004 Act;

(c) An owners' association should have the power to seek approval from the Tribunal for sale of an abandoned tenement building and distribution of the proceeds under section 23 of the 2004 Act.

(Para 4.54; 2004 Act, s 3A(4) and schedule A1 para 4(3)(l), inserted by Draft Bill, s 1, and 2004 Act, ss 22 and 23 and schedule 3 as amended by Draft Bill, schedule para 16, 17 and 23)

13. The owners' association should have power to execute and register a deed creating, varying or discharging association conditions in relation to the tenement, or to execute a deed applying the DMS to the tenement.

(Para 4.56; 2004 Act, s 3A(4) and schedule A1 para 4(3)(j) & (k), inserted by Draft Bill, s 1)

14. An owners' association should be prohibited from carrying on a trade, whether or not for profit.

(Para 4.60; 2004 Act, s 3A(4) and schedule A1 para 4(4)(b), inserted by Draft Bill, s 1)

15. An owners' association should be prohibited from owning heritable property.

(Para 4.66; 2004 Act, s 3A(4) and schedule A1 para 4(4)(a), inserted by Draft Bill, s 1)

16. The manager or another person so authorised by the owners' association should have power to sign documents and execute deeds on the association's behalf.

(Para 4.69; 2004 Act, s 3A(4) and schedule A1 para 26, inserted by Draft Bill, s 1)

17. The insolvency process which should be available to an owners' association is sequestration.

(Para 4.75)

18. The process of terminating an owners' association should begin automatically when:

(a) The tenement ceases to be a tenement; or

(b) Registration of a relevant deed applies the DMS to the tenement.

(Para 4.83; 2004 Act, s 3B(1) & (10) and s 3C(a)(ii) & (iv), inserted by Draft Bill, s 1)

19. A tenement should be taken to have ceased to be a tenement on the date on which:

(a) A completion certificate is accepted in relation to the demolition or renovation which caused the tenement to cease to exist; or

(b) The Tribunal determines that it ceased to exist.

(Para 4.83; 2004 Act, s 3B(1) & (10) and s 3C(a)(ii) & (iv), inserted by Draft Bill, s 1)

20. During the winding up period, the manager should:

(a) As soon as practicable after the commencement of the winding up, use association funds to pay any debts of the association then distribute any remaining funds to flat owners;

(b) Where any funds remain after the association's debts have been satisfied, distribute those surplus funds to owners on the same basis on which the relevant funds were originally paid to the association unless owners have agreed otherwise;

(c) Prepare the final accounts of the association and send a copy of those accounts to every member.

(Para 4.87; 2004 Act, s 3B(4), (5)(a)-(d) & (6), inserted by Draft Bill, s 1)

21. (a) The owners' association should be dissolved six months after the commencement of the winding up, or on a later specified date if members so decide prior to the expiry of the six-month period;

(b) Any rights and liabilities remaining to the association on the date of dissolution should be transferred to the members of the association, with any such rights or liabilities to be shared equally, subject to an association decision otherwise.

(Para 4.91; 2004 Act, s 3B(2) & (7)-(8), inserted by Draft Bill, s 1)

22. Owners' associations should be excluded from the definition of "property factor" in the Property Factors (Scotland) Act 2011.

(Para 4.98; Property Factors (Scotland) Act 2011, s 2(2)(d), inserted by Draft Bill, Schedule para 25(1) & (2)(a))

23. The actings of a manager should be valid regardless of any defect in the manager's appointment.

(Para 5.10; 2004 Act, s 3A(4) and Schedule A1 para 9(5), inserted by Draft Bill, s 1)

24. (a) The manager and a member acting on behalf of the owners' association should be required to sign a certificate of appointment confirming the manager's appointment;

(b) The certificate should require to be signed within one month of the manager's appointment.

(Para 5.15; 2004 Act, s 3A(4) and Schedule A1 para 9(3)-(4), inserted by Draft Bill, s 1)

25. The manager should be designated an agent of the association.

(Para 5.19; 2004 Act, s 3A(4) and Schedule A1 para 14(4), inserted by Draft Bill, s 1)

26. (a) The role of the association manager should be to manage the tenement on behalf of the association;

(b) The manager should have the functions conferred by the owners' association legislation and the rules on operation of the association;

(c) The manager should be under an obligation to ensure compliance by the association with its key duties under the legislation;

(d) The manager may instruct or carry out emergency work to association property;

(e) The manager may enforce any obligation owed to the association by a member or the association rules.

(Para 5.32; 2004 Act, s 3A(4) and Schedule A1 para 14(1)&(2), 15, 18 and 19(1), inserted by Draft Bill, s 1)

27. The manager should be subject to the following specific duties—

(a) to implement any decision of the association, except to the extent that the decision is contrary to any provision of the legislation or the association's rules;

(b) so far as reasonably practicable, to comply with any direction given by the association as respects the exercise of the manager's powers except to the extent that the direction is contrary to any provision of the legislation or the association's rules;

(c) to fix the financial year of the association;

(d) to keep, as respects the association, proper financial records and prepare the accounts of the association for each financial year;

(e) on request by any member, to make available for inspection any document which relates to the management of the tenement (other than correspondence with individual members);

(f) to monitor compliance by owners with their duty to take out insurance under section 18 of the 2004 Act, subject to the qualification that the manager is not required to obtain a valuation of the tenement for this purpose.

(Para 5.36; 2004 Act, s 3A(4) and Schedule A1 para 16-17, 19(2)&(3), 20-21, inserted by Draft Bill, s 1)

28. The duties of the manager should be owed to the association itself and to its members.

(Para 5.37; 2004 Act, s 3A(4) and Schedule A1 para 14(3), inserted by Draft Bill, s 1)

29. A manager's appointment should be terminated by an association decision to that effect.

(Para 5.50; 2004 Act, s 3A(4) and Schedule A1 para 9(6), inserted by Draft Bill, s 1)

30. Where a member of the association is appointed to be the manager of the association, they should not be considered to be acting "in the course of their business" within the meaning of section 2(1) of the Property Factors (Scotland) Act 2011 only because they are remunerated for that work.

(Para 5.68; Property Factors (Scotland) Act 2011, s 2(2A)-(2B), inserted by Draft Bill, Schedule para 25(1) & (2)(b))

31. The members of the association should be the owners, for the time being, of each flat in the tenement to which the association relates.

(Para 5.71; 2004 Act, s 3A(4) and Schedule A1 para 2, inserted by Draft Bill, s 1)

32 (a) The manager should be under a duty to maintain a record of names and contact details of members of the association.

(b) Members of the association should be under a duty to provide the first manager with their name and contact details within one month of the manager's appointment, and to inform the manager of any changes to their name and/or contact details within one month of their occurrence.

(c) To the extent that it is known to them, a member, on disposal of their flat, should be obliged to notify the manager of: (i) any change to their contact details; (ii) the name and contact details of the new owner; (iii) the name and address of the agent acting for the new owner; (iv) the date on which the new owner will be entitled to take entry.

(d) A member of the association should be entitled to obtain the name and contact details of another member or members where necessary in connection with the management and maintenance of the building or the operation of the association.

(e) A member's contact details must include details of how that person may be contacted in writing.

(Para 5.81; Act, s 3A(4) and Schedule A1 para 22 and 24 inserted by Draft Bill, s 1)

33. In the default rules on operation of the association:

(a) Members should have the power to carry out emergency work to association property;

(b) Emergency work should be defined as per rule 7.3 of the TMS;

(c) The association should have a duty to reimburse the costs of emergency work.

(Para 5.85; 2004 Act, s 3D(1) and Schedule A2 para 25, inserted by Draft Bill, s 2 and 2004 Act, s 29 amended by Draft Bill, Schedule para 20(b))

34. (a) An owners' association established prior to the appointed day must appoint its first manager within six months of the appointed day;

(b) An owners' association for a tenement which comes into existence after the appointed day must appoint its first manager within 18 months of the first day on which the tenement can be occupied;

(c) An owners' association for a tenement which comes into existence following disapplication of the DMS from the tenement must appoint its first manager within six months of the disapplication of the DMS;

(d) An owner's association must appoint its second and any subsequent manager within six months of the position becoming vacant.

(Para 6.16; 2004 Act, s 3A(4) and Schedule A1 para 8(1)(a), 9(1)-(2), and 13, inserted by Draft Bill, s 1)

35. (a) An owners' association established prior to the appointed day must hold its first annual meeting within 12 months of the appointed day;

(b) An owners' association for a tenement which comes into existence after the appointed day must hold its first annual meeting within 24 months of the first day on which the tenement can be occupied;

(c) An owners' association for a tenement which comes into existence following disapplication of the DMS from the tenement must hold its first annual meeting within 12 months of the disapplication of the DMS;

(d) An owner's association must hold an annual meeting in every fifteen months after the first annual meeting.

(Para 6.21; 2004 Act, s 3A(4) and Schedule A1 para 8(1)(b), 10, and 13, inserted by Draft Bill, s 1)

36. (a) An owners' association should be under a duty to approve a budget in respect of association costs for each financial year;

(b) An owners' association established prior to the appointed day must approve its first budget within 12 months of the appointed day;

(c) An owners' association for a tenement which comes into existence after the appointed day must approve its first budget within 24 months of the first day on which the tenement can be occupied;

(d) An owners' association for a tenement which comes into existence following disapplication of the DMS from the tenement must approve its first budget within 12 months of the disapplication of the DMS.

(Para 6.26; 2004 Act, s 3A(4) and Schedule A1 para 8(1)(c) & (2), and 13, inserted by Draft Bill, s 1)

37. (a) An owners' association should be under a duty to make an application for tenement identification information to be entered against relevant titles on the Land Register and/or Register of Sasines;

(b) The association must make such an application within two years of the appointed day for existing tenements, within three years of the first day on which a tenement can be occupied for "new" tenements, or within two years of the day on which the association is established following disapplication of the DMS from the tenement;

(c) Any member of the association who becomes aware that the identification information noted in relation to the tenement is inaccurate, or who intends to do something likely to result in a title sheet in respect of any part of the tenement being made up or cancelled, must inform the manager as soon as reasonably practicable;

(d) Where there is a change in tenement identification information, the manager should be under a duty to make an application for amendment of the information entered on the Land Register or Register of Sasines within six months of the day on which the information changed.

(Para 6.40; 2004 Act, s 3A(4) and Schedule A1 para 8(1)(d), 11, 13 and 25, inserted by Draft Bill, s 1)

38. The Land Registration etc (Scotland) Act 2012 should be amended as follows:

(a) An owners' association should be able to apply for a note of tenement identification information to be entered in the Land Register or recorded in the Register of Sasines, or for information so entered on the Land Register to be amended;

(b) Tenement identification information should be defined to mean the name of the owners' association for the tenement; the address of the tenement; the address of each flat in the tenement; the title number of each property registered in the Land Register which forms parts of the tenement and the address for each property recorded in the Register of Sasines which forms part of the tenement.

(c) An application for entry or amendment of tenement identification information should be accompanied by payment of the relevant fee;

(d) Where the Keeper accepts such an application, she must enter or amend the identification information in the property section of the title sheet for each plot of land which forms parts of the tenement, and/or record the note of identification information in the Register of Sasines in relation to each property in that Register which forms part of the tenement;

(e) Where a tenement has ceased to exist, any person with an interest in the tenement may apply to the Keeper for removal of identification information relating to that tenement from the Land Register or Register of Sasines;

(f) An application for removal should be accompanied by payment of the relevant fee;

(g) Where the Keeper accepts such an application, she must remove identification information from the Land Register or record the note of removal in the Register of Sasines;

(h) A new offence should be created in relation to the making of false or misleading statements in applications for entry or amendment of tenement identification information, with this offence modelled on the offence currently set out in section 112 of the 2012 Act.

(Para 6.41; Land Registration etc (Scotland) Act 2012, ss 64A-64C, inserted by Draft Bill, Schedule para 26)

39. (a) The key duties to appoint a manager, hold an annual meeting and approve an annual budget should be disapplied from owners' associations in relevant tenements;

(b) A relevant tenement is a small tenement consisting of two or three flats, or a tenement where all the flats are owned or co-owned by the same person or persons.

(Para 6.60; 2004 Act, s 3A(4) and Schedule A1 para 12, inserted by Draft Bill, s 1)

40. (a) The Tribunal may make an order for the appointment of a remedial manager to an owners' association, and removal of any existing manager of the association:

(b) The Tribunal should be able to make a such an order where:

(i) The association is in breach of a key duty; and

(ii) It is reasonable in all the circumstances to make the order.

(Para 7.9; 2004 Act, s 3F(1) & (2) inserted by Draft Bill, s 3)

41. The Tribunal may appoint a person as a remedial manager only where that person:

(a) Either owns a flat in the relevant tenement, or is entered on the Scottish Property Factor Register; and

(b) Has agreed to be appointed on terms which the Tribunal considers reasonable in all the circumstances.

(Para 7.15; 2004 Act, s 3F(3)(a) & (4) inserted by Draft Bill, s 3)

42. (a) The Tribunal may appoint the local authority for the area in which the tenement is situated as a remedial manager of last resort;

(b) A local authority appointed as a remedial manager of last resort may:

(i) appoint a person to exercise the remedial manager's functions on behalf of the authority (but, where it does so, remains responsible for the exercise of those functions);

(ii) recover a fee for acting as the remedial manager, and any costs of so acting, from the association;

(c) Scottish Ministers may, by delegated legislation, make provision about the level of fees and costs recoverable from the association in this context.

(Para 7.25; 2004 Act, s 3F(3)(b) and 3G(2)-(6) inserted by Draft Bill, s 3)

43. When acting as a remedial manager of last resort, the application of the Property Factors (Scotland) Act 2011 to local authorities should be suspended.

(Para 7.31; Property Factors (Scotland) Act 2011, s 2(2)(e), inserted by Draft Bill, Schedule para 25(1) & (2)(a))

44. Any person with an interest in the management of a tenement by a tenement owners' association may apply to the Tribunal for an order appointing a remedial manager, and removing any existing manager of the association.

(Para 7.34; 2004 Act, s 3F(1) inserted by Draft Bill, s 3)

45. (a) The local authority should be under a duty to apply for an order appointing a remedial manager to an owners' association where:

(i) The association is in breach of a key duty;

(ii) No other person has made, or is likely to make, an application for the order, and;

(iii) It is reasonable in all the circumstances to make the application.

(b) The local authority may recover the costs of making the application from the association.

(Para 7.40; 2004 Act, s 3F(5) & (9) inserted by Draft Bill, s 3)

46. An application for an order appointing a remedial manager must:

(a) Specify any key duty in respect of which the applicant considers the association to be in breach; and

(b) Either:

(i) Identify the proposed remedial manager, confirm their willingness to act and specify the terms of their agreement; or

(ii) Seek the appointment of the local authority as remedial manager of last resort and provide evidence of unsuccessful attempts to engage other managers.

(Para 7.44; 2004 Act, s 3F(6)-(7) inserted by Draft Bill, s 3)

47. (a) The function of a remedial manager should be to support the owners' association to comply with the key duties;

(b) In order to fulfil this function, the remedial manager should have the same powers and duties as a non-remedial manager.

(Para 7.47; 2004 Act, s 3G(1) inserted by Draft Bill, s 3)

48. The appointment of a remedial manager should be terminated:

(a) Where the association appoints a manager;

(b) Where the Tribunal makes an order appointing a new remedial manager;

(c) Where the remedial manager ceases to fulfil the eligibility criteria for the position;

(d) Where the appointment ends under the terms of the appointment.

(Para 7.50; 2004 Act, s 3F(8) inserted by Draft Bill, s 3)

49. The default association rules should apply only where appropriate provision, in the form of association conditions, is not made in the tenement titles.

(Para 8.11; 2004 Act, s 3D(1), inserted by Draft Bill, s 2)

50. (a) The rules of an owners' association are the rules set out in association conditions which affect the tenement, or where there are no such conditions, the default association rules set out in statute;

(b) Association conditions are real burdens to which each flat in the tenement is subject, contained in one constitutive deed and which replicate the default association rules in force when the burdens are created (or varied) subject only to permitted modifications.

(c) The Scottish Ministers should have power to specify the permitted modifications by way of regulations.

(d) The Scottish Government should engage with the Financial Conduct Authority and other mortgage industry stakeholders when preparing regulations on the permitted modifications to agree a protocol on consent to the grant of burdens which are association conditions.

(e) A difference between real burdens and association rules (other than a permitted modification) does not prevent the real burdens being association conditions,

unless the difference causes the real burdens to have a different effect than they would without the difference, or is misleading.

(f) The validity of anything done in good faith in accordance with a real burden which purports to be an association condition is not affected by its not being an association condition.

(Para 8.35; 2004 Act, s 3D(1)-(5)&(7), inserted by Draft Bill, s 2)

51. The default association rules should be construed in the same manner as provisions of deeds which related to land and are intended for registration.

(Para 8.38; 2004 Act, s 3D(6), inserted by Draft Bill s 2)

52. A deed of discharge in relation to a real burden which is an association condition is of no effect unless it discharges all the burdens which constitute those conditions.

(Para 8.42; 2004 Act, s 3E(1), inserted by Draft Bill s 2)

53. The jurisdiction of the Lands Tribunal in relation to title conditions should not apply to burdens which are association conditions.

(Para 8.47; 2004 Act, s 3E(3), inserted by Draft Bill s 2)

54. (a) Where an owners' association is dissolved, any burdens affecting the tenement which are association conditions are extinguished.

(b) The manager of the association should be under a duty, during the association winding up period, to notify the Keeper of any inaccuracy arising as a result of the extinction of such burdens.

(Para 8.49; 2004 Act, s 3B(5)(e) inserted by Draft Bill s 1 and s 3E(2), inserted by Draft Bill, s 2)

55. (a) The default association rules should be disapplied by provision on relevant matters in existing tenement burdens for a fixed period following the entry into force of the legislation;

(b) After the fixed period, existing burdens will cease to have that effect;

(c) The duration of the fixed period should be 20 years;

(d) Scottish Ministers should have power by way of regulations to change the fixed period prior to its expiry.

(Para 8.62; 2004 Act, s 3D(8) and schedule A3 paras 1-2, inserted by Draft Bill, s 2)

56. (a) During the transition period, any owner may request that the association registers a preservative deed of conditions, unless association conditions already apply to the tenement or a request for registration of a preservative deed has already been made;

(b) The manager of the association must, as soon as reasonably practicable after the request is made, notify members that the request has been made, and that, unless an association decision is taken not to register a preservative deed within 28 days, the manager will prepare a preservative deed.

(c) Unless an association decision is taken during this period not to register a preservative deed, the manager must prepare a preservative deed.

(d) The manager must circulate the preservative deed to all members and notify them that, unless an association decision is taken not to register a preservative deed within 28 days, the manager will register the preservative deed.

(e) Unless an association decision is taken during this period not to register a preservative deed, the manager must register the preservative deed on behalf of the association.

(f) An association decision not to register a preservative deed requires a special majority.

(Para 8.73; 2004 Act, s 3D(8) and schedule A3 para 3, inserted by Draft Bill, s 2)

57. In the default association rules in relation to association decisions, each flat should be allocated one vote.

(Para 9.12; 2004 Act, s 3D(1) and schedule A2 para 3(1), inserted by Draft Bill, s 2)

58. In the default association rules, a right to vote allocated to a flat may be exercised by the owner of the flat, or by a person nominated in writing by the owner to exercise the vote on their behalf.

(Para 9.18; 2004 Act, s 3D(1) and schedule A2 para 3(2), inserted by Draft Bill, s 2)

59. (a) In the default association rules, where there are two or more owners of a flat, the vote allocated to that flat may be exercised by any of the owners;

(b) If the owners disagree as to how the vote is to be cast, no vote is to be counted unless the vote is exercised by an owner or owners who own more than a half share of the flat.

(Para 9.21; 2004 Act, s 3D(1) and schedule A2 para 3(3)-(4), inserted by Draft Bill, s 2)

60. In the default association rules, an association decision is made where at least 50% of the votes allocated are cast in favour of the decision, unless a special majority rule applies.

(Para 9.30; 2004 Act, s 3D(1) and schedule A2 para 4(1), inserted by Draft Bill, s 2)

61. In the default association rules:

(a) An association decision which requires a special majority is made if at least 75% of the votes allocated are cast in favour of it;

(b) A special majority decision should be required in relation to:

(i) Improvements and alterations to, or replacement of, association property;

(ii) Demolition of a part of association property;

(iii) Payments from any reserve fund maintained by the association;

(iv) Execution of a deed which creates, varies or discharges association conditions, or applies a DMS deed of application to the tenement;

(c) Where a special majority decision relates to a part of the tenement not in common ownership, the owner's consent to the decision should be required.

(Para 9.36; 2004 Act, s 3D(1) and schedule A2 para 4(2)(a) & (3)-(5), inserted by Draft Bill, s 2)

62. In the default association rules, an association decision to demolish the tenement building is made if all the votes allocated are cast in favour of it.

(Para 9.38; 2004 Act, s 3D(1) and schedule A2 para 4(2)(b), inserted by Draft Bill, s 2)

63. In the default association rules:

(a) The manager must call the annual general meeting of members, to be held in accordance with the relevant key duty on the association;

(b) A member of the association may call the annual general meeting where the manager fails to do so or there is no manager;

(c) The manager may call a general meeting at any time, and must do so when required by owners who have at least 25% of the votes allocated;

(d) A member of the association may call a general meeting if the manager has failed to do so when required, or if there is no manager.

(Para 9.44; 2004 Act, s 3D(1) and schedule A2 para 9-10, inserted by Draft Bill, s 2)

64. In the default association rules:

(a) A general meeting is called by notice of the meeting being given not later than 14 days before the date fixed for the meeting;

(b) Notice must be given to each member and, if necessary, the manager;

(c) The notice must state:

(i) the date and time fixed for the meeting;

(ii) where the meeting is to be in person, the place at which the meeting is to be held;

(iii) where the meeting is to be by electronic means, the means by which the meeting is to be held;

(iv) where the meeting is to be both in person and by electronic means, the place at which and the means by which the meeting is to be held;

(v) the business to be conducted at the meeting.

(Para 9.46; 2004 Act, s 3D(1) and schedule A2 para 12, inserted by Draft Bill, s 2)

65. In the default association rules:

(a) A person may attend an annual or other general meeting of the association either in person or by electronic means;

(b) The manager must take reasonable steps to ensure that a person who wishes to do so may attend the meeting by electronic means.

(Para 9.49; 2004 Act, s 3D(1) and schedule A2 para 11, inserted by Draft Bill, s 1)

66. In the default association rules:

(a) The manager must attend any general meeting unless they have a reasonable excuse for not attending;

(b) Members in attendance at the meeting must select a person to chair the meeting;

(c) The chair is to be one of the members in attendance;

(d) The manager, or where the manager is not at the meeting, a member nominated by the chair, must keep a record of the business conducted at the meeting including any votes cast and any decisions made, and give a copy of that record to each member as soon as practicable after the meeting as notification of relevant decisions.

(Para 9.53; 2004 Act, s 3D(1) and schedule A2 para 13(1)-(3) & (5)-(6), inserted by Draft Bill, s 2)

67. In the default association rules, a vote on any matter at a general meeting is to be taken by a show of hands, or by such other method as the chair considers appropriate.

(Para 9.56; 2004 Act, s 3D(1) and schedule A2 para 13(4), inserted by Draft Bill, s 2)

68. In the default association rules:

(a) An association decision can be taken by way of consultation;

(b) A decision is taken this way where the manager or a member of the association consults with each owner about the matter to be decided and counts the votes cast;

(c) An owner need not be consulted if it is impractical to do so due to the owner's absence or some other good reason;

(d) Where an association decision is made, the person who undertook the consultation must, as soon as practicable after counting the votes, record the votes cast and the decision made, and give a copy of the record to each member of the association or instruct the manager to do so.

(e) Consultation with one owner is sufficient to count a vote for a co-owned property.

(Para 9.59; 2004 Act, s 3D(1) and schedule A2 para 5(1)(b) and (2)-(5), inserted by Draft Bill, s 2)

69. In the default association rules:

(a) A procedural irregularity in the making of an association decision does not affect its validity;

(b) Where an owner is directly affected by procedural irregularity in the making of an association decision, and was not aware that costs were being incurred, or objected immediately on becoming aware that costs were being incurred, that owner is not liable for those costs, and is left out of account for the purposes of determining the share of costs for which the other owners are liable.

(Para 9.63; 2004 Act, s 3D(1) and schedule A2 para 6, inserted by Draft Bill, s 2)

70. In the default association rules, where an association decision is made to carry out or authorise maintenance to association property, and an owner (or a group of owners) who did not vote in favour of that decision have liability for at least 75% of the costs which will arise from it, they may annul the decision by giving notice to the manager and other members within 21 days of the decision being taken.

(Para 9.68; 2004 Act, s 3D(1) and schedule A2 para 7, inserted by Draft Bill, s 2)

71. (a) An owner who did not vote in favour of an association decision may apply to the First-tier Tribunal for an order annulling that decision;

(b) An application must be made within 28 days of the meeting at which the decision was taken were the applicant was in attendance, or within 28 days of the date on which notice was given of that decision otherwise;

(c) The Tribunal may annul a decision in whole or in part if satisfied that the decision is not in the best interests of the owners as a group, or where is unfairly prejudicial to one or more of the owners;

(d) Where the decision concerns maintenance, improvements, or alterations to association property, the Tribunal should take into account:

(i) The age of the property;

(ii) The condition of the property;

(iii) The likely cost of the work;

(iii) The reasonableness of the cost.

(e) The provisions of section 5 of the 2004 Act should otherwise be replicated in relation to a Tribunal application in this respect.

(Para 9.72; 2004 Act, s 5 as amended by draft Bill, s 6(1)-(3) and Schedule para 4)

72. In the default association rules, an association decision should be binding on current and future members of the association.

(Para 9.76; 2004 Act, s 3D(1) and schedule A2 para 8, inserted by Draft Bill, s 2)

73. In the default association rules:

(a) Owners are liable for association costs in equal proportions, subject to the exceptions below;

(b) Where association property is owned in common by two or more owners, liability for maintenance and running costs incurred in relation to that property is divided amongst the common owners in proportion to their shares of that ownership;

(c) Where association property is not owned in common by two or more owners, and the floor area of any flat in the tenement is more than one and a half times that of another flat in the tenement, liability for maintenance and running costs incurred in relation to that property is divided amongst the owners in proportion to the floor areas of their flats;

(d) The rule in (c) above also applies where the association property in question is the portion of the roof above the close, where that portion of the roof is in common ownership by virtue of the 2004 Act s 3(1)(a).

(Para 10.7; 2004 Act, s 3D(1) and schedule A2 para 14, inserted by Draft Bill, s 2)

74. In the default association rules:

(a) The association may decide that an owner is not liable for specified association costs;

(b) A vote in favour of such a decision is not to be counted if the owner exercising the vote would not be liable for costs as a result, or is exercising a vote on behalf of the owner who would not be liable as a result.

(Para 10.9; 2004 Act, s 3D(1) and schedule A2 para 15(1)-(2), inserted by Draft Bill, s 2)

75. In the default association rules, liability for an exempt share of costs is divided equally amongst other owners liable for the same costs.

(Para 10.11; 2004 Act, s 3D(1) and schedule A2 para 15(3), inserted by Draft Bill, s 2)

76. In the default association rules, the association's budget for each financial year must set out:

(a) Details of maintenance work to association property which, in the reasonable assessment of the manager, is necessary to ensure compliance by owners with the duty under section 8 of the 2004 Act during that year, including the estimated cost of that work, how that estimate was arrived at and the estimated timeline;

(b) Details of any other work which it is proposed should be carried out to association property during that year, including the estimated cost of that work, how that estimate was arrived at and the estimated timeline;

(c) Details of any other costs expected to be incurred by the association during that year, including the nature of those costs;

(d) Details of any other amount to be included in the service charge and the reason for that amount;

(e) An estimate of any other funds which the association is likely to receive during the year and the source of those funds;

(Para 10.25; 2004 Act, s 3D(1) and schedule A2 para 16(1)(a)-(d) & (g), inserted by Draft Bill, s 2)

77. In the default association rules:

(a) The association's budget for each year must set out:

(i) In respect of each owner, the service charge payable and how that charge was calculated;

(ii) The date or dates on which the service charge will be due for payment;

(b) The service charge for each owner should be calculated by reference to the owner's share of liability for costs expected to be incurred by the association over the coming year, and any other amount to be included in the service charge.

(Para 10.30; 2004 Act, s 3D(1) and schedule A2 para 16(1)(e)-(f) & (2), inserted by Draft Bill, s 2)

78. In the default association rules:

(a) The manager must prepare a draft budget for the association for each financial year and give each member a copy;

(b) The association may approve the draft budget, approve the draft budget with such variations as members may specify, or reject the draft budget;

(c) Where a budget is rejected, the manager must prepare and circulate a revised draft budget within the period of 6 weeks beginning with the day on which the draft budget is rejected;

(d) Where, at the start of the financial year, no budget has been approved for that year, the service charge due by each owner is the same as the service charge due by the owner under the budget for the previous financial year, and is to be paid on the anniversary or anniversaries of the date or dates on which the charge was due for payment in the previous financial year.

(Para 10.35; 2004 Act, s 3D(1) and schedule A2 para 17, inserted by Draft Bill, s 2)

79. In the default association rules:

(a) The manager may from time to time determine that an additional service charge is payable by some or all of the owners;

(b) An additional service charge may be imposed only in respect of:

(i) association costs which were not set out in the budget for that year or which exceed the amount estimated in the budget;

(ii) an amount for which an owner becomes liable following an association decision to exempt a different owner from liability, or a service charge payable by a different owner proving to be unrecoverable;

(c) The additional service charge due by each owner is to be calculated by reference to the owner's liability for the costs to which the charge relates;

(d) The total amount of any additional service charge cannot exceed 25% of the service charge for that owner set out in the annual budget unless the manager submits to the association at a general meeting a draft supplementary budget;

(e) In calculating the total amount of any additional service charge, no account is to be taken of any additional charge payable in respect of emergency work.

(Para 10.37; 2004 Act, s 3D(1) and schedule A2 para 18, inserted by Draft Bill, s 2)

80. (a) Where a service charge cannot be recovered for some reason such as that the owner due to pay is insolvent or cannot by reasonable inquiry be identified or found, the other owners become liable for that amount in equal proportions;

(b) The owner in default becomes liable to each other owner for any amount paid in relation to the unrecoverable share.

(Para 10.41; 2004 Act, s 3D(1) and schedule A2 para 19, inserted by Draft Bill, s 2)

81. In the default association rules, following approval of the annual budget, or a determination that an additional service charge should be paid:

(a) Each owner is liable for the amount of the service charge payable as detailed in the budget or determination of additional service charge;

(b) The manager must give each owner a notice requiring payment of their service charge due by the owner on a specified date or dates;

(c) Where any service charge remains outstanding not less than 28 days after it became due for payment, the manager may give a notice to the owner concerned requiring payment of interest on the sum outstanding at such reasonable rate and from such date as the manager may specify.

(Para 10.43; 2004 Act, s 3D(1) and schedule A2 para 20, inserted by Draft Bill, s 2)

82. In the default association rules:

(a) An owner's liabilities for association costs are discharged by the payment of the owner's service charge for that year;

(b) Liabilities are discharged in the order in which costs become payable by the association;

(c) Where more than one cost becomes payable on the same day, and the service charge balance paid is insufficient to discharge all in full, liabilities are discharged in the proportions which those debts bear to the owner's overall liabilities to the association;

(d) Any amount payable by an owner under the service charge which is not referable to a liability is not to be treated as having been paid until all liabilities for that year have been discharged.

(Para 10.47; 2004 Act, s 3D(1) and schedule A2 para 21(1)-(6) & (9)-(10), inserted by Draft Bill, s 2)

83. In the default association rules, where the total service charge paid by the owner exceeds the owner's liability for association costs accrued that year and any contribution to association funds not referable to a liability, the association is to retain the excess amount, and offset that against the owner's service charge for the following year.

(Para 10.50; 2004 Act, s 3D(1) and schedule A2 para 21(7) & (8), inserted by Draft Bill, s 2)

84. In the default association rules:

(a) A successor owner should be severally liable with an outgoing owner for any service charge payment outstanding at the date of transfer, subject to a right of relief against the outgoing owner;

(b) But if any portion of the service charge is referable to an association cost for which the successor is not severally liable, the successor has no liability for that portion of the service charge;

(c) Any surplus service charge paid by the outgoing owner and retained by the association should be treated as if it were paid by the successor;

(d) Where any surplus is referable to payment for an association cost in relation to which the successor did not have several liability, the association should repay that surplus to the outgoing owner.

(e) Where an owner anticipates transferring ownership of their flat, and requests from the manager a statement of their account as at the anticipated date of transfer, the manager is under a duty to provide that statement within a reasonable time.

(Para 10.56; 2004 Act, s 3D(1) and schedule A2 para 22 & 23, inserted by Draft Bill, s 2)

85. In the default association rules:

(a) Association funds must be held in the name of the association in a bank or building society account;

(b) Where association funds are likely to be held for some time, the manager must ensure that they are deposited in an account which is interest bearing or invested otherwise in line with an association decision;

(c) The manager must ensure that any association funds forming a reserve fund are kept separately from other association funds.

(Para 10.60; 2004 Act, s 3D(1) and schedule A2 para 24, inserted by Draft Bill, s 2)

86. (a) The owners' association should have the right to enforce the obligations owed by any owner (or, where relevant, occupier) under sections 8, 9, 17 and 18 of the 2004 Act;

(b) The obligations owned by any owner under sections 8 and 9 should be enforceable by the association only insofar as those duties relate to association property.

(Para 11.13; 2004 Act ss 8, 9, 17 and 18 as amended by draft Bill s 8 and Schedule paras 6, 7, 13 and 14)

87. Section 11 of the Tenements (Scotland) Act 2004 should be amended to replace references to "scheme costs" with "association costs", and references to the "Tenement Management Scheme" with the "rules of the tenement owners' association".

(Para 11.18; 2004 Act s 11, as amended by draft Bill s 8 and Schedule para 9)

88. (a) Section 12 of the Tenements (Scotland) Act 2004 should be amended to allow for recovery by a new owner of payment of any amount of service charge not referable to an association cost for which the outgoing owner was liable.

(b) Section 13 of the Tenements (Scotland) Act 2004 should be amended to allow for the registration by a tenement owners' association of a notice of potential liability for costs.

(Para 11.23; 2004 Act s 12 and 13, as amended by draft Bill s 8 and Schedule para 10 and 11)

89. Section 14 of the Tenements (Scotland) Act 2004 should be amended to provide for the continuing right of an owner to reimbursement of costs owed by the owners' association under the legislation or the association rules notwithstanding the fact that person ceases to be an owner.

(Para 11.25; 2004 Act s 14 as amended by draft Bill, s 8 and Schedule para 12)

90. (a) The association manager may apply to the Tribunal to approve a budget for the association for a financial year;

(b) The manager may make such an application where the manager has attempted to obtain the approval of the association for a budget for that year in accordance with the association rules, and the association has not approved a budget;

(c) The manager must notify members that such an application has been made;

(d) The Tribunal may approve the budget only if satisfied that the budget only includes costs which relate to work required for the owners to comply with section 8 or the running of the association, and it is reasonable to do so in the circumstances.

(Para 11.28; 2004 Act s 6A, inserted by draft Bill s 4)

91. (a) The provisions on the diligence of land attachment should be brought into force, subject to the restriction that the diligence can be used only by an association in relation to heritable property forming part of the tenement in connection with debts owed in respect of association costs;

(b) The power to sell attached property should be excluded where the property in question is used as a sole or main residence as defined in section 98 of the Bankruptcy and Diligence etc. (Scotland) Act 2007.

(Para 11.36)

92. (a) The association, or any owner, may make an application for an order relating to any matter concerning the operation of the owners' association, the association rules or any provision of the 2004 Act;

(b) The application must be made to the Housing and Property Chamber of the First-Tier Tribunal;

(c) The Tribunal should have competence to make any order in connection with such proceedings as would be competent if the proceedings were civil proceedings.

(Para 11.41; 2004 Act s 6, as amended by draft Bill ss 6(1), (4)-(5) & 8 and Schedule para 5)

93. Rules 19 (mediation) and 40 (expenses) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 shall apply without amendment to cases concerning the operation of the management scheme which applies as respects a tenement or any provision of the 2004 Act.

(Para 11.47)

94. Where a debt owed to a third party by an owners' association has been constituted by decree or registration for execution, and the third party has executed diligence without recovering the debt or it does not appear that the association has any assets which reasonably could be recovered by diligence:

(a) The third party can recover a proportion of the debt from each owner who is liable for the costs to which the debt relates under the association rules;

(b) The proportion recoverable from each owner is the proportion for which that owner is liable under the association rules;

(c) Where the proportion owed by any owner proves unrecoverable, the creditor is entitled to recover from each other owner liable for the cost an equal share of that proportion, subject to a right of relief by each other owner against the owner whose proportion was unrecoverable.

(Para 11.53; 2004 Act s 13A, introduced by draft Bill, s 5)

95. The Scottish Government should consider appropriate reforms to the powers held by local authorities in relation to building maintenance in light of the introduction of owners' associations into the tenement maintenance framework.

(Para 11.56)

Appendix A: Tenements (Amendment) (Scotland) Bill

[DRAFT]

CONTENTS

Tenements (Amendment) (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to make provision for tenement owners' associations; to make provision about the maintenance of tenements; to provide for the First-tier Tribunal for Scotland's jurisdiction in relation to certain matters relating to the maintenance of tenements; and for connected purposes

Tenement owners' associations

1 Tenement owners' associations

(1) The Tenements (Scotland) Act 2004 is amended as follows.

(2) After section 3, insert—

"*Tenement owners' associations*

3A Establishment of tenement owners' associations

(1) A tenement owners' association is established for a tenement in accordance with this section.

(2) An association is established for a tenement—

(a) where the tenement exists on the day on which section 1 of the Tenements (Amendment) (Scotland) Act 2025 comes into force, on that day,

(b) where the tenement comes into existence after that section comes into force, on the day on which the tenement comes into existence,

unless, on the day mentioned in paragraph (a) or (as the case may be) (b), the development management scheme applies to the tenement.

(3) Where the development management scheme ceases to apply to a tenement by virtue of section 73(1) of the Title Conditions (Scotland) Act 2003, an association is established for the tenement on the day on which the scheme ceases to apply to the tenement.

(4) Schedule A1 makes further provision about tenement owners' associations.

3B Winding up and dissolution of association

(1) A tenement owners' association for a tenement must be wound up if—

(a) the development management scheme takes effect in relation to the tenement by virtue of section 71(1) of the Title Conditions (Scotland) Act 2003, or

(b) the tenement ceases to be a tenement.

(2) The winding up period is—

(a) the period of 6 months beginning with the day on which the event mentioned in subsection (1)(a) or (b) occurs, or

(b) such longer period beginning with that day as the association may determine.

(3) During the winding up period—

(a) the association—

(i) no longer has the function and powers mentioned in paragraph 4 of schedule A1, but

(ii) has the power to do anything which is necessary to wind up the association,

(b) paragraphs 8(1)(b), (c) and (d), 10, 11 and 20(c) of schedule A1 do not apply in relation to the association.

(4) The manager of the association must begin winding up the association as soon as practicable after the winding up period begins.

(5) During the winding up period, the manager must, in particular—

(a) pay any debts due by the association out of the funds of the association,

(b) after doing so, distribute any remaining funds amongst the owners in the proportions in which the owners contributed to the funds,

(c) prepare the association's final accounts,

(d) give each member of the association a copy of those accounts,

(e) where tenement owners' association conditions which affect the tenement are registered against land in the Land Register of Scotland, notify the Keeper of the Registers of Scotland that the Register will become inaccurate as regards those conditions when the association is dissolved.

(6) The final accounts must set out how the association has been wound up, including how any remaining funds were distributed.

(7) The association is dissolved at the end of the winding up period.

(8) Subject to any association decision, any rights or liabilities of the association subsisting immediately before it is dissolved are, when the association is dissolved—

(a) transferred to the owners, and

(b) shared amongst the owners in equal proportions.

(9) Where the tenement ceases to be a tenement, the members of the association during the winding up period are the persons who were its members immediately before the winding up period began.

(10) For the purposes of subsection (2), where a tenement ceases to be a tenement, the day on which that event is taken to occur is—

(a) the day on which a completion certificate is accepted under section 18 of the Building (Scotland) Act 2003 in respect of the work to, or conversion of, the tenement building which has resulted in the tenement ceasing to exist, or

(b) such other day as may be determined by the First-tier Tribunal for Scotland on an application under section 3C.

3C Application to First-tier Tribunal to determine certain dates

A person with an interest in a tenement owners' association for a tenement may apply to the First-tier Tribunal for Scotland for an order determining any of the following—

(a) the date on which—

(i) the tenement came into existence,

(ii) the tenement ceased to be a tenement,

(iii) the association was established,

(iv) the association was dissolved,

(b) whether, on a particular date—

(i) the tenement existed,

(ii) the association existed.".

(3) Before schedule 1, insert—

"SCHEDULE A1
(introduced by section 3A(4))

TENEMENT OWNERS' ASSOCIATIONS

PART 1

THE ASSOCIATION

Status

1 A tenement owners' association is a body corporate.

Membership

2 (1) The members of a tenement owners' association are the owners, for the time being, of each flat in the tenement to which the association relates.

(2) Where two or more persons own a flat in the tenement in common, both or (as the case may be) all of them are members of the association.

Name and address

3 (1) The name of a tenement owners' association is "The Tenement Owners' Association of [*address of the tenement building*]".

(2) The association has the following addresses—

(a) the address of the tenement building, and

(b) the address of the manager of the association (if any).

Function and general powers

4 (1) The function of a tenement owners' association is to manage the tenement for the benefit of the members of the association.

(2) The association may do anything which appears to it—

(a) to be necessary or expedient for the purposes of, or in connection with, the performance of its function, or

(b) to be otherwise conducive to the performance of its function.

(3) The association may, in particular—

(a) carry out maintenance, improvements or alterations to association property,

(b) carry out inspections of association property to determine whether or to what extent it is necessary to carry out maintenance to the property,

(c) enter into a contract of insurance in respect of the tenement or any part of it,

(d) purchase or otherwise obtain the use of moveable property,

(e) open and maintain an account with a bank or building society,

(f) invest any money held by the association,

(g) borrow money,

(h) engage employees or appoint agents,

(i) enforce any obligation owed by one member to another, the manager or the association under the association's rules or this Act,

(j) execute and register a deed creating, varying or discharging tenement owners' association conditions in relation to the tenement,

(k) execute and register a deed of application under section 71 of the Title Conditions (Scotland) Act 2003 (development management scheme) on behalf of the owners of the flats in the tenement,

(l) instruct demolition of all or part of the tenement.

(4) But the association may not—

(a) acquire heritable property,

(b) carry on a trade, whether for profit or otherwise.

(5) The association has an insurable interest in the tenement.

5 Nothing may be done by or on behalf of a tenement owners' association unless it is done—

(a) in accordance with a decision of the association, or

(b) by the manager of the association in accordance with this Act or the association's rules.

Meaning of "association property" and "maintenance"

6 (1) In this Act, "association property" means, in relation to a tenement, any or all of the following—

(a) any part of the tenement—

(i) which is the common property of two or more of the owners, or

(ii) the maintenance of which, or the cost of maintaining which, is, by virtue of a tenement burden, the responsibility of two or more of the owners,

(b) the following parts of the tenement building, other than a part mentioned in sub-paragraph (2), so far as not association property by virtue of paragraph (a)—

(i) the ground on which it is built,

(ii) its foundations,

(iii) its external walls,

(iv) its roof (including any rafter or other structure supporting the roof),

(v) if it is separated from another building by a gable wall, the part of the gable wall that is part of the tenement building, and

(vi) any wall (not being one falling within the preceding sub-paragraphs), beam or column that is load bearing.

(2) The parts referred to in sub-paragraph (1)(b) are—

(a) any extension which forms part of only one flat,

(b) any—

(i) door,

(ii) window,

(iii) skylight,

(iv) vent, or

(v) other opening,

which serves only one flat,

(c) any chimney stack or chimney flue.

7 (1) In this Act, "maintenance", in relation to a tenement, includes—

(a) work carried out in order to comply with section 8(1) (duty to maintain so as to provide support and shelter etc.),

(b) other work involving—

(i) repairs and replacement,

(ii) the installation of insulation,

(iii) cleaning, painting and other routine works,

(iv) the removal, deterrence or control of vermin or other pests, mould, harmful plants or any similar potentially harmful thing,

(v) gardening,

(vi) the day to day running of the tenement,

(vii) the reinstatement of part (but not most) of the tenement building.

(2) But "maintenance" does not include demolition, alteration or improvement unless reasonably incidental to the maintenance.

PART 2

KEY DUTIES

Key duties of the association

8 (1) A tenement owner's association must—

(a) appoint a manager in accordance with paragraph 9(1) and (2),

(b) hold annual general meetings in accordance with paragraph 10,

(c) approve a budget in respect of association costs for each financial year,

(d) make applications in relation to tenement identification information in accordance with paragraph 11.

(2) The association need not comply with sub-paragraph (1)(c)—

(a) where the association is established under section 3A(2)(a), until the appointed day,

(b) where the association is established under section 3A(2)(b), until the end of the period of one year beginning with the later of—

(i) the appointed day, or

(ii) the first day on which the tenement may be occupied,

(c) where the association is established under section 3A(3) before the appointed day, until the appointed day.

(3) Paragraph 12 makes provision about the application of sub-paragraph (1) to certain tenements.

(4) For the purposes of this Part, the first day on which a tenement may be occupied is—

(a) the day on which temporary permission to occupy or use a flat in the tenement is granted under section 21 of the Building (Scotland) Act 2003, or

(b) where no such permission is granted, either—

(i) the day on which a completion certificate is accepted in respect of the construction or conversion of the tenement under section 18 of the Building (Scotland) Act 2003, or

(ii) such other day as the First-tier Tribunal determines, on the application of a person with an interest in the tenement, is the day on which the construction or conversion was completed.

Appointment of manager

9 (1) A tenement owners' association must appoint its first manager—

(a) where the association is established under section 3A(2)(a), before the end of the period of 6 months beginning with the appointed day,

(b) where the association is established under section 3A(2)(b), before the end of the period of 18 months beginning with the later of—

(i) the appointed day, or

(ii) the first day on which the tenement may be occupied,

(c) where the association is established under section 3A(3), before the end of the period of 6 months beginning with the later of—

(i) the appointed day, or

(ii) the day on which the association is established.

(2) If the office of manager becomes vacant, the association must appoint a new manager within the period of 6 months beginning with the day on which the office becomes vacant.

(3) A certificate of appointment must be signed, within the period of one month beginning with the day of a manager's appointment, by—

(a) the manager, and

(b) a member of the association on behalf of the association.

(4) For the purposes of sub-paragraph (3), a certificate of appointment is a document stating—

(a) the name of the association,

(b) the name of the person appointed as manager, and

(c) the period of the person's appointment.

(5) The actings of the manager are valid regardless of any defect in the manager's appointment.

(6) A manager's appointment comes to an end—

(a) in accordance with the terms of the appointment, or

(b) if the association decides to terminate the appointment.

Annual general meetings

10 (1) A tenement owners' association must hold its first annual general meeting—

(a) where the association is established under section 3A(2)(a), before the end of the period of one year beginning with the appointed day,

(b) where the association is established under section 3A(2)(b), before the end of the period of two years beginning with the later of—

(i) the appointed day, or

(ii) the first day on which the tenement may be occupied,

(c) where the association is established under section 3A(3), before the end of the period of one year beginning with the later of—

(i) the appointed day, or

(ii) the day on which the association is established.

(2) An annual general meeting—

(a) must be called at least once in each calendar year, and

(b) must be held no more than 15 months after the day on which the previous annual general meeting was held.

Tenement identification information

11 (1) A tenement owners' association must make an application under section 64A(1)(a) (tenement identification information) of the Land Registration etc. (Scotland) Act 2012 ("the 2012 Act") in relation to the tenement—

(a) where the association is established under section 3A(2)(a), before the end of the period of two years beginning with the appointed day,

(b) where the association is established under section 3A(2)(b), before the end of the period of three years beginning with the later of—

(i) the appointed day, or

(ii) the first day on which the tenement may be occupied,

(c) where the association is established under section 3A(3), before the end of the period of two years beginning with the later of—

(i) the appointed day, or

(ii) the day on which the association is established.

(2) Sub-paragraph (3) applies where—

(a) a note of tenement identification information in relation to the tenement is entered in the Land Register of Scotland or (as the case may be) recorded in the Register of Sasines under section 64A of the 2012 Act, and

(b) that information changes.

(3) The association must, within the period of 6 months beginning with the day on which the information changes, make an application—

(a) under section 64A(1)(b) of the 2012 Act to amend the information in any note of tenement identification information entered in the Land Register of Scotland to reflect the new information,

(b) under section 64A(1)(a) of that Act to record a note of tenement identification information containing the new information in the Register of Sasines.

(4) In this paragraph, "tenement identification information" has the meaning given by section 64A(2) of the 2012 Act.

Disapplication of certain duties in relation to small and single-owner tenements

12 (1) Sub-paragraph (2) applies to a tenement—

(a) which is comprised of two or three flats, or

(b) each flat in which has the same owner.

(2) The tenement owners' association for the tenement need not comply with paragraph 8(1)(a), (b) and (c).

(3) But where the association appoints a person as its manager, this Act applies to that person as it applies to a manager appointed under paragraph 9.

(4) Where sub-paragraph (2) ceases to apply to the tenement, paragraphs 8(2), 9(1) and 10(1) do not apply to the association and instead—

(a) where sub-paragraph (2) ceases to apply to the tenement before the appointed day, the association need not comply with paragraph 8(1)(c) until the appointed day,

(b) the association must, if it does not already have a manager, appoint a manager before the end of the period of 6 months beginning with the later of—

(i) the appointed day, or

(ii) the day on which sub-paragraph (2) ceases to apply to the tenement,

(c) the association must hold an annual general meeting before the end of the period of one year beginning with the later of—

(i) the appointed day, or

(ii) the day on which sub-paragraph (2) ceases to apply to the tenement.

Meaning of "appointed day"

13 (1) In this Part, the "appointed day" means a day appointed by the Scottish Ministers by regulations.

(2) Regulations under sub-paragraph (1) may appoint different days for different purposes.

PART 3

THE MANAGER

General functions of association manager

14 (1) The role of the manager of a tenement owner's association is to manage the tenement on behalf of the association.

(2) The manager has the functions conferred by this Act and the association's rules.

(3) Any duty to which the manager is subject under this Act or the association's rules is owed to the association and to the members of the association.

(4) In exercising the manager's functions, the manager is an agent of the association.

Compliance with association's duties

15 The manager of a tenement owners' association must ensure compliance by the association with its duties under paragraph 8(1).

Implementation of association decisions

16 (1) The manager of a tenement owners' association must implement any decision of the association.

(2) But the manager must not implement such a decision to the extent that the decision is contrary to any provision of this Act or the association's rules.

Compliance with association directions

17 (1) The manager of a tenement owners' association must, so far as reasonably practicable, comply with any direction given by the association to the manager.

(2) But the manager must not comply with such a direction to the extent that the direction is contrary to any provision of this Act or the association's rules.

Power of manager to carry out emergency work

18 The manager of a tenement owners' association may instruct or carry out emergency work to association property.

Enforcement of obligations and rules

19 (1) The manager of a tenement owners' association may enforce—

(a) any obligation owed by a member of the association to the association,

(b) the association's rules.

(2) The manager must monitor compliance by the members with their duty to take out insurance on any part of the tenement owned by the member.

(3) Nothing in sub-paragraph (2) requires the manager to obtain a valuation of any part of the tenement.

Financial administration

20 The manager of a tenement owners' association must—

(a) fix the financial year for the association,

(b) keep proper financial records for the association,

(c) prepare the association's accounts for each financial year.

Inspection of documents

21 The manager of a tenement owners' association must make available for inspection any document which relates to the management of the tenement (other than correspondence with individual members) on the request of any member of the association.

PART 4

ADMINISTRATION

Record of association members

22 (1) The manager of a tenement owners' association must maintain a record of—

(a) the name of each member of the association, and

(b) contact details for each member.

(2) A person who becomes a member of the association must give the manager the member's name and contact details—

(a) within one month of becoming a member of the association, or

(b) where there is no manager when the person becomes a member, within one month of a manager being appointed.

(3) A member of the association must inform the manager of any change to the member's name or contact details within one month of that change occurring.

(4) The manager must, on request, provide a member of the association with the name and contact details of another member of the association if it is necessary to do so in connection with the management and maintenance of association property or the operation of the association.

(5) For the purposes of this paragraph and paragraph 24, a person's contact details—

(a) are details of how the person is to be contacted by the manager or a member of the association in connection with the operation of the association, and

(b) must include details of how the person may be contacted in writing.

Provision of information under association rules

23 (1) This paragraph applies where any information is to be given to a person under or in connection with the rules of a tenement owners' association.

(2) Where the information is to be given to a member who has provided contact details to the manager under paragraph 22, the information may be given to the member—

(a) using those contact details, or

(b) by being delivered to the member in writing in accordance with sub-paragraph (4).

(3) In any other case, the information may be given to the person—

(a) by being sent to the person at any postal or electronic address used by the person in connection with the association during the preceding year, or

(b) by being delivered to the person in writing in accordance with sub-paragraph (4).

(4) Information in writing is delivered to a person in accordance with this sub-paragraph if—

(a) it is delivered by hand—

(i) to the person,

(ii) at the person's residence, to another person who lives there, or

(iii) at the person's place of business, to an employee of the person or a person authorised to receive the document,

(b) where the person is not an individual, it is delivered by hand at the person's place of business to an employee of the person or a person authorised to receive the document, or

(c) after diligent enquiries and where there has been an unsuccessful attempt to deliver the document in accordance with—

(i) paragraph (a), it is left in or at the person's residence or place of business in a manner in which it is likely to come to the person's attention,

(ii) paragraph (b), it is left in or at the person's place of business in such a manner.

(5) Where the information is to be given to a member who has provided contact details to the manager under paragraph 22—

(a) information may be delivered at, or left in or at, a residence or place of business under sub-paragraph (4) only if the contact details include that residence or (as the case may be) place of business,

(b) a reference in sub-paragraph (4)(a), (b) or (c) to the person to whom information is to be given includes a reference to an agent of the member whose details have been provided to the manager under paragraph 22.

(6) Where the information is given to the person—

(a) by being posted, it is taken to be given on the day on which it is posted,

(b) by being sent by electronic means, it is taken to be given on the day on which it is sent.

(7) Where the information is to be given to a member who has died, the information is to be given to the member's executor.

(8) Where the information is to be given to a member or (as the case may be) a member's executor who cannot by reasonable enquiry be identified or found, a document is to be taken for the purposes of this paragraph to be given to the member or executor if it is posted or delivered to the member's flat addressed to "The Owner" or using some similar expression such as "The Proprietor".

Information to be provided on transfer of flat

24 (1) This paragraph applies where a member of a tenement owners' association transfers ownership of the member's flat to another person (the "transferee").

(2) The member must, before the date on which the transferee is entitled to take entry to the flat, give the manager the following information, insofar as the member is aware of it—

(a) the name and postal or email address of the transferee,

(b) the name and postal or email address of the transferee's solicitor or other agent in respect of the transfer,

(c) the date on which the transferee is entitled to take entry,

(d) the member's contact details after that date.

Information to be provided in relation to registration of flats and other parts of the tenement

25 (1) Sub-paragraph (2) applies where a member of a tenement owners' association intends to do something which is likely to result in a title sheet in respect of any part of the tenement being made up or cancelled.

(2) The member must inform the manager of—

(a) the likelihood of the title sheet being made up or cancelled, and

(b) when that is likely to occur.

(3) Where a member of the association becomes aware that a note of tenement identification information relating to the tenement is inaccurate, the member must inform the manager of the inaccuracy as soon as reasonably practicable.

(4) In this paragraph—

"note of tenement identification information" means a note of tenement identification information entered in the Land Register of Scotland or recorded in the Register of Sasines in accordance with section 64A(4) of the Land Registration etc. (Scotland) Act 2012,

"title sheet" means a title sheet made up under section 3 of that Act.

Execution of documents

26 A document is signed by a tenement owners' association if it is signed on behalf of the association by—

(a) the manager of the association acting within the manager's authority, or

(b) a member of the association, or any other person, authorised by the association to sign the document on its behalf.".

2 Tenement owners' association rules

(1) The Tenements (Scotland) Act 2004 is amended as follows.

(2) After section 3C (inserted by section 1), insert—

"*Operation of tenement owners' associations*

3D Tenement owners' association rules

(1) The rules of a tenement owners' association for a tenement are—

(a) the rules set out in tenement owners' association conditions ("association conditions") which affect the tenement, or

(b) where there are no such conditions, the default association rules set out in schedule A2.

(2) "Tenement owners' association conditions" are real burdens—

(a) to which each flat in the tenement is subject,

(b) which are contained in one constitutive deed, and

(c) which replicate the default association rules in force when the burdens are created—

(i) with the substitution of any reference in the rules to "this Act" with a reference to "the Tenements (Scotland) Act 2004",

(ii) otherwise, with no modifications or only with modifications which are permitted by regulations made by the Scottish Ministers.

(3) Where real burdens which are association conditions are varied, the reference in subsection (2)(c) to the default association rules in force when the real burdens are created is to be read, in relation to any provision of the real burdens which is varied, as a reference to the default association rules in force when the burdens are varied.

(4) A difference between real burdens and the default association rules (other than a difference mentioned in subsection (2)(c)(i) or (ii)) does not prevent the real burdens being association conditions unless the difference—

(a) causes the real burdens to have a different effect than they would have without the difference, or

(b) is misleading.

(5) The validity of anything done in good faith in accordance with a real burden which purports to be an association condition is not affected by its not being an association condition.

(6) The default association rules are to be construed as if they were real burdens (see section 14 of the Title Conditions (Scotland) Act 2003).

(7) In this section, "constitutive deed" has the meaning given by section 122(1) of the Title Conditions (Scotland) Act 2003.

(8) Schedule A3 makes provision about the application of the default association rules during the transition period.

3E Tenement owners' association conditions: further provision

(1) A deed of discharge granted in relation to a real burden which is one of a number of real burdens constituting the tenement owners' association conditions affecting a tenement is of no effect unless it discharges all of the real burdens which constitute those conditions.

(2) When a tenement owners' association for a tenement is dissolved, any association conditions which affect the tenement are extinguished.

(3) Sections 90 (powers of Lands Tribunal as respects title conditions) and 91 (special provision as to variation or discharge of community burdens) of the Title Conditions (Scotland) Act 2003 do not apply in relation to real burdens which are association conditions.".

(3) After schedule A1 (inserted by section 1), insert—

"SCHEDULE A2
(introduced by section 3D(1))

TENEMENT OWNERS' ASSOCIATION RULES: DEFAULT RULES

PART 1

DEFINITIONS

Definitions

1 (1) In these rules, a reference to—

(a) the "association" is to a tenement owners' association to which these rules apply,

(b) the "tenement" is to the tenement to which the association relates,

(c) an "owner" is to the owner of a flat in the tenement,

(d) a "member" is to a member of the association,

(e) the "manager" is to the manager of the association,

(f) a "financial year" is to a financial year of the association,

(g) a numbered rule is to the paragraph of these rules bearing that number.

(2) Any expression used in these rules which is defined in section 29 of this Act has the meaning given by that section.

PART 2

ASSOCIATION DECISIONS

Association decisions

2 A decision of the association is to be made in accordance with this Part.

Allocation of votes

3 (1) For the purposes of making an association decision, one vote is allocated to each flat in the tenement.

(2) A right to vote allocated to a flat may be exercised by—

(a) the owner of the flat, or

(b) a person nominated in writing by the owner to exercise the vote on behalf of the owner.

(3) Where there are two or more owners of a flat, the vote allocated to that flat may be exercised by any of the owners.

(4) But if the owners of the flat disagree as to how the vote is to be cast, the vote is not to be counted unless—

(a) where one of the owners owns more than a half share of the flat, the vote is exercised by that owner,

(b) in any other case, the vote is the agreed vote of the owners who together own more than a half share of the flat.

Votes required for association decisions

4 (1) An association decision is made if at least 50% of the votes allocated under rule 3 are cast in favour of the decision except as provided for in sub-paragraph (2).

(2) Where the decision is—

(a) one mentioned in sub-paragraph (3), the decision is made if at least 75% of the votes allocated under rule 3 are cast in favour of it,

(b) a decision to demolish the tenement building, the decision is made if all of the votes so allocated are cast in favour of it.

(3) The decisions referred to in sub-paragraph (2)(a) are decisions to—

(a) make improvements or alterations to, or replacements of, association property,

(b) demolish part of the association property,

(c) make payments from any reserve fund maintained by the association,

(d) execute and register a deed creating, varying or discharging tenement owners' association conditions in relation to the tenement,

(e) execute and register a deed of application under section 71 of the Title Conditions (Scotland) Act 2003 (development management scheme) in relation to the tenement.

(4) Sub-paragraph (5) applies where a decision mentioned in sub-paragraph (3)(a) or (b) relates to property which is not the common property of the owners (or not the common property of owners who between them own two or more flats in the tenement).

(5) The decision may be implemented only if the owner of the property consents in writing to the improvements, alterations, replacements or demolition in question.

How decisions are to be made

5 (1) An association decision is to be made—

(a) at a general meeting of the association, or

(b) in accordance with sub-paragraph (2).

(2) An association decision is made in accordance with this sub-paragraph by—

(a) the manager—

(i) consulting each owner about the matter to be decided, and

(ii) counting the votes cast, or

(b) a member—

(i) consulting each other owner about the matter to be decided, and

(ii) counting the votes cast.

(3) An owner need not be consulted under sub-paragraph (2)(a)(i) or (b)(i) if it is impractical to do so due to the owner's absence or some other good reason.

(4) Where an association decision is made—

(a) in accordance with sub-paragraph (2)(a), the manager must, as soon as practicable after counting the votes in respect of the decision—

(i) record the votes cast and the decision made, and

(ii) give notice of the decision made to each member of the association by giving them a copy of the record,

(b) in accordance with sub-paragraph (2)(b), the member who carried out the consultation must, as soon as practicable after counting the votes in respect of the decision—

(i) record the votes cast and the decision made,

(ii) give a copy of the record to the manager, and

(iii) either give notice of the decision made to each other member by giving them a copy of the record, or request the manager to do so.

(5) Where two or more persons own a flat in common, consultation with one of the owners is sufficient for the purposes of sub-paragraph (2)(a)(i) or (b)(i).

Procedural irregularities

6 (1) A procedural irregularity in the making of an association decision does not affect the validity of the decision.

(2) Sub-paragraph (3) applies where an owner—

(a) is directly affected by a procedural irregularity in the making of an association decision, and

(b) either—

(i) was not aware that any association costs were being incurred in relation to the decision, or

(ii) on becoming aware that such costs were being incurred, immediately objected to the incurring of the costs.

(3) The owner is not liable for the costs (whether incurred before or after the date of any objection) and, accordingly, the owner is left out of account for the purposes of determining the share of the costs for which each of the other owners is liable.

Annulment of association decision

7 (1) This rule applies where—

(a) an association decision is made to carry out, or authorise, maintenance to association property,

(b) an owner, or a group of owners, did not vote in favour of the decision, and

(c) that owner or group would be liable for at least 75% of the costs arising from the decision.

(2) That owner or group may annul the decision by giving notice that the decision is annulled to the manager and each of the other members of the association.

(3) Notice under sub-paragraph (2) must be given—

(a) where the decision was made at a general meeting of the association at which the owner or (as the case may be) at least one member of the group of owners was present, before the end of the period of 21 days beginning with the day of the meeting,

(b) otherwise, before the end of the period of 21 days beginning with the day on which the owner or (as the case may be) group of owners was notified of the decision.

(4) Where the members of a group of owners were notified of the decision on different days, the reference in sub-paragraph (3) to the day on which the group of owners was notified of the decision is a reference to the day on which the last of the group was notified of it.

Effect of association decision

8 An association decision is binding on—

(a) the members of the association when the decision is made, and

(b) any future members of the association.

PART 3

MEETINGS

Calling of annual general meeting

9 (1) An annual general meeting to be held in accordance with paragraph 10 of schedule A1 of this Act is to be called by the manager.

(2) But the meeting may be called by a member where—

(a) the manager has not called the meeting when required to do so, or

(b) the association does not have a manager.

General meetings

10 (1) The manager—

(a) may call a general meeting of the association at any time,

(b) must call such a meeting if owners who have at least 25% of the votes allocated under rule 3 require such a meeting to be called.

(2) A member may call a general meeting of the association if—

(a) the manager has not called a general meeting when required to do so by sub-paragraph (1)(b), or

(b) the association does not have a manager.

Attendance at meetings

11 (1) A person may attend an annual or other general meeting of the association—

(a) in person, or

(b) by electronic means.

(2) The manager of the association must take reasonable steps to ensure that a person who wishes to do so may attend a general meeting by electronic means.

Notice to be given of annual or other general meeting

12 (1) A meeting is called under rule 9 or 10 by notice of the meeting being given, in accordance with sub-paragraph (2), not later than 14 days before the day fixed for the meeting.

(2) The notice is to be given—

(a) where the meeting is called by the manager, to each member,

(b) where the meeting is called by a member, to the manager (if any) and each other member.

(3) The notice must state—

(a) the date and time fixed for the meeting,

(b) where attendance at the meeting is to be—

(i) in person, the place at which the meeting is to be held,

(ii) by electronic means, the means by which the meeting is to be held,

(iii) both in person and by electronic means, the place at which, and the means by which, the meeting is to be held,

(c) the business to be conducted at the meeting.

Proceedings at meetings

13 (1) The manager must attend any general meeting of the association unless the manager has a reasonable excuse for not attending.

(2) The members in attendance at a general meeting must select a person to chair the meeting (the "chair").

(3) The chair is to be one of the members in attendance at the meeting.

(4) A vote on any matter at a general meeting is to be taken by—

(a) a show of hands, or

(b) such other method as the chair considers appropriate.

(5) The manager or, where the manager is not at the meeting, a member nominated by the chair, must—

(a) keep a record of the business conducted, including any votes cast and any decision made, at the meeting, and

(b) give a copy of that record to each member (or, as the case may be, each other member) as soon as practicable after the meeting.

(6) A member who is not at the meeting is to be treated as being given notice of any decision made by the association at the meeting by being given a copy of the record of the business conducted at the meeting.

PART 4

OWNERS' LIABILITY FOR ASSOCIATION COSTS

Owners' liabilities

14 (1) The owners of all of the flats in the tenement are liable for association costs in equal proportions except as provided for in sub-paragraphs (2) to (4).

(2) The owners of any association property mentioned in sub-paragraph (5) are liable for maintenance and running costs relating to that property in the proportions in which the owners share ownership of the property.

(3) Where the floor area of any flat in the tenement is more than one and a half times that of another flat in the tenement, sub-paragraph (4) applies to maintenance and running costs relating to any association property other than property mentioned in sub-paragraph (5).

(4) The owners of all of the flats in the tenement are liable for the costs in the proportions which the floor area of the owners' flats bear to the total floor area of all of the flats in the tenement.

(5) The property referred to in sub-paragraphs (2) and (3) is property which is the property of two or more of the owners, other than a roof over the close of the tenement which is common property by virtue of section 3(1)(a) of this Act.

(6) In this rule, "maintenance and running costs" means association costs which are—

(a) costs arising from any maintenance or inspection of association property,

(b) remuneration payable to a person appointed to manage the carrying out of such maintenance as is mentioned in paragraph (a),

(c) running costs relating to any association property (other than costs incurred solely for the benefit of one flat),

(d) costs recoverable by a local authority in respect of work relating to any association property carried out by the authority by virtue of any enactment.

Exempting owner from liability

15 (1) The association may decide that an owner is not liable for such association costs as are specified in the decision.

(2) A vote in favour of such an association decision is not to be counted if any of the following persons is an owner who, by virtue of the decision, would not be liable as mentioned in sub-paragraph (1)—

(a) the owner exercising the vote, or

(b) where the vote is exercised by a person nominated by the owner—

(i) that person, or

(ii) the owner who nominated that person.

(3) Where an owner is not liable for an amount by virtue of sub-paragraph (1), the other owners who are liable for a share of the costs mentioned in that sub-paragraph are liable for a share of that amount in equal proportion.

PART 5

ANNUAL BUDGET, SERVICE CHARGE AND ASSOCIATION FUNDS

Annual budget

16 (1) The association's budget for each financial year must set out—

(a) details of any maintenance work which the manager considers it will be necessary to carry out to association property during that year in order to ensure compliance with section 8 of this Act, including—

(i) the estimated cost of that work,

(ii) how that estimate was arrived at,

(iii) the time line for completion of the work,

(b) details of any other maintenance work proposed to be carried out to association property during that year, including—

(i) the estimated cost of that work,

(ii) how that estimate was arrived at,

(iii) the time line for completion of the work,

(c) details of any other costs expected to be incurred by the association during that year, including the nature of those costs,

(d) details of—

(i) any other amount to be included in the service charge, and

(ii) the reason that amount is included in the charge,

(e) in respect of each owner—

(i) the service charge payable by the owner for that year,

(ii) how that charge was calculated,

(f) the date or dates on which the service charge will be due for payment,

(g) an estimate of any other funds which the association is likely to receive during the year and the source of those funds.

(2) The service charge payable by each owner is to be calculated by reference to the proportion of the costs mentioned in sub-paragraph (1)(a), (b) and (c), and any amount mentioned in sub-paragraph (1)(d), for which the owner is liable to the association.

Approval of budget

17 (1) The manager must—

(a) prepare a draft budget for the association for each financial year, and

(b) give each member a copy of the draft budget.

(2) The association may—

(a) approve the draft budget,

(b) approve the draft budget with such variations as the members may specify, or

(c) reject the draft budget.

(3) Where the association rejects the draft budget, it must direct the manager to, within the period of 6 weeks beginning with the day on which the draft budget is rejected—

(a) prepare a revised draft budget, and

(b) give each member a copy of that revised draft for approval.

(4) Sub-paragraphs (2) and (3) apply to a revised draft budget as they apply to the draft budget.

(5) Where, at the start of a financial year, no budget has been approved under sub-paragraph (2) for the year—

(a) the service charge due by each owner is, until a budget is approved for the financial year, the same as the service charge due by the owner under the budget for the previous financial year, and

(b) the charge is to be paid on the anniversary (or anniversaries) of the date (or dates) on which the charge was due for payment under the budget for the previous financial year.

Additional service charge

18 (1) The manager may from time to time determine that an additional service charge is payable by all or some of the owners.

(2) An additional service charge may be imposed only in respect of—

(a) association costs which—

(i) were not set out in the association's budget for the year, or

(ii) exceed an estimated amount set out in the budget, or

(b) an amount for which an owner becomes liable under rule 15(3) or 19(2).

(3) The additional service charge due by each owner is to be calculated by reference to the owner's liability for the costs to which the charge relates.

(4) The total amount of any additional service charge to be paid by an owner in a financial year must not exceed 25% of the service charge for the owner set out in the budget for that year unless the manager submits to the association at a general meeting a draft supplementary budget setting out—

(a) the amount of the additional service charge due by the owner, and

(b) the date or dates on which the charge is due to be paid.

(5) Rule 17(2) to (4) applies in relation to a draft supplementary budget as it applies to a draft budget.

(6) In calculating the total amount of any additional service charge for the purposes of sub-paragraph (4), no account is to be taken of any additional service charge payable in respect of the cost of emergency work carried out by virtue of paragraph 18 of schedule A1 of this Act or rule 25.

Redistribution of service charge which cannot be recovered

19 (1) Sub-paragraph (2) applies where a service charge or additional service charge cannot be recovered (in whole or in part) from an owner ("owner A") for some reason such as that—

(a) owner A is insolvent, or

(b) owner A cannot, by reasonable inquiry, be identified or found.

(2) Where a portion of the unrecoverable amount of the service charge relates to association costs for which one or more other owners are liable with owner A, those other owners are liable for that portion in equal proportions.

(3) Owner A is liable to each other owner for any amount for which the other owner becomes liable under sub-paragraph (2).

(4) But sub-paragraph (2) does not apply to any amount that the local authority has paid under section 4A of this Act in respect of owner A's share of any item of association costs.

Liability for, and collection of, service charge

20 (1) Each owner is liable to the association for—

(a) the amount of the service charge payable by the owner in accordance with the association's budget,

(b) any amount of additional service charge payable by the owner in accordance with rule 18.

(2) Where the association approves its budget, the manager must give each owner a notice requiring payment, on the date (or dates) specified in the budget, of the amount of the service charge specified in the budget as being due by the owner.

(3) Where the manager makes a determination under rule 18(1), the manager must give each owner to whom the determination relates a notice—

(a) requiring payment, on the date (or dates) stated in the notice, of the additional service charge determined under that sub-paragraph, and

(b) explaining why the additional charge is payable.

(4) Where any service charge or additional service charge (or part of it) remains outstanding not less than 28 days after it became due for payment, the manager may give a notice to the owner concerned requiring the owner to pay interest on the sum outstanding at such reasonable rate and from such date as the manager may specify in the notice.

Discharge of owners' liabilities for association costs

21 (1) An owner's liabilities for association costs for a financial year are discharged, in accordance with this paragraph, by the payment of the owner's service charge for the year.

(2) The owner's liabilities are discharged in the order in which the costs become payable by the association.

(3) Sub-paragraph (4) applies where—

(a) more than one amount of association costs become payable on the same day, and

(b) the owner's service charge balance is insufficient to discharge the owner's liabilities for those costs in full.

(4) The owner's liabilities for the costs mentioned in sub-paragraph (3)(a) are discharged—

(a) by the amount of the owner's service charge balance (if any), and

(b) in the proportions that the owner's liabilities for each amount of costs mentioned in that sub-paragraph bear to the owner's liabilities for all of the costs mentioned in that sub-paragraph.

(5) Sub-paragraph (6) applies where the service charge includes, by virtue of rule 16(1)(d), an amount which does not relate to the owner's liability for association costs.

(6) That amount is not to be treated as having been paid until all of the owner's liabilities for association costs for the year have been discharged.

(7) Sub-paragraph (8) applies where the total amount of the service charge paid by the owner during the financial year exceeds—

(a) the amount of the owner's liabilities for association costs payable during that year, and

(b) any other amount included in the service charge by virtue of rule 16(1)(d).

(8) The association is to—

(a) retain the excess amount paid by the owner, and

(b) offset that amount against the owner's service charge for the next financial year.

(9) Nothing in this rule prevents an owner's liability for association costs being discharged (in whole or in part) in any other way (for example, by being met from a reserve fund held by the association or by a third party).

(10) For the purposes of this rule and rule 22—

(a) a service charge includes an additional service charge,

(b) an owner's service charge balance is the amount of the service charge already paid by the owner in a financial year less the amount of the owner's liabilities for association costs already discharged in that year.

Liability for service charge on transfer of ownership of flat

22 (1) This rule applies where the owner of a flat in the tenement (the "transferor") transfers ownership of the flat to another person (the "transferee").

(2) The transferee is severally liable with the transferor for the amount of any service charge for which the transferor is liable on the day on which the transferee acquires right to the flat.

(3) But the transferee is not liable under sub-paragraph (2) for any amount of service charge which relates to association costs for which the transferee is not severally liable under section 12 of this Act.

(4) Except as provided for in sub-paragraph (6), any amount of service charge paid by the transferor is to be retained by the association.

(5) Sub-paragraph (6) applies where—

(a) an amount of service charge paid by the transferor relates to association costs for which the transferor is liable but the transferee is not severally liable, and

(b) the amount paid exceeds the actual amount of the transferor's liability for those costs.

(6) The association must pay the transferor a sum equivalent to the amount by which the amount paid exceeds the actual amount of the transferor's liability.

(7) Any sum retained by the association under sub-paragraph (4) is to be treated as if it were paid by the transferee.

Estimate of owner's liabilities on transfer of flat

23 The manager must, as soon as reasonably practicable after receiving a request to do so from an owner of a flat in the tenement who proposes to transfer ownership of the flat, provide the owner with the following information—

(a) the association costs for which the owner is liable in the financial year in which the proposed date of the transfer falls,

(b) an estimate of the amount of the owner's liability for those costs which will have been discharged before that date,

(c) the amount of any service charge due to be paid by the owner after that date and the date on which any payment is to be made,

(d) an estimate of the amount (if any) by which the amount of the service charge paid by the owner before that date will exceed the amount of the owner's liabilities which will have been discharged before that date.

Association funds

24 (1) Any association funds must be—

(a) held in the name of the association, and

(b) deposited by the manager in a bank or building society account.

(2) But where association funds are likely to be held for some time, the manager must ensure that the funds are—

(a) deposited in an account which is interest bearing, or

(b) invested in such other way as the association may decide.

(3) The manager must ensure that any association funds forming a reserve fund are kept separately from other association funds.

PART 6

EMERGENCY WORK

Authority to carry out emergency work

25 (1) A member may instruct or carry out emergency work to association property.

(2) The association must reimburse a member who pays for emergency work.

SCHEDULE A3

(Introduced by section 3D(8))

DEFAULT TENEMENT OWNERS' ASSOCIATION RULES: TRANSITION PERIOD

Transition period

1 (1) In this schedule, "transition period" means the period of 20 years beginning with the day on which section 2 of the Tenements (Amendment) (Scotland) Act 2025 comes into force.

(2) The Scottish Ministers may by regulations modify sub-paragraph (1) so as to substitute a different period for the period for the time being mentioned there (provided that the period for the time being mentioned there has not expired).

Application of default tenement owners' association rules during transition period

2 (1) This paragraph applies during the transition period where, under section 3D(1)(b), a tenement owners' association's rules are the default association rules.

(2) Those rules apply in accordance with sub-paragraphs (3) to (5).

(3) Part 2 (association decisions) applies unless—

(a) a pre-commencement tenement burden makes provision about the making of decisions by the owners of the flats in the tenement about any matter to be decided by the association, and

(b) that provision is the same for each flat in the tenement.

(4) In Part 4 (owners' liability for association costs)—

(a) rule 14 (owners' liabilities) applies except to the extent that a pre-commencement tenement burden provides that the entire liability for costs specified in the burden is to be met by one or more of the owners,

(b) rule 15 (exempting owner from liability) applies except to the extent that a pre-commencement tenement burden provides how liability for costs specified in the burden is to be redistributed amongst owners of flats in the tenement in the event that the owners decide that one of the them is not liable for a share of those costs.

(5) In Part 5 (annual budget, service charge and association funds)—

(a) rules 16 (annual budget), 17 (approval of budget), 18 (additional service charge) and 20 (liability for, and collection of, service charge) apply except to the extent that a pre-commencement tenement burden makes provision for budgeting for, and collecting payment by the owners of flats in the tenement of, costs specified in the burden,

(b) rule 19 (redistribution of service charge which cannot be recovered) applies except to the extent that a pre-commencement tenement burden provides how liability for costs specified in the burden is to be redistributed amongst the owners of flats in the tenement in the event that a share of the costs is not recoverable from one of the owners,

(c) rule 24 (association funds) applies except to the extent that a pre-commencement tenement burden makes provision about holding funds on behalf of the owners of the flats in the tenement.

(6) A tenement burden mentioned in—

(a) sub-paragraph (3) is to be treated as if it related to the making of association decisions by the owners (as well as any other decisions made by the owners of the flats in the tenement),

(b) sub-paragraph (4) or (5)(b) is to be treated as if it related to liability of the owners for association costs (as well as any other costs specified in the burden),

(c) sub-paragraph (5)(a) is to be treated as if it related to budgeting for, and collecting payment by the owners of, association costs (as well as any other costs incurred by or on behalf of the owners),

(d) sub-paragraph (5)(c) is to be treated as if it related to association funds (as well as any other funds held on behalf of the owners).

(7) In this paragraph a reference to—

(a) a Part is to a Part of schedule A2,

(b) a numbered rule is to a paragraph of that schedule bearing that number,

(c) a "pre-commencement tenement burden" is to a tenement burden which affects the tenement on the day on which section 2 of the Tenements (Amendment) (Scotland) Act 2025 comes into force.

Registration of preservative deed of conditions

3 (1) This paragraph applies during the transition period where—

(a) no tenement owners' association conditions affect a tenement owners' association,

(b) a member of the association requests that the association registers a preservative deed of conditions, and

(c) such a request has not previously been made to the association (by that or any other member).

(2) The manager of the association must, as soon as reasonably practicable after the request is made, inform each other member of the association that—

(a) a request has been made to register a preservative deed of conditions,

(b) the manager will prepare the deed unless the association objects to such a deed being registered,

(c) the association will object to such a deed being registered only if owners having at least 75% of the votes allocated to owners notify the manager that they so object, and

(d) any such objection must be notified to the manager by an owner within the period of 28 days beginning with the day on which the manager informs the owner that the request has been made.

(3) Where the association does not object as mentioned in sub-paragraph (2)(b), the manager must—

(a) prepare the preservative deed of conditions,

(b) give a copy of the deed to each member of the association and inform each member that—

(i) the manager will register the deed unless the association objects to the deed being registered,

(ii) the association will object to the deed being registered only if owners having at least 75% of the votes allocated to owners notify the manager that they so object, and

(iii) any such objection must be notified to the manager by an owner within the period of 28 days beginning with the day on which the manager gives the owner a copy of the deed.

(4) Where the association does not object as mentioned in sub-paragraph (3)(b)(i), the manager must register the deed on behalf of the association.

(5) Where two or more persons own a flat in common—

(a) the reference in sub-paragraph (2)(d) to the day on which the manager informs the owner that the request has been made is a reference to the day on which the manager so informs the last of those persons,

(b) the reference in sub-paragraph (3)(b)(iii) to the day on which the manager gives the owner a copy of the deed is a reference to the day on which the manager gives a copy of the deed to the last of those persons.

(6) In this paragraph—

(a) a "preservative deed of conditions" is a deed creating tenement owners' association conditions which set out the default tenement owners' association rules with (in addition to the modifications required by section 3D(2)(c)(i)) such modifications as—

(i) are required to make the effect of the conditions consistent with the effect of tenement burdens which affect the tenement on the day on which section 2 of the Tenements (Amendment) (Scotland) Act 2025 comes into force, and

(ii) are permitted by regulations made under section 3D(2)(c)(ii),

(b) a reference to preparing a preservative deed of conditions includes a reference to instructing the preparation of such a deed.".

3 Appointment of remedial manager

(1) The Tenements (Scotland) Act 2004 is amended as follows.

(2) After section 3E (inserted by section 2) insert—

"**3F Application to First-tier tribunal for appointment of remedial manager to tenement owners' association**

(1) A person who has an interest in the management of a tenement by a tenement owners' association may apply to the First-tier Tribunal for Scotland for an order—

(a) removing the manager (if any) of the association, and

(b) appointing a remedial manager to the association.

(2) The Tribunal may make an order under subsection (1) if satisfied that—

(a) the association is in breach of a duty under paragraph 8(1) of schedule A1, and

(b) it is reasonable in all the circumstances to make the order.

(3) The Tribunal may appoint as the remedial manager—

(a) a person mentioned in subsection (4), or

(b) if satisfied that there is no such person, the local authority for the area in which the tenement is situated.

(4) A person referred to in subsection (3) is a person who—

(a) is—

(i) a member of the association, or

(ii) a registered property factor, and

(b) has agreed to be appointed as remedial manager on terms which the Tribunal is satisfied are reasonable in all the circumstances.

(5) The local authority for the area in which the tenement building is situated must make an application for an order under subsection (1) if the authority considers that—

(a) the association is in breach of a duty under paragraph 8(1) of schedule A1,

(b) no other person has made, or is likely to make, an application for the order, and

(c) it is reasonable in all the circumstances to make the application.

(6) An application for an order under subsection (1) must—

(a) specify any duty under paragraph 8(1) of schedule A1 of which the applicant considers the association to be in breach, and

(b) either—

(i) specify a person mentioned in subsection (4) whom the applicant proposes be appointed as the remedial manager, the terms on which it is proposed the person be appointed and that the person is content to be appointed on those terms, or

(ii) state that the applicant has not obtained the agreement of a person mentioned in subsection (4) to be appointed as the remedial manager.

(7) Where the application includes a statement under subsection (6)(b)(ii), it must be accompanied by evidence that the applicant has attempted to obtain the agreement of a person mentioned in subsection (4) to be appointed as the remedial manager.

(8) The appointment of a remedial manager comes to an end when—

(a) the association appoints a manager under paragraph 9 of schedule A1,

(b) a new remedial manager is appointed under subsection (1), or

(c) where the remedial manager is not a local authority appointed under subsection (3)(b)—

(i) the remedial manager ceases to be a member of the association or a registered property factor, or

(ii) the appointment ends under the terms of the appointment.

(9) Where a local authority makes an application under subsection (1), the authority may recover the costs of making the application from the association.

(10) In this section, "registered property factor" is to be construed in accordance with section 31 (interpretation) of the Property Factors (Scotland) Act 2011.

3G Remedial managers: functions

(1) A remedial manager of a tenement owners' association—

(a) may do anything that a manager appointed under paragraph 9 of schedule A1 may do so far as is necessary for the association to comply with its duties under paragraph 8(1) of that schedule,

(b) does not otherwise have any of the functions of a manager appointed under that paragraph.

(2) Subsections (3) and (4) apply where a local authority is appointed as a remedial manager under section 3F(3)(b).

(3) The authority may appoint a person to exercise the remedial manager's functions on its behalf (but, where it does so, remains responsible for the exercise of those functions).

(4) The authority may recover from the association—

(a) a fee for acting as the remedial manager,

(b) costs incurred by the authority in so acting.

(5) The Scottish Ministers may by regulations make provision about—

(a) the amount of the fee which may be recovered under subsection (4)(a),

(b) the costs which may be recovered under subsection (4)(b).

(6) Regulations under subsection (5) may—

(a) include transitional, transitory or saving provision,

(b) make different provision for different purposes.".

4 Application to First-tier Tribunal for budget approval

(1) The Tenements (Scotland) Act 2004 is amended as follows.

(2) After section 6, insert—

"**6A Application to First-tier Tribunal for approval of association budget**

(1) The manager of a tenement owners' association for a tenement may apply to the First-tier Tribunal for Scotland to approve a budget for the association for a financial year.

(2) The manager may make an application under subsection (1) only if—

(a) the manager has attempted to obtain the approval of the association for a budget for that year in accordance with the association's rules, and

(b) the association has not approved a budget.

(3) An application under subsection (1) must include the budget to be approved.

(4) The manager must notify the members of the association of an application made under subsection (1).

(5) The Tribunal may approve the budget only if the Tribunal is satisfied that—

(a) the budget includes only costs which relate to—

(i) work required in order for the owners of flats in the tenement to comply with section 8, or

(ii) the running of the association (including the cost of making an application under subsection (1)), and

(b) it is reasonable to do so in the circumstances.".

5 Debt recovery by third parties

(1) The Tenements (Scotland) Act 2004 is amended as follows.

(2) After section 13, insert—

"**13A Third party's right to recover debt from owners**

(1) This section applies where—

(a) a tenement owners' association for a tenement owes a debt which is constituted by—

(i) decree, or

(ii) a document which has been registered for execution in the Books of Council and Session or (as the case may be) in the appropriate sheriff court books kept for any sheriffdom, and

(b) either—

(i) the creditor has executed diligence but has not recovered the debt in full, or

(ii) it does not appear that the association has any assets which reasonably could be recovered by diligence.

(2) The creditor is entitled to recover a proportion of the debt from each of the owners of flats in the tenement who are liable for the costs to which the debt relates under the association's rules.

(3) The proportion recoverable from each owner is the proportion for which the owner is liable under the rules.

(4) Subsection (5) applies where all or part of the proportion of the debt owed by an owner cannot be recovered from the owner for some reason such as that—

(a) the owner is insolvent, or

(b) the owner cannot, by reasonable inquiry, be identified or found.

(5) The creditor is entitled to recover from each other owner mentioned in subsection (2) an equal share of the amount that cannot be recovered.

(6) The owner mentioned in subsection (4) is liable to each other owner for any amount which the other owner pays under subsection (5).".

Jurisdiction of First-tier Tribunal for Scotland

6 Jurisdiction of First-tier Tribunal in relation to disputes

(1) The Tenements (Scotland) Act 2004 is amended as follows.

(2) In section 5—

(a) in subsection (1), for ", by summary application, apply to the sheriff" substitute "apply to the First-tier Tribunal for Scotland",

(b) in subsection (5), for "sheriff" substitute "Tribunal",

(c) in subsection (6), for "sheriff" substitute "Tribunal",

(d) in subsection (7), for "sheriff", in each place where it occurs, substitute "Tribunal",

(e) subsections (8) and (9) are repealed,

(f) in subsection (10)(b)(i), for "specified in subsection (8) above within which an appeal against the sheriff's decision may be made" substitute "for making an appeal against the Tribunal's decision".

(3) The title of section 5 becomes "**Application to First-tier Tribunal for annulment of certain decisions**".

(4) In section 6—

(a) in subsection (1), for "by summary application apply to the sheriff" substitute "apply to the First-tier Tribunal for Scotland",

(b) in subsection (2)—

(i) for "sheriff", in each place where it occurs, substitute "Tribunal",

(ii) in paragraph (a), the word "craved" is repealed,

(c) subsections (3) and (4) are repealed,

(d) at the end insert—

"(5) The Tribunal may make any order under subsection (2)(b) that it would be competent for the Tribunal to make if proceedings under this section were civil proceedings.".

(5) The title of section 6 becomes "**Application to First-tier Tribunal for order resolving certain disputes**".

Maintenance

7 Duty to maintain tenement property

(1) Section 8 of the Tenements (Scotland) Act 2004 (duty to maintain so as to provide support and shelter etc.) is amended as follows.

(2) For subsection (1) substitute—

"(1) The owner of any part of a tenement building must maintain that part—

(a) if that part provides, or is intended to provide, support or shelter to any other part, so as to ensure that it provides support or shelter,

(b) so as to prevent damage to any part of the tenement,

(c) in the interests of health and safety.".

Final provisions

8 Modification of enactments

The schedule makes modifications of the Tenements (Scotland) Act 2004 and other enactments.

9 Ancillary provision

(1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.

(2) Regulations under this section may—

(a) make different provision for different purposes,

(b) modify any enactment.

(3) Regulations under this section—

(a) are subject to the affirmative procedure if they add to, replace, or omit any part of the text of an Act,

(b) otherwise, are subject to the negative procedure.

10 Commencement

(1) This section and sections 9 and 11 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under this section may—

(a) include transitional, transitory or saving provision,

(b) make different provision for different purposes.

11 Short title

The short title of this Act is the Tenements (Amendment) (Scotland) Act 2025.

SCHEDULE
(Introduced by section 8)

MODIFICATION OF ENACTMENTS

PART 1

TENEMENTS (SCOTLAND) ACT 2004

1 The Tenements (Scotland) Act 2004 is amended in accordance with this Part.

2 The following provisions are repealed—

(a) section 4, and the cross-heading immediately preceding it,

(b) schedule 1.

3 (1) In section 4A—

(a) in subsection (1), for "scheme" substitute "association",

(b) in subsection (2), for the words from "scheme costs" to the end substitute "association costs incurred in relation to a common policy of insurance for the tenement",

(c) in subsection (3)—

(i) in the opening words, for "scheme costs is to be determined in accordance with" substitute "association costs is the share of those costs for which the owner is liable in accordance with the tenement owners' association's rules.",

(ii) paragraphs (a) and (b) are repealed,

(d) in subsection (4), for "scheme" substitute "association",

(e) in subsection (5), for "scheme" substitute "association".

(2) The heading of section 4A becomes "**Power of local authority to pay share of association costs**".

4 In section 5—

(a) in subsection (1), for the words from "the owners" to "scheme)" substitute "a tenement owners' association for a tenement in accordance with the association's rules",

(b) in subsection (3), for "all the other owners" substitute "the tenement owners' association",

(c) in subsection (5)(a), after "owners" insert "of flats in the tenement",

(d) in subsection (7), for "owners" substitute "an owner or the association",

(e) in subsection (10)(a), for "owners" substitute "association".

5 In section 6, in subsection (1)—

(a) for "Any owner" substitute "A tenement owners' association for a tenement or an owner",

(b) for paragraph (a), substitute—

"(a) the tenement owners' association or the association's rules,".

6 In section 8, in subsection (3)—

(a) the words from "by any other" to the end become paragraph (a),

(b) after that paragraph insert, ", or

(b) insofar as the duty relates to association property, by the tenement owners' association.".

7 In section 9 (prohibition on interference with support or shelter etc.), in subsection (2)—

(a) the words from "by any other" to the end become paragraph (a),

(b) after that paragraph insert, ", or

(b) insofar as the prohibition relates to association property, by the tenement owners' association.".

8 In section 10 (recovery of costs incurred by virtue of section 8)—

(a) the existing text becomes subsection (1),

(b) in that subsection—

(i) in paragraph (a), after "tenement" insert "to which the development management scheme applies",

(ii) in paragraph (b), for "the management scheme which" substitute "that scheme as it",

(iii) in the closing words, for "management scheme in question" substitute "development management scheme",

(c) after subsection (1) insert—

"(2) Where in any other case an owner carries out maintenance by virtue of section 8 to any part of a tenement which is association property, the owner is entitled to recover from the tenement owners' association the costs of the maintenance carried out to the association property.".

9 In section 11 (determination of when an owner's liability for certain costs arises)—

(a) in subsection (1), for—

(i) "a scheme" substitute "an association",

(ii) scheme, where it second occurs, substitute "association",

(b) in subsection (2), for "a scheme" substitute "an association",

(c) in subsection (4), for "of the kind mentioned in rule 4.1(d) of the Tenement Management Scheme" substitute "recoverable by a local authority in respect of work relating to any association property carried out by the authority by virtue of any enactment",

(d) in subsection (9)(a), for the words from "costs" to the end substitute "association costs for which the owner is liable by virtue of the rules of a tenement owners' association,"

(e) in subsection (10), for the words from ""emergency work"" to the end substitute ""manager" means the manager of a tenement owners' association".

10 In section 12 (liability of owner and successors for certain costs), after subsection (5) insert—

"(5A) Where a new owner pays an amount to a tenement owners' association—

(a) for which a former owner of the flat is liable, and

(b) which does not relate to relevant costs mentioned in subsection (5),

the new owner may recover the amount so paid from the former owner.".

11 In section 13 (notice of potential liability for costs: further provision), in subsection (1)(a)—

(a) the word "or" after sub-paragraph (ii) is repealed,

(b) after sub-paragraph (iia), insert "or

(iib) the tenement owners' association for the tenement (if any),",

(c) sub-paragraph (iii) (but not the word "and" immediately following it) is repealed.

12 In section 14 (former owner's right to recover costs)—

(a) for "Tenement Management Scheme or any other" substitute "rules of a tenement owners' association or any",

(b) after "from" insert "the association or".

13 In section 17 (access for maintenance and other purposes)—

(a) in subsection (1), after "an owner" insert "or an owners' association for a tenement",

(b) subsection (2) is repealed,

(c) after subsection (9) insert—

"(10) In this section, "owners' association" means—

(a) a tenement owners' association, or

(b) an owners' association established by the development management scheme.".

14 In section 18 (obligation of owner to insure)—

(a) in subsection (5)—

(i) in the opening words, after "tenement" insert ", and the tenement owners' association for the tenement (if any) may by notice in writing request the owner of any flat in the tenement,",

(ii) in paragraph (a), for "owner of that other flat" substitute "recipient",

(iii) in the closing words, after "the notice" insert "or (as the case may be) the association",

(b) in subsection (6), after "other owner" insert "or the tenement owners' association for the tenement (if any)".

15 In section 21 (cost of demolishing tenement building)—

(a) before subsection (1), insert—

"(A1) Where a tenement has a tenement owners' association, the cost of demolishing the tenement building is an association cost.

(A2) Subsections (1) to (3) apply in relation to a tenement which does not have a tenement owners' association.",

(b) in subsection (3), for "this section" substitute "subsection (1)".

16 In section 22 (use and disposal of site where tenement building demolished), in subsection (3) after "flat" insert "or the tenement owners' association for the tenement (if any)".

17 In section 23 (sale of abandoned tenement building), in subsection (1), in the closing words, after "owner" insert "or the tenement owners' association for the tenement (if any)".

18 In section 24 (liability to non owner for certain damage costs), after subsection (1) insert—

"(1A) Where there is a tenement owners' association for a tenement mentioned in subsection (1), the association is to be treated, for the purpose of determining whether A is liable to the association as respects the cost of maintenance arising from the damage, as having been an owner of the damaged part of the tenement at the time when the damage was done.".

19 In section 27 (meaning of "management scheme")—

(a) paragraph (a) is repealed,

(b) in paragraph (c), for the words from "any tenement burdens" to the end substitute "the rules of the tenement owners' association for the tenement (see section 3D(1))".

20 In section 29 (interpretation), in subsection (1)—

(a) before the definition of "chimney stack", insert—

""association costs" means costs incurred by a tenement owners' association,

"association decision" means a decision of a tenement owners' association made in accordance with the association's rules,

"association property" has the meaning given by paragraph 6 of schedule A1,",

(b) after the definition of "door", insert—

""emergency work" means work which, before an association decision can be made in relation to the work, requires to be carried out to association property—

(a) to prevent damage to any part of a tenement, or

(b) in the interests of health and safety,",

(c) in the definition of "register"—

(i) after "in relation to" insert "a deed creating, varying or discharging tenement owners' association conditions, a deed of application under section 71 of the Title Conditions (Scotland) Act 2003,",

(ii) after "means register" insert "the deed or (as the case may be)",

(iii) after "record" insert "the deed or (as the case may be)",

(d) after the definition of "tenement burden", insert—

""tenement owners' association" means an association established by section 3A,

"tenement owners' association conditions" is to be construed in accordance with section 3D(2),",

(e) the definition of "Tenement Management Scheme" is repealed.

21 (1) Section 30 is amended as follows.

(2) In subsection (1), for "Tenement Management Scheme" substitute "rules of a tenement owners' association".

(3) After subsection (1), insert—

"(1A) Any notice which is to be given to a tenement owners' association under or in connection with this Act (other than under or in connection with the association's rules) may be given in writing by sending the notice to the association.".

(4) In subsection (2), after "(1)" insert "or (1A)".

22 In section 32 (orders and regulations)—

(a) in subsection (2), after "except" insert "regulations mentioned in subsection (2A) or",

(b) after subsection (2), insert—

"(2A) Regulations under section 3D(2)(c)(ii), paragraph 13(1) of schedule A1 or paragraph 1(2) of schedule A3 are subject to the affirmative procedure.".

23 (1) Schedule 3 is amended as follows.

(2) In paragraph 1—

(a) in sub-paragraph (1)—

(i) in the opening words, after "owner" insert "or tenement owners' association",

(ii) in the closing words, after "owner", in both places where it occurs, insert "or (as the case may be) association",

(b) in sub-paragraph (3)—

(i) after "owner" insert "or association",

(ii) after "owners" insert "or (as the case may be) each of the owners",

(c) after sub-paragraph (3), insert—

"(3A) Where an application under sub-paragraph (1) is made by an owner, the owner must give notice of the application to the tenement owners' association for the tenement (if any).",

(d) in sub-paragraph (5)(a), after "owner" insert "or (as the case may be) association".

(3) In paragraph 4—

(a) in sub-paragraph (1), after "owner" insert "or tenement owners' association",

(b) in sub-paragraph (2), in the opening words, after "owner" insert "or (as the case may be) association",

(c) in sub-paragraph (3)—

(i) in the opening words, after "owner" insert "or (as the case may be) association",

(ii) in paragraph (b), after "behalf" insert "or (as the case may be) of the association or of any agent acting on the association's behalf",

(d) in sub-paragraph (4)—

(i) the words from "the owner or" to the end become paragraph (a),

(ii) at the beginning of that paragraph insert "where the power of sale order is granted in favour of an owner,"

(iii) after that paragraph, insert—

"(b) where the power of sale order is granted in favour of an association, the association or any person authorised by the association is entitled to enter any part of the sale subjects".

(4) In paragraph 5—

(a) in sub-paragraph (1), in the opening words, after "owner")" insert ", or a tenement owners' association selling the sale subjects,",

(b) in sub-paragraph (4), after "selling owner" insert "or (as the case may be) association",

(c) in sub-paragraph (5)—

(i) in the opening words—

(A) for the words from "another owner" to "selling owner" substitute "an owner ("the recipient") the remainder of that owner's share, the selling owner or (as the case may be) the association",

(B) for "that other owner" substitute "the recipient",

(ii) in paragraph (a)(i), for "that owner's" substitute "the recipient's".

(5) In paragraph 6(a), after "owner" insert "or tenement owners' association".

PART 2

OTHER ENACTMENTS

Housing (Scotland) Act 2006

24 (1) The Housing (Scotland) Act 2006 is amended as follows.

(2) In section 174A (repayment charges: registered social landlords)—

(a) in subsection (1)(b), for "the owner's share of scheme costs" substitute "association costs for which the owner is liable",

(b) in subsection (2)(c), for "the Tenement Management Scheme" substitute "schedule A2 of the 2004 Act (tenement owners' association rules: default rules)",

(c) in subsection (5)—

(i) before the definition of "owner of a flat in a tenement", insert—

""association costs" has the meaning given by section 29 of the 2004 Act,",

(ii) the definition of "Tenement Management Scheme" is repealed.

Property Factors (Scotland) Act 2011

25 (1) The Property Factors (Scotland) Act 2011 is amended as follows.

(2) In section 2 (meaning of "property factor")—

(a) in subsection (2), after paragraph (c), insert—

"(d) a tenement owners' association established by section 3A of the Tenements (Scotland) Act 2004 so far as managing or maintaining common parts or land in accordance with that Act,

(e) a local authority appointed as a remedial manager under section 3F(3)(b) of that Act so far as managing or maintaining common parts or land in accordance with that appointment.",

(b) after subsection (2), insert—

"(2A) Subsection (2B) applies where the manager of a tenement owners' association established by section 3A of the Tenements (Scotland) Act 2004—

(a) is a member of the association, and

(b) is remunerated for carrying out the role of manager.

(2B) For the purposes of subsection (1)(a) and (c), the manager is not to be taken to be acting in the course of the manager's business only because the manager is remunerated.".

(3) In section 9 (effect of refusal to enter in register or removal from register), in subsection (2)(c), the words "or, as the case may be, the Tenement Management Scheme" are repealed.

(4) In section 10 (section 9: interpretation etc.), subsection (4) is repealed.

(5) In section 31 (interpretation), the definition of "Tenement Management Scheme" is repealed.

Land Registration etc. (Scotland) Act 2012

26 (1) The Land Registration etc. (Scotland) Act 2012 is amended as follows.

(2) After Part 4, insert—

"**PART 4A**

TENEMENT IDENTIFICATION INFORMATION

64A Tenement identification information

(1) A tenement owners' association for a tenement may apply to the Keeper for—

(a) a note of tenement identification information in relation to the tenement to be entered in the Land Register or recorded in the Register of Sasines in accordance with subsection (4), or

(b) the amendment of such a note which is already entered in the Land Register.

(2) In this section, "tenement identification information" means, in relation to a tenement—

(a) the name of the tenement owners' association for the tenement,

(b) the address of the tenement,

(c) the address of each flat in the tenement,

(d) the title number of the title sheet for each registered plot of land which forms part of the tenement,

(e) the address in the Register of Sasines against which title is recorded for any property which forms part of the tenement.

(3) The Keeper may accept an application under subsection (1) only if—

(a) such fee as is payable in respect of the application is paid, or

(b) arrangements satisfactory to the keeper are made for payment of that fee.

(4) If the Keeper accepts an application under subsection (1)(a), the Keeper must—

(a) enter the note in the property section of the title sheet for each registered plot of land which forms part of the tenement,

(b) record the note in the Register of Sasines in relation to each property which—

(i) forms part of the tenement, and

(ii) is recorded in that Register.

(5) If the Keeper accepts an application under subsection (1)(b), the Keeper must, in accordance with the application, amend any note to which the application relates which is entered in the property section of the title sheet for a registered plot of land.

(6) In this section, "tenement owners' association" has the meaning given by section 29 of the Tenements (Scotland) Act 2004.

64B Removal of tenement identification information

(1) This section applies where a tenement in relation to which a tenement identification information note is entered in the Land Register or recorded in the Register of Sasines under section 64A(1) ceases to exist.

(2) A person with an interest in the tenement may apply to the Keeper for—

(a) the note to be removed from the Land Register, or

(b) a note of removal of tenement identification details to be recorded in the Register of Sasines.

(3) The Keeper may accept an application under subsection (1) only if—

(a) such fee as is payable in respect of the application is paid, or

(b) arrangements satisfactory to the Keeper are made for payment of that fee.

(4) If the Keeper accepts an application under subsection (1), the Keeper must remove the note from the Land Register or, as the case may be, record the note of removal of tenement identification details in the Register of Sasines.

64C Tenement identification information: offence

(1) A person mentioned in subsection (2) commits an offence if the person—

(a) makes a materially false or misleading statement in relation to an application under section 64A(1) knowing that, or being reckless as to whether, the statement is false or misleading,

(b) intentionally fails to disclose material information in relation to such an application or is reckless as to whether all material information is disclosed.

(2) The persons are—

(a) a person making an application under section 64A(1), or

(b) a person who, in connection with such an application, acts as solicitor or other legal adviser to the applicant.

(3) It is a defence for a person charged with an offence under subsection (1) (the "accused") that the accused took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

(4) The defence is established if the accused—

(a) acted in reliance on information supplied by another person, and

(b) did not know and had no reason to suppose that—

(i) the information was false or misleading, or

(ii) all material information had not been disclosed.

(5) Subsection (4) does not exclude other ways of establishing the defence mentioned in subsection (3).

(6) An accused may not rely on a defence involving the allegation that the commission of the offence was due to reliance on information supplied by another person unless—

(a) the accused has complied with subsection (7), or

(b) the court grants leave.

(7) The accused must serve on the prosecutor a notice giving such information identifying or assisting in the identification of the other person as is in the accused's possession—

(a) in proceedings on indictment, at least 14 clear days before the preliminary hearing (where the case is to be tried in the High Court) or the first diet (where the case is to be tried in the sheriff court),

(b) in summary proceedings—

(i) where an intermediate diet is held, at or before that diet,

(ii) where no such diet is held, at least 10 clear days before the trial diet.

(8) Subsection (6) does not apply where—

(a) the accused lodges a defence statement—

(i) under section 70A of the Criminal Procedure (Scotland) Act 1995, or

(ii) under section 125 of the Criminal Justice and Licensing (Scotland) Act 2010 in accordance with the time limits mentioned in subsection (7)(b), and

(b) the accused's defence involves an allegation that the commission of the offence was due to reliance on information supplied by another person.

(9) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a period not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a period not exceeding 2 years, to a fine, or to both.".

Appendix B Explanatory Notes

Explanatory notes to the draft Tenements (Amendment) (Scotland) Bill

Introduction

1. These explanatory notes have been prepared by the Scottish Law Commission in order to assist the reader of the draft Bill. They do not form part of the Bill.

2. 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 a part of a section, does not seem to require any explanation or comment, none is given.

Commentary on provisions

Section 1: Tenement owners' associations

3. Section 1 of the Bill inserts new sections 3A, 3B and 3C and schedule A1 into the Tenements (Scotland) Act 2004 ("the 2004 Act").

4. New section 3A has the effect of establishing tenement owners' associations in all tenement buildings in Scotland except those tenements which are managed under the development management scheme ("DMS").

5. For tenements which are already in existence on the day when section 1 of the Bill comes into force, an owners' association will be established on that day (section 3A(2)(a)). For tenements which come into existence after section 1 of the Bill comes into force (such as a block of flats constructed after section 1 is in force, or a single building that has been converted into flats after section 1 is in force), an owners' association will be established on the day when the tenement comes into existence (section 3A(2)(b)). In either case, no association will be established if the DMS applies to the tenement in question (section 3A(2)).

6. A tenement exists or comes into existence where the building meets the definition set out in section 26 of the 2004 Act. This is a factual question based on the physical characteristics of the building and the terms of its title deeds.

7. Where the DMS applies to a tenement, but then ceases to apply, section 3A(3) provides that a tenement owners' association is established on the day when the DMS ceases to apply. The DMS will cease to apply where a deed of disapplication is registered in respect of the flats in that tenement in accordance with section 73(1) of the Title Conditions (Scotland) Act 2003 ("2003 Act").

8. Section 3A(4) introduces schedule A1 which makes further provision in relation to tenement owners' associations.

See recommendations 6 and 7, paragraphs 4.17 and 4.30 of the Report.

9. New section 3B makes provision for the winding up and dissolution of tenement owners' associations.

10. Section 3B(1) sets out the circumstances in which an owners' association must be wound up. These are where the DMS takes effect in relation to the tenement in question, or where the tenement ceases to be a tenement. The DMS will take effect in relation to a tenement where the owners of the tenement grant a deed of application in line with section 71(1) of the 2003 Act. A tenement will cease to be a tenement where it no longer meets the definition of "tenement" in section 26 of the 2004 Act. This might happen where the tenement building has been demolished, or where the building has been renovated in such a way that the existing flats have been merged into a single unit. Section 3B(10) provides that the tenement will be taken to have ceased to exist on either the day when a completion certificate under section 18 of the Building (Scotland) Act 2003 has been accepted in respect of the demolition or conversion of the building, or on such other day as may be determined by the First-tier Tribunal for Scotland.

11. Section 3B(2) provides that the winding up period for a tenement owners' association is, by default, 6 months from either the day that the DMS first applies to the building, or the day when the tenement ceased to be a tenement. The tenement owners' association may, however, take a decision to extend this period. Section 3B(7) confirms that the association is dissolved at the end of the winding up period.

12. Section 3B(3) sets out the function and powers of the tenement owners' association during the winding up period. Sections 3B(4) and (5) set out the duties of the owners' association manager during the winding up period. Section 3B(6) makes provision about the association's final accounts.

13. Section 3B(8) makes provision about the rights and liabilities of the association at the point when it is dissolved. Any rights or liabilities that the association has immediately prior to dissolution are transferred to the members of the association in equal proportions. (Schedule A1, para 2 makes provision about membership of the association.)

14. Section 3B(9) ensures continuity of association membership during the winding up period. It provides that, where the tenement ceases to be a tenement, the members of the association during the winding up period are those persons who were association members immediately before the winding up period began, notwithstanding that the tenement has ceased to exist.

For section 3B(1) and (10) see recommendations 18 and 19, paragraph 4.83 of the Report.

For section 3B(2), (7) and (8) see recommendation 21, paragraph 4.91 of the Report.

For section 3B (4), (5)(a)-(d) and (6) see recommendation 20, paragraph 4.87 of the Report.

For section 3B(5)(e) see recommendation 54, paragraph 8.49 of the Report.

15. Section 3C allows for an application to be made to the First-tier Tribunal for an order to confirm the date that a tenement came into existence or ceased to be a tenement, the date that a tenement owners' association was established or dissolved, or to determine whether a

tenement existed, or a tenement owners' association existed, on any particular date. The power of the Tribunal to make such orders provides a mechanism to resolve any dispute in relation to these matters. An application under this section may be made by a person with an interest in the tenement owners' association. This may include persons beyond the owners of the flats in the tenement.

For section 3C(a)(i) and (iii) & (b) see recommendation 8, paragraph 4.35 of the Report. For section 3C(a)(ii) and (iv) see recommendations 18 and 19, paragraph 4.83 of the Report.

New schedule A1

16. Section 1(3) of the Bill inserts new schedule A1 into the 2004 Act. Schedule A1 makes provision about tenement owners' associations. The schedule is in four parts. Part 1 provides for fundamental aspects of the association including its legal status and membership. Part 2 sets out the key duties which the association must meet. Part 3 makes provision about the association manager, and Part 4 makes provision about association administration.

Part 1 – The association

17. Paragraphs 1 to 6 of schedule A1 make provision in relation to fundamental aspects of the tenement owners' association.

18. Paragraph 1 provides that a tenement owners' association is constituted as a body corporate. This means that the association is a separate legal person from its members and that its existence is unaffected by changes to its membership. Separate legal personality means that the association will be able to do things, such as entering into contracts or raising court proceedings, in its own name. Provision for how an association will make decisions to take such actions will be set out in the association rules. Default rules are provided for in schedule A2, inserted into the 2004 Act by section 2(3) of the Bill.

19. Paragraph 2 provides that the association's members are the current owners of each flat within the tenement (para 2(1)). Where a flat is co-owned by two or more people, such as a married couple, every co-owner is a member.

20. Paragraph 3 sets out how an association is to be named. It also provides that the association has two addresses: the address of the tenement building itself, and the association manager's address.

21. Paragraph 4 sets out the functions and general powers of the association. The association's principal function is to manage the tenement for the benefit of its members (para 4(1)). The association is given broad power to do anything which is necessary, expedient or conducive to the performance of its function (para 4(2)). It is important to note, however, that an association usually cannot exercise its powers unless a decision has been taken by association members that it should do so. Where such a decision has been taken, the association manager has a duty to implement it on the association's behalf (para 15). The powers of the manager to act on behalf of the association are set out in Part 3 of schedule A1.

22. A member of the association has no power to act on the association's behalf unless an association decision is taken authorising that member to do so.

23. Paragraph 4(3) sets out an indicative and non-exhaustive list of things that the association has power to do. These include the power to carry out maintenance, improvements or alterations to association property, to take out insurance for the tenement (or a part of it) and to open a bank account. The association may not, however, acquire heritable property or carry on a trade (para 4(4)).

24. Paragraph 4(5) confirms that the association has an insurable interest in the tenement building. This provision puts beyond doubt that an insurance contract can be taken out for the building in the association's name, even although the association has no right of ownership in the building.

25. Paragraphs 6 and 7 define two key terms in relation to the functioning of the association: association property and maintenance.

26. "Association property" (para 6) means any part of the tenement which is owned in common by two or more flat owners, or any part which two or more owners have responsibility to maintain (para 6(1)(a)). In addition, it means certain structurally significant parts of the building are included in the definition even where ownership of that part or responsibility for its maintenance is not shared. These include the foundations of the building, the external walls and the roof (including rafters or other supporting structures) (para 6(1)(b)). However, some elements of these structural parts are excluded from the definition, such as windows and doors that serve only a single flat, and any chimney stack or flue (para 6(2)). The application of this definition to particular parts of tenement buildings is considered further in Chapter 3 of the Report.

27. "Association property" replaces the concept of "scheme property" used in the Tenement Management Scheme. "Scheme property" was defined in broadly the same terms under rule 1.2 of schedule 1 to the 2004 Act.

28. "Maintenance" (para 7) in relation to the tenement is defined to include, first, any work undertaken in order to comply with the duty set out in section 8(1) of the 2004 Act (duty to maintain parts of the tenement so as to provide support and shelter etc.) (sub-para (a)). The definition also includes repairs, cleaning, pest control, and work to ensure the day-to-day running of the tenement (sub-para (b)). Demolition, alteration, or improvement of the tenement is specifically excluded from the definition unless it is incidental to the maintenance (para 7(2)).

For paragraph 1 of schedule A1 see recommendation 5, paragraph 4.7 of the Report.

For paragraph 2 of schedule A1 see recommendation 31, paragraph 5.71 of the Report.

For paragraph 3 of schedule A1 see recommendation 9, paragraph 4.39 of the Report.

For paragraphs 4(1) and (2) of schedule A1 see recommendation 10, paragraph 4.45 of the Report.

For paragraphs 4(3)(a)-(h) and 4(5) of schedule A1 see recommendation 11, paragraph 4.50 of the Report.

For paragraphs 4(3)(j) and (k) of schedule A1 see recommendation 13, paragraph 4.56 of the Report.

For paragraph 4(3)(l) see recommendation 12, paragraph 4.54 of the Report.

For paragraph 4(4)(a) of schedule A1 see recommendation 15, paragraph 4.66 of the Report.

For paragraph 4(4)(b) of schedule A1 see recommendation 14, paragraph 4.60 of the Report.

For paragraph 6 of schedule A1 see recommendation 2, paragraph 3.39 of the Report.

For paragraph 7 of schedule A1 see recommendation 3, paragraph 3.50 of the Report.

Part 2 – Key duties

29. Paragraphs 8 to 13 of schedule A1 make provision in relation to the four key duties which are placed on the owners' association and which are listed in paragraph 8(1). Those duties are: to appoint a manager for the association (para 8(1)(a)); to hold annual general meetings (para 8(1)(b)); to approve a budget in respect of association costs for each financial year (para 8(1)(c)); and to apply to have certain information noted on the property registers in respect of the tenement (para 8(1)(d)). Further detail on the requirements in relation to each duty is provided for within Part 2 of schedule A1.

Annual budget

30. The association must approve a budget for association costs in each financial year (para 8(1)(c)). The content of the annual budget will be specified in the rules of the owners' association, with default budget rules set out in paragraphs 16 and 17 of schedule A2. Paragraph 8(2) of schedule A1 makes provision about the day on which the duty to approve a budget first applies to an association. Different days are specified depending on the day when the association is established under new section 3A of the 2004 Act.

31. For existing tenements (meaning tenements which are already in existence when section 1 of the Bill comes into force), the duty will first apply on the "appointed day", which is a day to be set by the Scottish Ministers after the legislation is enacted (paras 8(2)(a) and 13).

32. For "new" tenements (meaning those constructed or converted after section 1 of the Bill comes into force), the duty will first apply at the end of a period of one year beginning with the appointed day, or with the first day on which the tenement may be occupied, whichever is later (para 8(2)(b)). Paragraph 13 makes provision in respect of the appointed day. The first day on which the tenement may be occupied is the day on which a certificate of temporary occupation is granted in relation to the building under section 21(3) of the Building (Scotland) Act 2003 (para 8(4)(a)). If no such certificate is granted in relation to the building, the first day on which the tenement may be occupied is the day on which a completion certificate is accepted in respect of the construction or conversion of the tenement under section 18 of the 2003 Act (para 8(4)(b)(i)), or such other day as the First-Tier Tribunal determines to be the day on which the construction or conversion was completed (para 8(4)(b)(ii)).

33. For tenements where an owners' association is established following the disapplication of the DMS to the tenement, the duty will first apply on the appointed day, or on the day on which the association is established, whichever is later (para 8(1)(c) and (2)(c)).

34. The duty under para 8(1)(c) to approve a budget is for a financial year. The financial year is set by the manager under para 20(a) of schedule A1. Accordingly, while the duty to approve a budget will apply to the association from a particular day as outlined above, this does not mean that the budget must be approved on or by that day. The deadline for approval of the budget will depend on the financial year set by the manager.

Appointment of manager

35. The association must appoint a manager (para 8(1)(a)). The function, powers and general duties of the manager are set out in Part 3 of schedule A1. The process by which a decision can be taken by the association to appoint a manager will be specified in the rules of the owners' association, with default rules on association decisions set out in Part 2 of schedule A2. Paragraph 9 of schedule A1 sets out further detail in relation to the appointment of a manager.

36. Paragraph 9(1) makes provision about the day by which the association must have appointed its first manager. Different days are specified depending on the day when the association is established under new section 3A of the 2004 Act.

37. For existing tenements (meaning tenements which are already in existence when section 1 of the Bill comes into force), the first manager must be appointed within 6 months of the "appointed day", which is a day to be set by the Scottish Ministers after the legislation is enacted (paras 9(1)(a) and 13).

38. For "new" tenements (meaning those constructed or converted after section 1 of the Bill comes into force), the first manager must be appointed within 18 months of the appointed day, or of the first day on which the tenement may be occupied, whichever is later (para 9(1)(b)). Paragraph 13 makes provision in respect of the appointed day. The first day on which the tenement may be occupied is the day on which a certificate of temporary occupation is granted in relation to the building under section 21(3) of the Building (Scotland) Act 2003. If no such certificate is granted in relation to the building, the first day on which the tenement may be occupied is the day on which a completion certificate is accepted in respect of the construction or conversion of the tenement under section 18 of the 2003 Act, or such other day as the First-Tier Tribunal determines to be the day on which the construction or conversion was completed (para 8(4)).

39. For tenements where an owners' association is established following the disapplication of the DMS to the tenement, the first manager must be appointed within 6 months of the appointed day, or the day on which the association is established, whichever is later (para 9(1)(c)).

40. Any subsequent manager of an association must be appointed within six months of the position becoming vacant (para 9(2)).

41. A certificate of appointment must be signed by both the manager and a member of the association (signing on behalf of the association) within one month of the manager's appointment (para 9(3)). The certificate set outs the name of the association, the name of the manager and the period of their appointment (para 9(4)). The certificate may provide that the appointment is for an indefinite period.

42. Paragraph 9(5) confirms that the actings of the manager are valid regardless of any defect in their appointment.

43. Paragraph 9(6) provides that a manager's appointment will come to end in accordance with the terms of their appointment or upon termination by the association. It should be noted that the appointment may also be terminated in accordance with the general law of agency, for example by the mental incapacity or death of a manager who is a natural person or the dissolution of a manager who is a legal person, or by the dissolution of the association. It is also possible for the manager to resign from the post at any time, subject to a claim for damages for breach of contract by the association where the resignation fails to comply with any relevant contractual terms. (See also new section 3F(2) of the 2004 Act inserted by section 3(2) of the Bill, which gives the First-tier Tribunal power to remove a manager upon appointment of a remedial manager.)

Annual general meetings

44. The association must hold a general meeting annually (para 8(1)(b)). The process by which the annual general meeting (AGM) will be organised and provision for proceedings at the meeting will be specified in the rules of the owners' association, with default rules set out in Part 3 of schedule A2. However, paragraph 10 of schedule A1 sets out further detail regarding the duty to hold an AGM.

45. Paragraph 10(1) sets out the timescales in which an owners' association must hold its first annual general meeting (AGM). The timescale which applies depends on when the association is established under new section 3A of the 2004 Act.

46. For existing tenements (meaning tenements which are already in existence when section 1 of the Bill comes into force), the first AGM must be held within one year of the "appointed day", which is a day to be set by the Scottish Ministers after the legislation is enacted (paras 10(1)(a) and 13).

47. For "new" tenements (meaning those constructed or converted after section 1 of the Bill comes into force), the first AGM must be held within two years of the appointed day, or of the first day on which the tenement may be occupied, whichever is later (para 10(1)(b)). The first day on which the tenement may be occupied is the day on which a certificate of temporary occupation is granted in relation to the building under section 21(3) of the Building (Scotland) Act 2003. If no such certificate is granted in relation to the building, the first day on which the tenement may be occupied is the day on which a completion certificate is accepted in respect of the construction or conversion of the tenement under section 18 of the 2003 Act, or such other day as the First-Tier Tribunal determines to be the day on which the construction or conversion was completed (para 8(4)).

48. For tenements where an owners' association is established following the disapplication of the DMS to the tenement, the first AGM must be held within one year of the appointed day, or the day on which the association is established, whichever is later (para 10(1)(c)).

49. Subsequent AGMs must be called at least once in each calendar year and be held no more than 15 months apart (para 10(2)).

Tenement identification information

50. Paragraph 11 sets out further detail regarding the duty of the owners' association to apply to have certain identification information in relation to the tenement noted on the property registers (para 8(1)(d)). Tenement identification information is defined in section 64A(2) of the Land Registration etc. (Scotland) Act 2012 ("the 2012 Act"). Section 64A is inserted into the 2012 Act by paragraph 26 of the schedule of the Bill.

51. Paragraph 11(1) imposes a duty on the owners' association to make an application under section 64A(1)(a) (tenement identification information) of the 2012 Act in relation to the tenement within certain timescales. The timescale which applies depends on when the association is established under new section 3A of the 2004 Act.

52. For existing tenements (meaning tenements which are already in existence when section 1 of the Bill comes into force), an application for entry of identification information in the property registers must be made within two years of the "appointed day", which is a day to be set by the Scottish Ministers after the legislation is enacted (paras 11(1)(a) and 13).

53. For "new" tenements (meaning those constructed or converted after section 1 of the Bill comes into force), an application for entry of identification information in the property registers must be made within three years of the appointed day, or of the first day on which the tenement may be occupied, whichever is later (para 11(1)(b)). The first day on which the tenement may be occupied is the day on which a certificate of temporary occupation is granted in relation to the building under section 21(3) of the Building (Scotland) Act 2003. If no such certificate is granted in relation to the building, the first day on which the tenement may be occupied is the day on which a completion certificate is accepted in respect of the construction or conversion of the tenement under section 18 of the 2003 Act, or such other day as the First-Tier Tribunal determines to be the day on which the construction or conversion was completed (para 8(4)).

54. For tenements where an owners' association is established following the disapplication of the DMS to the tenement, an application for entry of identification information in the property registers must be made within two years of the appointed day, or the day on which the association is established, whichever is later (para 11(1)(c)).

55. Where there is a change to the tenement identification information which has been entered in the Land Register or recorded in the Register of Sasines, the association must make an application to update that information within 6 months of the information changing (para 11(3)).

Disapplication of certain duties in relation to small and single-owner tenements

56. The effect of paragraph 12(1) and (2) is that where a tenement consists of two or three flats, or where all the flats in a tenement have the same owner, the owners' association for that tenement need not comply with the key duties set out in para 8(1)(a) (the duty to appoint a manager), para 8(1)(b) (the duty to hold AGMs) or para 8(1)(c) (the duty to approve an annual budget). There is nothing to prevent associations in this category from appointing a manager, holding an AGM or approving an annual budget should they wish to do so, however. Paragraph 12(3) confirms that where such an association appoints a manager voluntarily, the

2004 Act applies as if the manager had been appointed by virtue of the duty to do so in paragraph 9.

57. For the avoidance of doubt, the duty in paragraph 8(1)(d) (to make an application in respect of tenement identification information) applies to an owners' association in this category.

58. It may be the case that a tenement which is in this category at one point in time may not remain so. A tenement which once consisted of two or three flats may be converted such that it now consists of four or more flats. A tenement in which all the flats had the same owner may later have flats with different owners. In those circumstances, paragraph 12(4) confirms that the duties to appoint a manager (para 8(1)(a)), to hold AGMs (para 8(1)(b)) and to approve an annual budget (para 8(1)(c)) apply to that tenement. The duties apply from the appointed day, or, as the case may be, the day on which the tenement stopped being a small tenement or the day on which the tenement stopped being a tenement in which all flats have the same owner, whichever is the later.

59. Paragraph 13 sets out the meaning of "appointed day", which is the day on which the key duties set out in paragraph 8 begin to apply to certain owners' associations as set out in paragraphs 8 to 12. Paragraph 13(1) provides that Scottish Ministers may appoint a day by regulations for the purposes of Part 2 of schedule A1. Paragraph 13(2) provides that different days may be provided for different purposes, meaning that the Ministers may choose to bring different duties into force on different days.

For paragraphs 8(1)(a), 9(1)-(2) and 13 of schedule A1 see recommendation 34, paragraph 6.16 of the Report.

For paragraphs 8(1)(b), 10 and 13 of schedule A1 see recommendation 35, paragraph 6.21 of the Report.

For paragraphs 8(1)(c), 8(2) and 13 of schedule A1 see recommendation 36, paragraph 6.26 of the Report.

For paragraphs 8(1)(d), 11, 13 and 25 of schedule A1 see recommendation 37, paragraph 6.40 of the Report.

For paragraph 9(3) and (4) of schedule A1 see recommendation 24, paragraph 5.15 of the Report.

For paragraph 9(5) of schedule A1 see recommendation 23, paragraph 5.10 of the Report.

For paragraph 9(6) of schedule A1 see recommendation 29, paragraph 5.50 of the Report.

For paragraph 12 of schedule A1 see recommendation 39, paragraph 6.60 of the Report.

Part 3 – The manager

60. Paragraphs 14 to 21 make provision in relation to the functions, powers and duties of the owners' association manager.

61. Paragraph 14(1) sets out the general function of the manager, which is to manage the tenement on behalf of the owners' association. Paragraph 14(2) confirms that the manager's further functions are as set out in the 2004 Act and in the association's rules. (Default association rules are set out in new schedule A2). Paragraphs 14(3) and (4) make provision regarding the relationship between the manager, the association and the association members. Paragraph 14(3) provides that duties owed by the manager are owed to the association and its members. Paragraph 14(4) provides that the manager is an agent of the association meaning that, in so far as not provided for in the 2004 Act or the association's rules, the general law of agency applies to the relationship between the association and the manager.

62. Paragraph 15 requires the manager to ensure that the association meets its key duties under paragraph 8(1). Those duties are: to appoint a manager for the association (para 8(1)(a)); to hold annual general meetings (para 8(1)(b)); to approve a budget in respect of association costs for each financial year (para 8(1)(c)); and to apply to have certain information noted on the property registers in respect of the tenement (para 8(1)(d)).

63. Paragraphs 16 and 17 set out the manager's duty to implement decisions made by the association and also to follow directions given by the association. (The process for taking association decisions will be set out in the association's rules. Default association rules are provided for in new schedule A2.) However, the manager must not implement a decision or follow a direction if it would be contrary to the 2004 Act or the association's rules. For example, a manager could not implement an association decision not to hold an AGM in a particular year, as this would breach the key duty in paragraph 8(1)(b) of schedule A1. Nor could a manager follow a direction that they should not prepare association accounts for a financial year, which would be contrary to paragraph 20(c) of schedule A1.

64. Paragraph 18 gives the manager the power to arrange or carry out emergency work to association property. ("Association property" is defined in paragraph 6 of schedule A1. A definition of "emergency work" is inserted into section 29 of the 2004 Act by paragraph 20 of the schedule of the Bill.)

65. Paragraph 19(1) provides that the manager has power to enforce any obligations that members owe to the association, and also enforce the association's rules. This means that the manager could, for example, raise proceedings to enforce payment of a service charge owed to the association by a member where that member has failed to pay by the date agreed in the annual budget.

66. Section 18 of the 2004 Act places flat owners under an obligation to insure their flat (and, as the case may be, certain other parts of the tenement building). Paragraph 19(1) of schedule A1 places a duty on the manager to monitor compliance with that duty. Paragraph 19(3) provides that that this duty does not require the manager to obtain a valuation of any part of the tenement. The manager may accordingly identify non-compliance with the duty where an owner has no insurance, or where it is within the manager's knowledge that the insurance obtained is insufficient to meet the owner's duty in section 18. However, the

manager does not need to instruct a property valuation (and incur associated costs) where the sums insured for seem reasonable on their face. Paragraph 14(a) of the schedule of the Bill amends section 18(5) of the 2004 Act to allow the owners' association to give written notice requesting that an owner produce evidence of their insurance policy and payment of any premium. Additionally the owners' association is given the right to enforce the owners' obligation to insure their flat (Bill schedule, para 14(b)). The rights of the owners' association in both these instances sit alongside the rights of individual owners to take these actions.

67. Paragraph 20 sets out the manager's duties in respect of certain aspects of financial administration of the association.

68. Paragraph 21 gives members of the association the right to see documents held by the manager which relate to the management of the tenement. This would include, for instance, a quotation for work submitted by a tradesperson or a set of accounts from a particular financial year. However, this right does not extend to correspondence between the manager and individual members.

For paragraphs 14(1)-(2), 15, 18 and 19(1) of schedule A1 see recommendation 26, paragraph 5.32 of the Report.

For paragraph 14(3) of schedule A1 see recommendation 28, paragraph 5.37 of the Report.

For paragraph 14(4) of schedule A1 see recommendation 25, paragraph 5.19 of the Report.

For paragraphs 16, 17, 19(2), 19(3), 20 and 21 of schedule A1 see recommendation 27, paragraph 5.36 of the Report.

Part 4 – Administration

69. Paragraphs 22 to 26 make provision in relation to administrative matters concerning the owners' association.

70. Paragraph 22 requires the manager of an owners' association to keep a record of each member's name and contact details (para 22(1)). New members of the association must provide this information to the manager within one month of becoming a member (para 22(2)(a)). Where no manager is in place at the time someone becomes a new member, they are required to provide the information within one month of a manager being appointed (para 22(2)(b)). Members must also notify the manager of any changes to their name or contact details within one month of the change (para 22(3)). The manager must share a member's contact details with another member if it is necessary in connection with managing or maintaining the tenement or for the operation of the association (para 22(4)). Paragraph 22(5) confirms that contact details are details of how the person is to be contacted by the manager or a member and must include details of how the person can be contacted in writing.

71. Paragraph 23 makes provision as to how information should be given to any person where required under the association's rules. If a member has provided contact details to the manager under paragraph 22, those details may be used to give information to the member where required by the association rules or the information may be given by being delivered to the member in writing in a way which complies with sub-paragraph (4) (para 23(2)). In any

other case (meaning where information is to be provided to someone other than a member such as the association manager, or where a member has not provided contact details to the manager), the information may be sent by post or email to any address used by the person in connection with the association in the past year or by being delivered to the person in writing in a way which complies with sub-paragraph (4) (para 23(3)). Where information must be provided in writing, paragraphs 23(4) and (5) set out which methods may be used to deliver that information in which circumstances.

72. Paragraph 23(6) provides for assumptions to be made as to the date when information has been given depending on the method of delivery.

73. Paragraph 23(7) confirms that information is to be given to a person's executor in the event of the person's death.

74. Where a member of the association or their executor cannot be identified or found following reasonable enquiry, a document can be given to the member (or their executor) by being posted or delivered to the member's flat and addressed to the "The Owner" or other similar term (para 23(8)).

75. Paragraph 24 applies where a member sells or otherwise transfers ownership of their flat. Before the date on which the new owner is entitled to take entry, the outgoing member must give the manager certain details, if they are known to them. The details are: the name and postal address of the new owner and their solicitor or agent; the date of entry; and the outgoing member's contact details after the date of transfer.

76. Paragraph 25 makes provision which will help to ensure that the tenement identification information in the property registers is accurate. Where a member intends to do something that will result in a title sheet being made up or cancelled, they must inform the manager and say when this is likely to happen (paras 25(1) and (2)). In practice this is likely to occur if a member intends to merge two flats into one or divide one flat into two or more separate flats. More generally, if a member becomes aware that the tenement identification information entered in the Land Register or recorded in the Register of Sasines is incorrect they must inform the manager as soon as reasonably possible (para 25(3)).

77. Paragraph 26 sets out how documents can be signed on behalf of the association. A document can be signed by the manager provided that they are acting within their authority or by another person who has been authorised by the association to sign the document on its behalf. The association may authorise one of its members, or a third party, to sign on its behalf.

For paragraphs 22 and 24 of schedule A1 see recommendation 32, paragraph 5.81 of the Report.

For paragraph 23 of schedule A1 see recommendation 4, paragraph 3.57 of the Report.

For paragraph 25 of schedule A1 see recommendation 37, paragraph 6.40 of the Report.

For paragraph 26 of schedule A1 see recommendation 16, paragraph 4.69 of the Report.

Section 2: Tenement owners' association rules

78. Section 2 of the draft Bill inserts new sections 3D and 3E, and schedules A2 and A3, into the 2004 Act.

79. New section 3D makes provision regarding the rules which govern the operation of certain aspects of the tenement owners' association, referred to as "association rules". The association rules will cover how association decisions may be taken by members including at association meetings, liability for association costs, and the financial administration of the association including preparation and approval of the annual budget.

80. Section 3D(1) provides that the rules of a tenement owners' association are the rules set out in the "association conditions" which affect the tenement, or if there are no association conditions then the rules set out in schedule A2. The provisions of schedule A2 are therefore the default association rules.

81. Section 3D(2) sets out what is meant by "association conditions". These are real burdens (within the meaning of section 1 of the Title Conditions (Scotland) Act 2003 ("2003 Act")) which: apply to every flat in the tenement; are all contained in a single constitutive deed (within the meaning of section 122(1) of 2003 Act); and reproduce the default association rules in schedule A2 which were in force at the time the burdens were created, subject only to certain permitted changes.

82. The changes to the schedule A2 rules which it is permitted to make are minor changes to references to the 2004 Act (section 3D(2)(c)(i)), and changes which are specified by the Scottish Ministers in regulations (section 3D(2)(c)(ii)).

83. The purpose of this section is to standardise the way in which tenement management provisions appear in title deeds, while at the same time giving sufficient flexibility to allow tenement properties, which do not fit a standard template, to be managed in an appropriate way.

84. The requirement that association conditions reproduce the schedule A2 rules (subject to permitted changes) means that, for example, since rule 3 of schedule A2 provides for the allocation of votes amongst flats, rule 3 of the association conditions in any flat's title deeds must also make provisions for the allocation of votes. Rule 3 schedule A2 provides for each flat to have one vote. If Scottish Ministers permit variations here, rule 3 of the association conditions in any particular tenement may provide for a different allocation of votes, so that, for example, larger flats may be given a larger share of the vote than smaller flats. But in any case, rule 3 will always provide for the allocation of votes. This should make it easier for people to navigate their title deeds and therefore identify the rules that apply to their flat.

85. Where real burdens do not replicate the rules set out in schedule A2 (taking into account the permitted changes) then, generally, they will not be association conditions and not be rules of the association. In that case, the default rules in schedule A2 will apply. However, section 3D(4) has the effect that only differences of substance, being differences which cause the burden to have a different effect to the default rule (taking into account permitted changes) or differences which are misleading, should result in the real burdens not being recognised as an association condition.

86. It is possible that the default rules in schedule A2 might be changed by future legislation. A scenario might arise as follows. An owners' association has association conditions which match entirely those of schedule A2 as it appears now. Five years later, legislation is enacted which amends rule 4 of schedule A2. A year after that, the members of the owners' association decide to make amendments to their association conditions, including amendments to rule 4. Section 3D(2) provides that this can only be done by replicating the version of rule 4 in force at the time the association conditions are amended, subject to any changes to the default rules permitted by delegated legislation at that time. In other words, although legislative changes to the default association rules set out in schedule A2 have no automatic effect on association conditions created earlier, such legislative changes must be incorporated into relevant association conditions should members of the owners' association choose to amend those conditions after the legislative changes have taken effect.

87. Section 3D(5) recognises that things may be done under rules set out in real burdens which are thought to be association conditions, but which are found later not to be. In those circumstances the validity of anything done in good faith is unaffected by the fact that the real burdens turn out not to be association conditions.

88. Section 3D(8) introduces new schedule A3 of the 2004 Act. This schedule makes transitional provision in relation to the application of the default association rules in schedule A2.

89. Section 3E makes additional, technical provision in relation to association conditions. Subsection (1) provides that a deed of discharge (meaning a deed which terminates a real burden) has effect only if it terminates all of the real burdens that make up the association. Subsection (2) confirms that if the owners' association is dissolved, the association conditions automatically cease to have effect. Finally, subsection (3) provides that the jurisdiction of the Lands Tribunal in relation to title conditions and to the variation and discharge of community burdens should not apply in relation to association conditions.

For section 3D(1) see recommendation 49, paragraph 8.11 of the Report.

For section 3D(1)-(5) and (7) see recommendation 50, paragraph 8.35 of the Report.

For section 3D(6) see recommendation 51, paragraph 8.38 of the Report.

For section 3D(8) see recommendation 55, paragraph 8.62 of the Report.

For section 3E(1) see recommendation 52, paragraph 8.42 of the Report.

For section 3E(2) see recommendation 54, paragraph 8.49 of the Report.

For section 3E(3) see recommendation 53, paragraph 8.47 of the Report.

New schedule A2

90. Section 2(3) of the Bill inserts new schedule A2 into the 2004 Act. Schedule A2 provides a default set of rules for the operation of tenement owners' associations. These rules

will apply in the absence of association conditions set out in title deeds for the flats in the tenement (see section 3D above).

Part 1 – Definitions

91. Paragraph 1 of schedule A2 sets out definitions for various terms used throughout the schedule. Paragraph 1(2) confirms that the definitions found in section 29 of the 2004 Act will also apply for the purpose of interpreting association conditions (see section 3D).

Part 2 – Association decisions

92. Rules 2 to 8 provide a framework for decision making by an owners' association.

93. Rule 3 sets out how voting rights are allocated for the purpose of making association decisions. Each flat in the tenement is allocated one vote (rule 3(1)). The vote may be exercised by the owner or a nominated representative (rule 3(2)). Where a flat has multiple owners, any one of them may exercise the vote, but if there is disagreement among the co-owners, the vote is only counted if it is cast by an owner holding more than a half share of the flat or it is agreed by owners collectively holding more than a half share (rule 3(3) and (4)).

94. Rule 4 specifies the voting thresholds required for decision making. In general, a decision will be made if 50% or more of the allocated votes are cast in favour (rule 4(1)). This threshold would apply to an owners' association deciding, for example, to carry out maintenance work on association property.

95. Decisions on matters which are likely to be more consequential, such as the carrying out of improvements to association property, the demolition of part of the tenement, the use of reserve funds, or the execution of certain deeds, require a higher voting threshold. In those circumstances 75% of allocated votes are required to make the decision (rule 4(2)(a) and (3)). A unanimous vote is required for a decision to demolish the whole of the tenement building (rule 4(2)(b)).

96. A decision to improve, alter, replace or demolish part of the association property which is not owned in common (or is not owned by owners who own two or more flats) requires a decision of 75% of the allocated votes and also the written consent of the owner or owners of that property before it can be implemented (rules 4(3), (4) and (5)).

97. Rule 5 sets out the methods by which association decisions are made. Decisions can be taken either at a general meeting or through consultation conducted by the manager or a member (rule 5(1) and (2)). Rule 5(3) to (5) sets out procedural aspects in relation to decisions made by consultation. How consultation can be carried out is not specified or restricted, so it would be open to owners or the manager to consult in writing, in person or via electronic means, for example.

98. Rule 6 provides that procedural irregularities do not invalidate an association decision (rule 6(1)). However, an owner directly affected by a procedural irregularity will not be liable for costs if the irregularity means that they were unaware that costs were to be incurred, or they object promptly to incurring those costs on becoming aware (rule 6(2) and (3)).

99. Rule 7 makes provision regarding annulment of certain association decisions. An owner or group of owners can annul a decision to carry out maintenance to association

property where they did not vote in favour of the decision and would bear at least 75% of the costs of that decision (rule 7(1) and (2)). Rule 7(3) and (4) sets out the timescale for giving notice that a decision is to be annulled.

100. Rule 8 confirms that association decisions are binding on all current and future members of the association.

For rule 3(1) of schedule A2 see recommendation 57, paragraph 9.12 of the Report.

For rule 3(2) of schedule A2 see recommendation 58, paragraph 9.18 of the Report.

For rule 3(3)-(4) of schedule A2 see recommendation 59, paragraph 9.21 of the Report.

For rule 4(1) of schedule A2 see recommendation 60, paragraph 9.30 of the Report.

For rule 4(2)(a), (3)-(5) of schedule A2 see recommendation 61, paragraph 9.36 of the Report.

For rule 4(2)(b) of schedule A2 see recommendation 62, paragraph 9.38 of the Report.

For rule 5(1)(b), (2)-(5) of schedule A2 see recommendation 68, paragraph 9.59 of the Report.

For rule 6 of schedule A2 see recommendation 69, paragraph 9.63 of the Report.

For rule 7 of schedule A2 see recommendation 70, paragraph 9.68 of the Report.

For rule 8 of schedule A2 see recommendation 72, paragraph 9.76 of the Report.

Part 3 – Meetings

101. Rules 9 to 13 make provision regarding meetings of the association.

102. Rule 9(1) provides that the annual general meeting (AGM) of the association is to be called by the manager. However, where the manager fails to do so or where no manager is appointed, any member of the association may call the meeting (rule 9(2)). The association requires to have an AGM by virtue of paragraphs 8(1) and 10 of schedule A1.

103. Rule 10(1) gives the manager power to call a general meeting of the association at any time, but also requires the manager to do so where a meeting is requested by owners holding at least 25% of the allocated votes. If the manager fails to act or if no manager is in place, a member may call the meeting (rule 10(2)).

104. Rule 11(1) confirms that members may attend meetings either in person or by electronic means. Rule 11(2) places a duty on the association manager to take reasonable steps to facilitate electronic attendance.

105. Rule 12 sets out the requirements for giving notice of meetings. Notice of either the AGM or any other general meeting of the association must be given at least 14 days in advance (rule 12 (1)) and must include key details including the date, time, location and (where appropriate) the electronic means to be used to access the meeting (rule 12(3)(a) and (b)).

Notice of the meeting must also state the business to be conducted at the meeting (rule 12(3)(c)). Notice is to be given to each member, and where the meeting is called by a member, also to the manager (rule 12(2)).

106. Rule 13 governs how meetings are to be conducted. Rule 13(1) provides that the manager is to attend any general meeting of the association unless they have a reasonable excuse not to do so. Attending members must select one of their number to act as chair for the meeting (rule 13(2) and (3)). Voting may be conducted by a show of hands or another method deemed appropriate by the chair (rule 13(4)). A record of the meeting, including votes and decisions, must be kept and distributed to all members (rule 13(5)). Members not present at a meeting are deemed to have received notice of any decisions made at the meeting by being given a copy of the record of business (rule 13(6)).

For rules 9 and 10 of schedule A2 see recommendation 63, paragraph 9.44 of the Report.

For rule 11 of schedule A2 see recommendation 65, paragraph 9.49 of the Report.

For rule 12 of schedule A2 see recommendation 64, paragraph 9.46 of the Report.

For rules 13(1)–(3) and (5)–(6) of schedule A2 see recommendation 66, paragraph 9.53 of the Report.

For rule 13(4) of schedule A2 see recommendation 67, paragraph 9.56 of the Report.

Part 4 – Owners' liabilities for association costs

107. Rules 14 and 15 make provision in relation to the liability of flat owners for costs incurred by the association, and as to how an owner may be exempted from their liabilities by the other owners.

108. Rule 14 sets out how liability for association costs is to be apportioned among the owners of the flats in a tenement. In general all owners are equally liable for association costs (rule 14(1)). Two exceptions to this general rule are provided for in rules 14(2) to (4).

109. Rule 14(2) provides an exception for maintenance and running costs relating to association property that is owned by two or more of the owners. In such cases, liability is shared in proportion to ownership. For example, in a tenement with two commercial units on the ground floor and four residential units above, each of the commercial units may own a 20% share of the roof, whereas each of the residential units owns a 15% share of the roof. The owners of the commercial units would therefore each be responsible for 20% of any maintenance costs in relation to the roof, whereas the owners of the residential unit would each be responsible for 15% of these costs. (This exception does not, however, apply if the roof over the close of the tenement is common property only by virtue of section 3(1)(a) of the 2004 Act (rule 14(5)).

110. Rule 14(3) and (4) introduces a further exception where there is a significant disparity in the size of flats. If the floor area of any flat is more than one and half times the floor area of another, liability for maintenance and running costs is apportioned according to floor area.

This applies only to association property that is not owned in common by some or all of the owners as per the first exception discussed above.

111. Rule 14(6) defines "maintenance and running costs" for the purposes of these exceptions. These include costs for maintenance, inspection, management and certain costs recoverable by a local authority, but exclude running costs incurred solely for the benefit of one flat.

112. Rule 15(1) allows the association to decide that an owner is exempt from particular association costs. Such a decision would be taken by the association using its normal decision making processes (see rules 2 to 8). Rule 15(2) prevents an owner from voting in favour of a decision that would exempt them from liability. Where an association takes a decision to exempt an owner from liability, that liability is shared equally among the other owners who are liable in relation to that cost (rule 15(3)).

For rule 14 of schedule A2 see recommendation 73, paragraph 10.7 of the Report.
For rules 15(1)–(2) of schedule A2 see recommendation 74, paragraph 10.9 of the Report.
For rule 15(3) of schedule A2 see recommendation 75, paragraph 10.11 of the Report.

Part 5 – Annual budget, service charge and association funds

113. Rules 16 to 24 make provision for the administration of financial matters in relation to the owners' association.

114. Rule 16 sets out what is required to be included in the association's annual budget for each financial year. The budget must specify:

- Details of any maintenance work that the manager considers is required in order to meet the duty under section 8 of the 2004 Act, including cost estimates, how the estimate was arrived at and a time line for the work to be completed (rule 16(1)(a)).
- Details of any other proposed maintenance work, together with cost estimates, how that estimate was arrived at and a time line for the work to be completed (rule 16(1)(b)).
- Details of any other expected costs and the nature of those costs. This might include, for example, insurance payments or costs for hiring accommodation for a meeting (rule 16(1)(c)).
- Details of any additional amounts to be included in the service charge, along with an explanation of why they are included. This might include a sum for a "float" which could be used to cover minor repairs or maintenance throughout the year (rule 16(1)(d)).
- Details of the service charge payable by each owner, how it was calculated, and when it is due (rule 16(1)(e) and (f)).

- An estimate of any monies that the association expects to receive during the year, and their source.

115. Rule 16(2) sets out how an owner's service charge is to be calculated.

116. Rule 17 sets out the procedure by which an association's annual budget should be approved. Rule 17(1) provides that the manager must prepare a draft budget and give a copy to each member. The association can then approve the draft as it is, approve it with changes, or reject it (rule 17(2)). If the budget is rejected, the association must direct the manager to prepare a revised draft within six weeks and circulate it to members for approval (rule 17(3)). The same approval or revision process applies to the revised draft (rule 17(4)).

117. If no budget has been approved by the start of the association's financial year, the previous year's service charge continues to apply until a new budget is agreed (rule 17(5)(a)). This service charge is due to be paid on the anniversary (or anniversaries) of the date (or dates) under the previous budget (rule 17(5)(b)).

118. Rule 18(1) allows the association manager to impose an additional service charge on some or all of the owners.

119. An additional service charge can only be imposed if unexpected costs arise that were not included in the association's annual budget, if actual costs exceed the estimated amounts in the annual budget, or if an owner becomes liable for another owner's share of costs either due to a decision to exempt an owner from liability for costs under rule 15 or a decision on redistribution of a service charge where an owner has failed to pay under rule 19 (rule 18(2)).

120. The amount of any additional service charge must reflect each owner's share of the relevant costs (section 18(3)).

121. The total additional charge for any owner cannot exceed 25% of their original service charge unless the manager presents a draft supplementary budget at a general meeting setting out the amount of the additional service charge and the date it is due to be paid (rule 18(4)). That supplementary budget must then be approved in the same way as any other budget (rule 18(5)). The cost of emergency work is generally excluded from the calculation of the 25% addition to the original service charge (rule 18(6)).

122. Rule 19 makes provision for situations where a service charge or additional service charge cannot be recovered from a particular owner (referred to as "owner A"), for example if the owner becomes insolvent or they cannot be identified or found.

123. If the unpaid amount relates to costs that were shared with other owners, those owners must cover the shortfall in equal proportions (rule 19(2)). For example, in a tenement of 20 flats, four owners are liable for the maintenance of a common stair which only serves those four flats. If one of the four owners becomes insolvent, the shortfall in payment of their service charge must be met equally by the remaining three owners who have responsibility for the stair rather than being divided among the other 20 owners.

124. Rule 19(3) provides that owner A remains liable to those other owners for the amount of owner A's liability which they have taken on. However, if the local authority has already paid owner A's share (or a proportion of that share) under section 4A of the 2004 Act, the other owners are not liable for that portion.

125. Rule 20 makes provision regarding liability for and collection of the service charge. Rule 20(1) confirms that each owner is liable to pay the association the amount of service charge allocated to them in the association's budget, and any additional charges determined under rule 18. Once the association's budget is approved the manager must give each owner notice requiring payment of their service charge as specified in the budget, on the dates set out in the budget (rule 20(3)). If an additional charge is imposed, the manager must give relevant owners a notice which specifies the amount of additional service charge due and the date (or dates) by which it must be paid, and also explains the reason for the charge (rule 20(4)). If any charge remains unpaid for 28 days or more, the manager has the power to issue a notice requiring the owner to pay interest on the overdue amount at a reasonable rate and from a specified date (rule 20(4)).

126. Rule 21 provides for how owners' liabilities for association costs are discharged. An example of how this rule operates is given at page 173 of the Report.

127. Rule 21(1) provides how an owner's liability for association costs is discharged through payment of their service charge. Those liabilities are discharged in the order in which the association becomes liable to pay the costs. This means costs which are payable earlier are settled in full before costs which become payable later. Rule 21(3) and (4) deal with the situation where multiple costs fall due on the same day and the owner's service charge balance is not enough to cover all of them. In such cases, the payment is applied across those costs based on the proportion of each cost in relation to that owner's outstanding liabilities on that date.

128. Rule 21(5) and (6) clarify that if the service charge includes an amount not related to the owner's liability for association costs (for example, payment into a sinking fund), that amount is not treated as paid until all association costs have been settled. The effect of these provisions is therefore to prioritise the payment of association costs.

129. Where the service charge paid by an owner in a financial year exceeds the owner's liabilities for association costs and any other amount due under the budget, the association is to retain the excess amount and offset it against the service charge payable for the next financial year (rule 21(7) and (8)).

130. Rule 21(9) makes clear that liabilities can also be discharged in any other way, such as through payments from a reserve fund or by funds coming from a third party.

131 Rule 21(10) contains interpretative provision about key terms used in this rule and rule 22. It provides that the term "service charge" includes an additional service charge, and explains how an owner's service charge balance is calculated.

132. Rule 22 sets out what happens to service charge liabilities when a flat in a tenement is sold or otherwise transferred to a new owner. Rule 22(2) provides a general rule to the effect that when ownership of a flat is transferred (for example, upon sale to a new owner), the new owner (the "transferee") becomes severally liable with the previous owner (the "transferor") for the amount of any service charge that was outstanding on the day the transfer took place. However, the new owner is not responsible for any part of the service charge that relates to costs they are not severally liable for under section 12 (liability of owner and successors for certain costs) of the 2004 Act. Essentially this means that the transferee will only be severally liable with the transferor for maintenance costs arising prior to the date on which they acquired

the flat if a notice of potential liability has been registered at least 14 days prior to the acquisition (see 2004 Act, sections 11(9) and 12(2) and (3)).

133. Rule 22(4) and (7) set out the general principle that any amount of service charge paid by the transferor is to be retained by the association and, after the transfer, is to be treated as having been paid by the transferee. However, where the transferor has paid an amount of service charge in relation to an association cost for which the transferee is not severally liable, and the amount paid is more than the actual cost incurred, the association must refund the excess to the transferor (rule 22(5) and (6)). This would cover the situation where, for example, maintenance work had been carried out before the date of transfer, and no notice of potential liability for the cost of that work had been registered against the flat in question under section 12 of the 2004 Act. The transferee would accordingly have no liability for the cost of that work. Any amount paid by the transferor which exceeded their share of the final cost of that work should be returned to the transferor by the association.

134. Rule 23 provides that, where an owner intends to sell or otherwise transfer ownership of their flat, if they make a request to the manager, the manager must provide them with a statement detailing the association costs for which that owner is liable in that year, the extent to which those costs have been discharged by service charge payments made to date, the extent of any remaining service charge instalments due in that year, and an estimate of the extent to which the amount of the service charge paid by the owner before that date will exceed the amount of the owner's liabilities which have been discharged before that date.

135. Rule 24 sets out how association funds must be held and managed.

136. Rule 25 allows any member of the association to instruct or carry out emergency work, with the member being entitled to reimbursement from the association for the cost of that work. Paragraph 20(b) of the schedule of the Bill inserts a definition of "emergency work" into section 29 (Interpretation) of the 2004 Act.

For rules 16(1)(a)–(d) and (g) of schedule A2 see recommendation 76, paragraph 10.25 of the Report.

For rules 16(1)(e)–(f) and (2) of schedule A2 see recommendation 77, paragraph 10.30 of the Report.

For rule 17 of schedule A2 see recommendation 78, paragraph 10.35 of the Report.

For rule 18 of schedule A2 see recommendation 79, paragraph 10.38 of the Report.

For rule 19 of schedule A2 see recommendation 80, paragraph 10.41 of the Report.

For rule 20 of schedule A2 see recommendation 81, paragraph 10.43 of the Report.

For rules 21(1)–(6) and (9)–(10) of Schedule A2 see recommendation 82, paragraph 10.47 of the Report.

For rules 21(7)–(8) of Schedule A2 see recommendation 83, paragraph 10.50 of the Report.

For rules 22 and 23 of Schedule A2 see recommendation 84, paragraph 10.56 of the Report.

For rule 24 of Schedule A2 see recommendation 85, paragraph 10.60 of the Report.

For rule 25 of schedule A2 see recommendation 33, paragraph 5.85 of the Report.

New schedule A3 – Default tenement owners' association rules: transition period

137. Schedule A3 is inserted into the 2004 Act by section 3(3) of the Bill (and introduced by section 3D(8) of that Act). It makes transitional arrangements in relation to the application of the default tenement owners' association rules set out in schedule A2.

138. A real burden is a form of title condition regulating the use owners can make of their property. The effect of paragraphs 1 and 2 is to allow certain real burdens included in the titles to tenement flats prior to the enactment of the Bill ("pre-commencement burdens") to disapply the default association rules during the transition period.

139. The transition period is 20 years, although this can be altered by regulations made by the Scottish Ministers (para 1).

140. The pre-commencement burdens which will disapply the default association rules during the transition period are:

- Burdens which make provision in relation to decision making by the owners, as detailed further in paragraph 2(3));
- Burdens which make provision in relation to the liability of owners for costs, where those costs will become association costs upon commencement of the Bill, as detailed further in paragraph 2(4)(a);
- Burdens which relate to the redistribution of liabilities among owners where an owner has been exempted from costs, as detailed further in paragraph 2(4)(b);
- Burdens which make provision for budgeting and collecting payments from owners in relation to costs which will become association costs upon commencement of the Bill, as detailed further in paragraph 2(5)(a);
- Burdens which make provision in relation to the redistribution of liabilities among owners in the event that an owner is in default, as detailed further in paragraph 2(5)(b); and
- Burdens which make provision regarding the holding of funds on behalf of the owners, as detailed further in paragraph 2(5)(c).

141. Inevitably these burdens will not make reference to the owners' association, given that they will have been put in place at a time when those associations did not exist. Accordingly paragraph 2(6) provides that the specified burdens (in para 2(3)) are to be treated as if they relate to association decisions, costs, budgeting or funds.

142. Sub-paragraph (7) provides interpretative provision about the terms used in the paragraph.

For schedule A3 paragraphs 1-2 see recommendation 55, paragraph 8.62.

Registration of preservative deed of conditions

143. Paragraph 3 makes provision which, in certain circumstances during the transition period (see para 2(1)), requires an owners' association to register a deed which will preserve the effect of pre-commencement burdens after the default association rules set out in schedule A2 have come into force. This deed is known as a "preservative deed of conditions" (para 3(6)). In short, during the transition period, the association will be required to register a preservative deed of conditions on the request of any owner, unless a special majority of owners vote against that request.

144. Paragraph 3(1) sets out the conditions under which the procedure relating to the registration of a preservative deed of conditions will apply. Those conditions are: (a) that no tenement owners' association conditions affect the association; (b) a member of the association requests that a preservative deed of conditions is registered; and (c) such a request has not previously been made.

145. Paragraphs 3(2) and (3) set out the procedure which must be followed where such a request is made. The manager of the association must inform all other members that the request has been made, and that the deed will be prepared unless the association objects (para 2(a) and (b)). Owners having at least 75% of the allocated votes for the association must indicate their objection to the deed (para 2(c)) with owners having 28 days to notify the manager of their objection (para 2(2)(c) and (d)). Where there is no objection, the manager must prepare the preservative deed of conditions, give a copy to each member and inform members that the deed will be registered unless the association objects (para 3(3)(a) and (b)(i)). Again, an objection requires owners having at least 75% of the allocated votes to object. They have 28 days to notify the manager of that objection (para 3(3)(b)(ii) to (iii)). Where there is no objection to the deed, it must be registered by the manager (para 3(4)).

146. Paragraph 3(5) provides that where a flat is owned by two or more people in common, the 28-day period for objections only starts once the last co-owner has been informed or has received a copy of the deed.

147. Paragraph 3(6)(a) provides a detailed definition of "preservative deed of conditions". It confirms that such a deed can preserve conditions only where that is possible by way of permitted modification of the default association rules. Paragraph 3(6)(b) confirms that a reference to preparing a preservative deed of conditions includes a reference to instructing preparation of such a deed.

For schedule A3 paragraph 3 see recommendation 56, paragraph 8.73.

Section 3: Appointment of remedial manager

148. Section 3 of the Bill inserts new sections 3F and 3G into the 2004 Act. These new sections introduce a process for the appointment of a remedial manager to a tenement owners' association. This process acts as an enforcement mechanism where an association fails to meet its key duties under paragraph 8 of new schedule A1.

New section 3F – Application to First-tier Tribunal for appointment of remedial manager to tenement owners' association

149. Section 3F(2) provides that any person with an interest in the management of the owners' association may apply to the First-Tier Tribunal for Scotland (FTT) for an order removing the manager (if any) of the association and appointing a remedial manager to the association. The term "any person with an interest in the management of the owners' association" is deliberately wide and stretches beyond the owners of the tenement in question. Examples of parties with such an interest may include a tenant of a flat in the tenement or an owners' association of a neighbouring tenement.

150. The FTT may grant the order sought if it is satisfied both that the association is failing to carry out its key duties under paragraph 8(1) of schedule A1 and that it is reasonable to do so in the circumstances (section 3F(2)).

151. The FTT may appoint a member of the association or a registered property factor as the remedial manager, provided that the person in question has agreed to act on terms that the FTT considers reasonable (s 3F(3)(a) and (4)). Where the FTT is satisfied that there is no such person, it may appoint the local authority for the area in which the tenement is situated as the remedial manager (s 3F(3)(b)).

152. Section 3F(5) imposes a duty on the local authority for the area in which a tenement is situated to make an application for an order appointing a remedial manager (and, where appropriate, removing an existing manager) in circumstances where the association is in breach of its key duties under paragraph 8 of schedule A1, no other person has made or is likely to make an application, and it is reasonable to make such an application. It is not intended that the section 3F(5) duty should require a local authority to monitor the state of compliance by owners' associations with their key duties. The duty on the local authority will be triggered where it is brought or otherwise comes to the local authority's attention that an association is not complying with its duties (and, of course, the other requirements are met).

153. Section 3F(6) sets out information which must be included in an application for the appointment of a remedial manager. This includes specification of the duty (or duties) which the owners' association is considered to have breached, and either the name of a proposed remedial manager and their agreed terms of appointment, or alternatively confirmation that no agreement of this kind has been reached, along with evidence of attempts to find a suitable person.

154. Section 3F(8) makes provision as to when a remedial manager's appointment ends. This will be when the association appoints a manager, a new remedial manager is appointed, the current remedial manager no longer meets the eligibility criteria or the appointment ends under the agreed terms.

155. Section 3F(9) confirms that local authorities can recover the costs of making an application for the appointment of a remedial manager from the association.

For section 3F(1) see recommendation 44, paragraph 7.34 of the Report.

For sections 3F(1) and (2) see recommendation 40, paragraph 7.9 of the Report.

For sections 3F(3)(a) and 3F(4) see recommendation 41, paragraph 7.15 of the Report.

For sections 3F(3)(b) see recommendation 42, paragraph 7.25 of the Report.

For sections 3F(5) and (9) see recommendation 45, paragraph 7.40 of the Report.

For sections 3F(6)–(7) see recommendation 46, paragraph 7.44 of the Report.

For section 3F(8) see recommendation 48, paragraph 7.50 of the Report.

New section 3G – Remedial managers: functions

156. Section 3G makes provision about the functions of a remedial manager and recognises the limits of the role of the remedial manager.

157. Section 3G(1) provides that the remedial manager may do anything that a manager appointed under paragraph 9 of schedule A1 can do, but only in so far as that will bring the association into compliance with the key duties under paragraph 8(1) of schedule A1.

158. Accordingly while the remedial manager has the power to call an annual general meeting in order to comply with paragraph 8(1)(b) of schedule A1, they would not have power, for example, to propose the inclusion of improvement works within the annual budget, the latter not being something required to bring the association into compliance with its key duties.

159. Where a local authority is appointed as a remedial manager, section 3G(3) and (4) confirm that it can delegate that function to another person (but it retains responsibility), and also that it can recover fees and costs for acting as remedial manager. Scottish Ministers may specify by regulations the amount of fees or the costs which are recoverable by a local authority (s 3G(6)).

For section 3G(1) see recommendation 47, paragraph 7.47 of the Report.

For sections 3G(2)–(6) see recommendation 42, paragraph 7.25 of the Report.

Section 4: Application to First-tier Tribunal for budget approval

160. Section 4 of the Bill inserts new section 6A into the 2004 Act. Section 6A introduces a process which allows the manager of a tenement owners' association to apply to the FTT for approval of a budget for the association in circumstances where it has not been possible to agree one via the normal route. (Para 17 of schedule A2 sets out default rules on the budget approval process.)

161. Section 6A provides that the manager may apply to the FTT only if they have tried to get the association to approve a budget, following the association's rules, and the association has not done so (s 6A(1) and (2)). The application must be notified to all members of the association and must include the budget to be approved by the FTT (s 6A(3) and (4)).

162. Section 6A(5) sets out the circumstances in which the FTT may approve the budget. The FTT must be satisfied that the budget only includes costs that relate to work required to comply with the duty in section 8 of the 2004 Act (duty to maintain so as to provide support

and shelter etc.) or costs that relate to the running of the association, and that it is reasonable to approve the budget in the circumstances.

For section 4 of the Bill see recommendation 90, paragraph 11.28 of the Report.

Section 5: Debt recovery by third parties

163. Section 5 of the Bill inserts new section 13A into the 2004 Act. Section 13A makes provision to allow third party creditors to recover debts owed by the owners' association directly from owners.

164. Section 13A(1) sets out the circumstances in which a creditor can use this route. Those circumstances are essentially that the creditor has tried to recover the debt via formal debt enforcement proceedings, but has either been unsuccessful or it is clear that the association has no assets from which recovery of the debt can be made. In reality this points to the association having little or no money in the bank or in investments, given it is highly unlikely that an association will own any movable property of any significant value.

165. In those circumstances the creditor is entitled to recover the debt from the owners of the association who would be liable for it, and in the proportion to which they are liable for it, under the association rules (s 13A(2) and (3)). Where an owner is unable to pay due to their insolvency or if they cannot be found or identified, the remaining owners are required to pay an equal share of the amount due by that owner (s 13A(4) and (5)). That owner however is then liable to the other owners for any amount they have had to pay (s 13A(6)).

For section 5 of the Bill see recommendation 94, paragraph 11.53 of the Report.

Section 6: Jurisdiction of First-tier Tribunal in relation to disputes

166. Section 6 of the Bill makes changes to both sections 5 and 6 of the 2004 Act.

167. Section 5 of the 2004 Act made provision which allowed an owner to seek annulment of a collective decision taken by the other owners under the management scheme which applied to their tenement (unless that scheme was the development management scheme). That challenge was made by way of summary application in the sheriff court (s 5(1)). Section 6 of the 2004 Act made provision which allowed owners to apply to the sheriff, by summary application, for an order relating to any matter concerning either the operation of the management scheme for the tenement or the application of any provision of the 2004 Act as it applied to that tenement.

168. The decision of the sheriff in relation to applications under either section could be appealed to the Court of Session (ss 5(8) and 6(3)).

169. The effect of the changes made by section 6 of the Bill is that applications analogous to those discussed above will now be made to the First-tier Tribunal for Scotland (FTT) rather than the sheriff court. Under section 5, as amended by the Bill, an owner can make an application to the FTT to annul a decision of the owners' association provided that they were

not in favour of it, or they were not an owner at the time the decision was made but have since become an owner (s 5(1) and (2))

170. Under section 6, as amended by the Bill, the owners' association or any owner may apply to the FTT for an order concerning the operation of the owners' association, the association's rules or the application of any provision of the 2004 Act to the tenement.

171. An appeal against the decision of the FTT, in relation to applications made under either section, lies to the Upper Tribunal.

For section 6(1)-(3) of the draft Bill see recommendation 71, paragraph 9.72 of the Report. For sections 6(1), (4) and (5) of the draft Bill see recommendation 92, paragraph 11.41 of the Report.

Section 7: Duty to maintain tenement property

172. Section 7 of the Bill makes amendments to extend and clarify section 8 (duty to maintain so as to provide support and shelter etc.) of the 2004 Act. Under section 8 as amended owners of any part of the tenement must maintain that part so as to continue to provide support and shelter to any other part of the tenement, to prevent damage to any part of the tenement and in the interests of health and safety.

173. The right to enforce this duty is also extended to the owners' association where the part of the tenement in question is association property (Bill schedule, para 6). Additionally, an owner who carries out maintenance by virtue of this duty to any part of the tenement which is association property may recover the costs of that work from the association (Bill schedule, para 8).

For section 7 of the Bill see recommendation 1, paragraph 3.26 of the Report.

Schedule to the Bill

174. The schedule of the Bill makes modifications to enactments. A large number of these are consequential modifications following from the provisions of the Bill. Some of these provisions have been discussed above, but the following are also of note.

175. Paragraph 2 amends the 2004 Act to repeal the Tenement Management Scheme.

176. Paragraph 7 amends section 9 (prohibition on interference with support or shelter etc.) of the 2004 Act to allow an owners' association to enforce the prohibition against impairment of support or shelter or natural light insofar as that relates to association property.

177. Paragraph 11 amends section 13 (notice of potential liability for costs: further provision) of the 2004 Act to allow the owners' association to register a notice of potential liability for costs.

178. Paragraph 13 amends section 17 (access for maintenance and other purposes) of the 2004 Act to allow an owners' association to take access to another owner's property (following reasonable notice) to carry out, among other things, maintenance and inspections.

179. Paragraph 15 amends section 21 (cost of demolishing tenement building) of the 2004 Act to provide that, where a tenement has an owners' association, the cost of demolishing that tenement is an association cost.

180. Paragraphs 16 and 17 amend sections 22 (use and disposal of site where tenement building demolished) and 23 (sale of abandoned tenement) of the 2004 Act to allow an owners' association to apply for power to sell, respectively, the site of a demolished tenement or an abandoned tenement building. Consequential amendments to schedule 3 (sale under section 22(3) or 23(1)) of the 2004 Act are made by paragraph 23 of the schedule of the Bill.

181. Paragraph 18 amends section 24 (liability to non-owner for certain damage costs) of the 2004 Act to allow an owners' association to be treated as an owner of certain parts of the tenement building for the purposes of recouping the costs of damage done to the building.

182. Paragraph 20(b) amends section 29 (interpretation) to insert a definition of "emergency work."

183. Paragraph 25(2)(a) amends section 2(2) of the Property Factors (Scotland) Act 2011 to provide that neither a tenement owners' association nor a local authority acting as a remedial manager of last resort are property factors for the purposes of that Act.

184. Paragraph 25(2)(b) inserts new sections 2(2A) and (2B) into the Property Factors (Scotland) Act 2011. The effect of these new subsections is that an owner of a flat who acts as the association manager is not to be considered to be acting in the course of their business simply because they receive some form of remuneration for doing so. This provision does not exclude the possibility that an owner-manager could be acting in the course of their business when exercising the functions of manager, but provides that that conclusion does not necessarily follow solely because they receive remuneration.

185. Paragraph 26 inserts new sections 64A, 64B and 64C into the Land Registration etc. (Scotland) Act 2012. These sections make provision regarding tenement identification information applications. It is a duty of the tenement owners' association to make such an application in terms of paragraphs 8(1)(d) and 11 of schedule A1 of the 2004 Act.

186. Section 64A makes provision to allow an owners' association to have a note of tenement identification information entered on the Land Register or recorded in the Register of Sasines (s 64A(1)(a)). Section 64A(1)(b) allows for the amendment of any such note which is already entered on the Land Register (see also subsection (5)). No equivalent provision is made for a note entered in the Register of Sasines, since amendment of a note in this Register is not possible. A new note with the updated information must instead be recorded. Section 64A(2) sets out what is meant by tenement identification information and includes matters such as the name of the owners' association for the tenement and the address of each flat in the tenement.

187. Section 64B makes provision for the removal of a note of tenement identification information where the tenement ceases to exist.

188. Section 64C creates a statutory offence where a person knowingly or recklessly makes a materially false or misleading statement in an application regarding tenement identification information (s 64C(1)(a)). It is also an offence to intentionally fail to disclose material or be reckless as to whether all material information is disclosed in an application (s 64C(1)(b)).

189. The offence can be committed by either the person making the application or a person who acts as solicitor or legal advisor to the applicant (s 64(2)).

190. Section 64C(3) and (5) makes provision regarding a defence to the section 64(1) offence that the accused took all reasonable precautions and exercised all due diligence in relation to the application.

191. Section 64C(6) and (7) sets out the requirements which an accused person must follow before they can rely on a defence involving an allegation that the offence was committed because the accused relied on information provided by another person. Subsection (8) sets out an exception to the section 65C(6) and (7) requirements in circumstances where the accused lodges a defence statement under relevant provisions of the Criminal Procedure (Scotland) Act 1995 and the Criminal Justice and Licensing (Scotland) Act 2010.

192. Section 64C(9) sets out the penalties applicable for this offence.

For paragraphs 6, 7, 13 and 14 of the schedule see recommendation 86, paragraph 11.13 of the Report.

For paragraph 9 of the schedule see recommendation 87, paragraph 11.18 of the Report.

For paragraph 11 of the schedule see recommendation 88, paragraph 11.23 of the Report.

For paragraph 12 of the schedule see recommendation 89, paragraph 11.25 of the Report.

For paragraphs 16, 17 and 23 of the schedule see recommendation 12, paragraph 4.54 of the Report.

For paragraph 20 of the schedule see recommendation 33, paragraph 5.85 of the Report.

For paragraphs 25(1) and 25(2)(a) of the schedule see recommendation 22, paragraph 4.98 of the Report or recommendation 43, paragraph 7.31 of the Report.

For paragraphs 25(1) and 25(2)(b) of the schedule see recommendation 30, paragraph 5.68 of the Report.

For paragraph 26 of the schedule see recommendation 38, paragraph 6.41 of the Report.

Appendix C: Tenements (Scotland) Act 2004

KEELING SCHEDULE

This is a version of the Tenements (Scotland) Act 2004 showing the changes which would be made by the draft Tenements (Amendment) (Scotland) Bill. While every effort has been made to ensure its accuracy, its contents are not guaranteed.

Boundaries and pertinents

1 Determination of boundaries and pertinents

(1) Except in so far as any different boundaries or pertinents are constituted by virtue of the title to the tenement, or any enactment, the boundaries and pertinents of sectors of a tenement shall be determined in accordance with sections 2 and 3 of this Act.

(2) In this Act, "title to the tenement" means—

(a) any conveyance, or reservation, of property which affects—

(i) the tenement; or

(ii) any sector in the tenement; and

(b) where—

(i) the tenement; or

(ii) any sector in the tenement,

has been registered in the Land Register of Scotland, the relevant title sheet.

2 Tenement boundaries

(1) Subject to subsections (3) to (7) below, the boundary between any two contiguous sectors is the median of the structure that separates them; and a sector—

(a) extends in any direction to such a boundary; or

(b) if it does not first meet such a boundary–

(i) extends to and includes the solum or any structure which is an outer surface of the tenement building; or

(ii) extends to the boundary that separates the sector from a contiguous building which is not part of the tenement building.

(2) For the purposes of subsection (1) above, where the structure separating two contiguous sectors is or includes something (as for example, but without prejudice to the generality of this subsection, a door or window) which wholly or mainly serves only one of those sectors, the thing is in its entire thickness part of that sector.

(3) A top flat extends to and includes the roof over that flat.

(4) A bottom flat extends to and includes the solum under that flat.

(5) A close extends to and includes the roof over, and the solum under, the close.

(6) Where a sector includes the solum (or any part of it) the sector shall also include, subject to subsection (7) below, the airspace above the tenement building and directly over the solum (or part).

(7) Where the roof of the tenement building slopes, a sector which includes the roof (or any part of it) shall also include the airspace above the slope of the roof (or part) up to the level of the highest point of the roof.

3 Pertinents

(1) Subject to subsection (2) below, there shall attach to each of the flats, as a pertinent, a right of common property in (and in the whole of) the following parts of a tenement—

(a) a close;

(b) a lift by means of which access can be obtained to more than one of the flats.

(2) If a close or lift does not afford a means of access to a flat then there shall not attach to that flat, as a pertinent, a right of common property in the close or, as the case may be, lift.

(3) Any land (other than the solum of the tenement building) pertaining to a tenement shall attach as a pertinent to the bottom flat most nearly adjacent to the land (or part of the land); but this subsection shall not apply to any part which constitutes a path, outside stair or other way affording access to any sector other than that flat.

(4) If a tenement includes any part (such as, for example, a path, outside stair, fire escape, rhone, pipe, flue, conduit, cable, tank or chimney stack) that does not fall within subsection (1) or (3) above and that part—

(a) wholly serves one flat, then it shall attach as a pertinent to that flat;

(b) serves two or more flats, then there shall attach to each of the flats served, as a pertinent, a right of common property in (and in the whole of) the part.

(5) For the purposes of this section, references to rights of common property being attached to flats as pertinents are references to there attaching to each flat equal rights of common property; except that where the common property is a chimney stack the share allocated to a flat shall be determined in direct accordance with the ratio which the number of flues serving it in the stack bears to the total number of flues in the stack.

Tenement owners' associations

3A Establishment of tenement owners' associations

(1) A tenement owners' association is established for a tenement in accordance with this section.

(2) An association is established for a tenement—

(a) where the tenement exists on the day on which section 1 of the Tenements (Amendment) (Scotland) Act 2025 comes into force, on that day,

(b) where the tenement comes into existence after that section comes into force, on the day on which the tenement comes into existence,

unless, on the day mentioned in paragraph (a) or (as the case may be) (b), the development management scheme applies to the tenement.

(3) Where the development management scheme ceases to apply to a tenement by virtue of section 73(1) of the Title Conditions (Scotland) Act 2003, an association is established for the tenement on the day on which the scheme ceases to apply to the tenement.

(4) Schedule A1 makes further provision about tenement owners' associations.

3B Winding up and dissolution of association

(1) A tenement owners' association for a tenement must be wound up if—

(a) the development management scheme takes effect in relation to the tenement by virtue of section 71(1) of the Title Conditions (Scotland) Act 2003, or

(b) the tenement ceases to be a tenement.

(2) The winding up period is—

(a) the period of 6 months beginning with the day on which the event mentioned in subsection (1)(a) or (b) occurs, or

(b) such longer period beginning with that day as the association may determine.

(3) During the winding up period—

(a) the association—

(i) no longer has the function and powers mentioned in paragraph 4 of schedule A1, but

(ii) has the power to do anything which is necessary to wind up the association,

(b) paragraphs 8(1)(b), (c) and (d), 10, 11 and 20(c) of schedule A1 do not apply in relation to the association.

(4) The manager of the association must begin winding up the association as soon as practicable after the winding up period begins.

(5) During the winding up period, the manager must, in particular—

(a) pay any debts due by the association out of the funds of the association,

(b) after doing so, distribute any remaining funds amongst the owners in the proportions in which the owners contributed to the funds,

(c) prepare the association's final accounts,

(d) give each member of the association a copy of those accounts,

(e) where tenement owners' association conditions which affect the tenement are registered against land in the Land Register of Scotland, notify the Keeper of the Registers of Scotland that the Register will become inaccurate as regards those conditions when the association is dissolved.

(6) The final accounts must set out how the association has been wound up, including how any remaining funds were distributed.

(7) The association is dissolved at the end of the winding up period.

(8) Subject to any association decision, any rights or liabilities of the association subsisting immediately before it is dissolved are, when the association is dissolved—

(a) transferred to the owners, and

(b) shared amongst the owners in equal proportions.

(9) Where the tenement ceases to be a tenement, the members of the association during the winding up period are the persons who were its members immediately before the winding up period began.

(10) For the purposes of subsection (2), where a tenement ceases to be a tenement, the day on which that event is taken to occur is—

(a) the day on which a completion certificate is accepted under section 18 of the Building (Scotland) Act 2003 in respect of the work to, or conversion of, the tenement building which has resulted in the tenement ceasing to exist, or

(b) such other day as may be determined by the First-tier Tribunal for Scotland on an application under section 3C.

3C Application to First-tier Tribunal to determine certain dates

A person with an interest in a tenement owners' association for a tenement may apply to the First-tier Tribunal for Scotland for an order determining any of the following—

(a) the date on which—

(i) the tenement came into existence,

(ii) the tenement ceased to be a tenement,

(iii) the association was established,

(iv) the association was dissolved,

(b) whether, on a particular date—

(i) the tenement existed,

(ii) the association existed.

Operation of tenement owners' associations

3D Tenement owners' association rules

(1) The rules of a tenement owners' association for a tenement are—

(a) the rules set out in tenement owners' association conditions ("association conditions") which affect the tenement, or

(b) where there are no such conditions, the default association rules set out in schedule A2.

(2) "Tenement owners' association conditions" are real burdens—

(a) to which each flat in the tenement is subject,

(b) which are contained in one constitutive deed, and

(c) which replicate the default association rules in force when the burdens are created—

(i) with the substitution of any reference in the rules to "this Act" with a reference to "the Tenements (Scotland) Act 2004",

(ii) otherwise, with no modifications or only with modifications which are permitted by regulations made by the Scottish Ministers.

(3) Where real burdens which are association conditions are varied, the reference in subsection (2)(c) to the default association rules in force when the real burdens are

created is to be read, in relation to any provision of the real burdens which is varied, as a reference to the default association rules in force when the burdens are varied.

(4) A difference between real burdens and the default association rules (other than a difference mentioned in subsection (2)(c)(i) or (ii)) does not prevent the real burdens being association conditions unless the difference—

(a) causes the real burdens to have a different effect than they would have without the difference, or

(b) is misleading.

(5) The validity of anything done in good faith in accordance with a real burden which purports to be an association condition is not affected by its not being an association condition.

(6) The default association rules are to be construed as if they were real burdens (see section 14 of the Title Conditions (Scotland) Act 2003).

(7) In this section, "constitutive deed" has the meaning given by section 122(1) of the Title Conditions (Scotland) Act 2003.

(8) Schedule A3 makes provision about the application of the default association rules during the transition period.

3E Tenement owners' association conditions: further provision

(1) A deed of discharge granted in relation to a real burden which is one of a number of real burdens constituting the tenement owners' association conditions affecting a tenement is of no effect unless it discharges all of the real burdens which constitute those conditions.

(2) When a tenement owners' association for a tenement is dissolved, any association conditions which affect the tenement are extinguished.

(3) Sections 90 (powers of Lands Tribunal as respects title conditions) and 91 (special provision as to variation or discharge of community burdens) of the Title Conditions (Scotland) Act 2003 do not apply in relation to real burdens which are association conditions.

3F Application to First-tier tribunal for appointment of remedial manager to tenement owners' association

(1) A person who has an interest in the management of a tenement by a tenement owners' association may apply to the First-tier Tribunal for Scotland for an order—

(a) removing the manager (if any) of the association, and

(b) appointing a remedial manager to the association.

(2) The Tribunal may make an order under subsection (1) if satisfied that—

(a) the association is in breach of a duty under paragraph 8(1) of schedule A1, and

(b) it is reasonable in all the circumstances to make the order.

(3) The Tribunal may appoint as the remedial manager—

(a) a person mentioned in subsection (4), or

(b) if satisfied that there is no such person, the local authority for the area in which the tenement is situated.

(4) A person referred to in subsection (3) is a person who—

(a) is—

(i) a member of the association, or

(ii) a registered property factor, and

(b) has agreed to be appointed as remedial manager on terms which the Tribunal is satisfied are reasonable in all the circumstances.

(5) The local authority for the area in which the tenement building is situated must make an application for an order under subsection (1) if the authority considers that—

(a) the association is in breach of a duty under paragraph 8(1) of schedule A1,

(b) no other person has made, or is likely to make, an application for the order, and

(c) it is reasonable in all the circumstances to make the application.

(6) An application for an order under subsection (1) must—

(a) specify any duty under paragraph 8(1) of schedule A1 of which the applicant considers the association to be in breach, and

(b) either—

(i) specify a person mentioned in subsection (4) whom the applicant proposes be appointed as the remedial manager, the terms on which it is proposed the person be appointed and that the person is content to be appointed on those terms, or

(ii) state that the applicant has not obtained the agreement of a person mentioned in subsection (4) to be appointed as the remedial manager.

(7) Where the application includes a statement under subsection (6)(b)(ii), it must be accompanied by evidence that the applicant has attempted to obtain the agreement of a person mentioned in subsection (4) to be appointed as the remedial manager.

(8) The appointment of a remedial manager comes to an end when—

(a) the association appoints a manager under paragraph 9 of schedule A1,

(b) a new remedial manager is appointed under subsection (1), or

(c) where the remedial manager is not a local authority appointed under subsection (3)(b)—

(i) the remedial manager ceases to be a member of the association or a registered property factor, or

(ii) the appointment ends under the terms of the appointment.

(9) Where a local authority makes an application under subsection (1), the authority may recover the costs of making the application from the association.

(10) In this section, "registered property factor" is to be construed in accordance with section 31 (interpretation) of the Property Factors (Scotland) Act 2011.

3G Remedial managers: functions

(1) A remedial manager of a tenement owners' association—

(a) may do anything that a manager appointed under paragraph 9 of schedule A1

may do so far as is necessary for the association to comply with its duties under paragraph 8(1) of that schedule,

(b) does not otherwise have any of the functions of a manager appointed under that paragraph.

(2) Subsections (3) and (4) apply where a local authority is appointed as a remedial manager under section 3F(3)(b).

(3) The authority may appoint a person to exercise the remedial manager's functions on its behalf (but, where it does so, remains responsible for the exercise of those functions).

(4) The authority may recover from the association—

(a) a fee for acting as the remedial manager,

(b) costs incurred by the authority in so acting.

(5) The Scottish Ministers may by regulations make provision about—

(a) the amount of the fee which may be recovered under subsection (4)(a),

(b) the costs which may be recovered under subsection (4)(b).

(6) Regulations under subsection (5) may—

(a) include transitional, transitory or saving provision,

(b) make different provision for different purposes.

4A Power of local authority to pay share of association costs

(1) The local authority for the area in which a tenement is situated may pay a sum representing an owner's share of association costs if that owner—

(a) is unable or unwilling to do so, or

(b) cannot, by reasonable inquiry, be identified or found.

(2) But a local authority may not pay a sum representing an owner's share of association costs incurred in relation to a common policy of insurance for the tenement.

(3) For the purposes of this section an owner's share of any association costs is the share of those costs for which the owner is liable in accordance with the tenement owners' association's rules.

(4) Before making a payment under this section, the local authority must give notice to the owner who has failed to pay a share of any association costs.

(5) The local authority may recover from the owner who failed to pay a share of any association costs any—

(a) payments made under this section, and

(b) administrative expenses incurred by it in connection with the making of the payment.

(6) This section is without prejudice to any entitlement to recover sums in accordance with section 11 or 12.

5 Application to First-tier Tribunal for annulment of certain decisions

(1) Where a decision is made by a tenement owners' association for a tenement in accordance with the association's rules, an owner mentioned in subsection (2) below may apply to the First-tier Tribunal for Scotland for an order annulling the decision.

(2) That owner is—

(a) any owner who, at the time the decision referred to in subsection (1) above was made, was not in favour of the decision; or

(b) any new owner, that is to say, any person who was not an owner at that time but who has since become an owner.

(3) For the purposes of any such application, the defender shall be the tenement owners' association.

(4) An application under subsection (1) above shall be made—

(a) in a case where the decision was made at a meeting attended by the owner making the application, not later than 28 days after the date of that meeting; or

(b) in any other case, not later than 28 days after the date on which notice of the making of the decision was given to the owner for the time being of the flat in question.

(5) The Tribunal may, if satisfied that the decision—

(a) is not in the best interests of all (or both) the owners of flats in the tenement taken as a group; or

(b) is unfairly prejudicial to one or more of the owners, make an order annulling the decision (in whole or in part).

(6) Where such an application is made as respects a decision to carry out maintenance, improvements or alterations, the Tribunal shall, in considering whether to make an order under subsection (5) above, have regard to—

(a) the age of the property which is to be maintained, improved or, as the case may be, altered;

(b) its condition;

(c) the likely cost of any such maintenance, improvements or alterations; and

(d) the reasonableness of that cost.

(7) Where the Tribunal makes an order under subsection (5) above annulling a decision (in whole or in part), the Tribunal may make such other, consequential, order as the Tribunal thinks fit (as, for example, an order as respects the liability of an owner or the association for any costs already incurred).

(8) ...

(9) ...

(10) Where an owner is entitled to make an application under subsection (1) above in relation to any decision, no step shall be taken to implement that decision unless—

(a) the period specified in subsection (4) above within which such an application is to be made has expired without such an application having been made and notified to the association; or

(b) where such an application has been so made and notified—

(i) the application has been disposed of and either the period for making an appeal against the Tribunal's decision has expired without such an appeal having been made or such an appeal has been made and disposed of; or

(ii) the application has been abandoned.

(11) Subsection (10) above does not apply to a decision relating to work which requires to be carried out urgently.

6 Application to First-tier Tribunal for order resolving certain disputes

(1) A tenement owners' association for a tenement or an owner may apply to the First-tier Tribunal for Scotland for an order relating to any matter concerning the operation of—

(a) the tenement owners' association or the association's rules, or

(b) any provision of this Act in its application as respects the tenement.

(2) Where an application is made under subsection (1) above the Tribunal may, subject to such conditions (if any) as the Tribunal thinks fit—

(a) grant the order; or

(b) make such other order under this section as the Tribunal considers necessary or expedient.

(3) ...

(4) ...

(5) The Tribunal may make any order under subsection (2)(b) that it would be competent for the Tribunal to make if proceedings under this section were civil proceedings.

6A Application to First-tier Tribunal for approval of association budget

(1) The manager of a tenement owners' association for a tenement may apply to the First-tier Tribunal for Scotland to approve a budget for the association for a financial year.

(2) The manager may make an application under subsection (1) only if—

(a) the manager has attempted to obtain the approval of the association for a budget for that year in accordance with the association's rules, and

(b) the association has not approved a budget.

(3) An application under subsection (1) must include the budget to be approved.

(4) The manager must notify the members of the association of an application made under subsection (1).

(5) The Tribunal may approve the budget only if the Tribunal is satisfied that—

(a) the budget includes only costs which relate to—

(i) work required in order for the owners of flats in the tenement to comply with section 8, or

(ii) the running of the association (including the cost of making an application under subsection (1)), and

(b) it is reasonable to do so in the circumstances.

Support and shelter

7 Abolition as respects tenements of common law rules of common interest

Any rule of law relating to common interest shall, to the extent that it applies as respects a tenement, cease to have effect; but nothing in this section shall affect the operation of any such rule of law in its application to a question affecting both a tenement and—

(a) some other building or former building (whether or not a tenement); or

(b) any land not pertaining to the tenement.

8 Duty to maintain so as to provide support and shelter etc.

(1) The owner of any part of a tenement building must maintain that part—

(a) if that part provides, or is intended to provide, support or shelter to any other part, so as to ensure that it provides support or shelter,

(b) so as to prevent damage to any part of the tenement,

(c) in the interests of health and safety.

(2) An owner shall not by virtue of subsection (1) above be obliged to maintain any part of a tenement building if it would not be reasonable to do so, having regard to all the circumstances (and including, in particular, the age of the tenement building, its condition and the likely cost of any maintenance).

(3) The duty imposed by subsection (1) above on an owner of a part of a tenement building may be enforced—

(a) by any other such owner who is, or would be, directly affected by any breach of the duty, or

(b) insofar as the duty relates to association property, by the tenement owners' association.

(4) Where two or more persons own any such part of a tenement building as is referred to in subsection (1) above in common, any of them may, without the need for the agreement of the others, do anything that is necessary for the purpose of complying with the duty imposed by that subsection.

9 Prohibition on interference with support or shelter etc.

(1) No owner or occupier of any part of a tenement shall be entitled to do anything in relation to that part which would, or would be reasonably likely to, impair to a material extent—

(a) the support or shelter provided to any part of the tenement building; or

(b) the natural light enjoyed by any part of the tenement building.

(2) The prohibition imposed by subsection (1) above on an owner or occupier of a part of a tenement may be enforced—

(a) by any other such owner who is, or would be, directly affected by any breach of the prohibition, or

(b) insofar as the prohibition relates to association property, by the tenement owners' association.

10 Recovery of costs incurred by virtue of section 8

(1) Where—

(a) by virtue of section 8 of this Act an owner carries out maintenance to any part of a tenement to which the development management scheme applies; and

(b) that scheme as it applies as respects the tenement provides for the maintenance of that part,

the owner shall be entitled to recover from any other owner any share of the cost of the maintenance for which that other owner would have been liable had the maintenance been carried out by virtue of the development management scheme.

(2) Where in any other case an owner carries out maintenance by virtue of section 8 to any part of a tenement which is association property, the owner is entitled to recover from the tenement owners' association the costs of the maintenance carried out to the association property.

Repairs: costs and access

11 Determination of when an owner's liability for certain costs arises

(1) An owner is liable for any relevant costs (other than accumulating relevant costs) arising from an association decision from the date when the association decision to incur those costs is made.

(2) For the purposes of subsection (1) above, an association decision is, in relation to an owner, taken to be made on—

(a) where the decision is made at a meeting, the date of the meeting; or

(b) in any other case, the date on which notice of the making of the decision is given to the owner.

(3) An owner is liable for any relevant costs arising from any emergency work from the date on which the work is instructed.

(4) An owner is liable for any relevant costs recoverable by a local authority in respect of work relating to any association property carried out by the authority by virtue of any enactment from the date of any statutory notice requiring the carrying out of the work to which those costs relate.

(5) An owner is liable for any accumulating relevant costs (such as the cost of an insurance premium) on a daily basis.

(6) Except where subsection (1) above applies in relation to the costs, an owner is liable for any relevant costs arising from work instructed by a manager from the date on which the work is instructed.

(7) An owner is liable in accordance with section 10 of this Act for any relevant costs arising from maintenance carried out by virtue of section 8 of this Act from the date on which the maintenance is completed.

(8) An owner is liable for any relevant costs other than those to which subsections (1) to (7) above apply from—

(a) such date; or

(b) the occurrence of such event,

as may be stipulated as the date on, or event in, which the costs become due.

(9) For the purposes of this section and section 12 of this Act, "relevant costs" means, as respects a flat—

(a) the share of any association costs for which the owner is liable by virtue of the rules of a tenement owners' association; and

(b) any costs for which the owner is liable by virtue of this Act.

(10) In this section, "manager" means the manager of a tenement owners' association.

12 Liability of owner and successors for certain costs

(1) Any owner who is liable for any relevant costs shall not, by virtue only of ceasing to be such an owner, cease to be liable for those costs.

(2) Subject to subsection (3) below, where a person becomes an owner (any such person being referred to in this section as a "new owner"), that person shall be severally liable with any former owner of the flat for any relevant costs for which the former owner is liable.

(3) A new owner shall be liable as mentioned in subsection (2) above for relevant costs relating to any maintenance or work (other than local authority work) carried out before the acquisition date only if—

(a) notice of the maintenance or work—

(i) in, or as near as may be in, the form set out in schedule 2 to this Act; and

(ii) containing the information required by the notes for completion set out in that schedule,

(such a notice being referred to in this section and section 13 of this Act as a "notice of potential liability for costs") was registered in relation to the new owner's flat at least 14 days before the acquisition date; and

(b) the notice had not expired before the acquisition date.

(4) In subsection (3) above—

"acquisition date" means the date on which the new owner acquired right to the flat; and

"local authority work" means work carried out by a local authority by virtue of any enactment.

(5) Where a new owner pays any relevant costs for which a former owner of the flat is liable, the new owner may recover the amount so paid from the former owner.

(5A) Where a new owner pays an amount to a tenement owners' association—

(a) for which a former owner of the flat is liable, and

(b) which does not relate to relevant costs mentioned in subsection (5), the new owner may recover the amount so paid from the former owner.

(6) This section applies as respects any relevant costs for which an owner becomes liable on or after the day on which this section comes into force.

13 Notice of potential liability for costs: further provision

(1) A notice of potential liability for costs—

(a) may be registered in relation to a flat only on the application of—

(i) the owner of the flat;

(ii) the owner of any other flat in the same tenement;

(iia) a local authority entitled to recover costs under section 4A(5), or

(iib) the tenement owners' association for the tenement (if any), and

(iii) ...

(b) shall not be registered unless it is signed by or on behalf of the applicant.

(2) A notice of potential liability for costs may be registered—

(a) in relation to more than one flat in respect of the same maintenance or work; and

(b) in relation to any one flat, in respect of different maintenance or work.

(3) A notice of potential liability for costs expires at the end of the period of 3 years beginning with the date of its registration, unless the notice is renewed by being registered again before the end of that period.

(3A) The owner of a flat may apply to register a notice (a "notice of discharge") if—

(a) a notice of potential liability for costs in relation to the flat has not expired,

(b) the liability for costs under section 12(2) to which the notice of potential liability relates has, in relation to the flat which is the subject of the application, been fully discharged, and

(c) the person who registered the notice of potential liability for costs consents to the application.

(3B) A notice of discharge—

(a) must be in the form prescribed by order made by the Scottish Ministers, and

(b) on being registered, discharges the notice of potential liability for costs as it applies to the flat which is the subject of the application.

(4) This section applies to a renewed notice of potential liability for costs as it applies to any other such notice.

(5) The Keeper of the Registers of Scotland shall not be required to investigate or determine whether the information contained in any notice of potential liability for costs submitted for registration is accurate.

(6) The Scottish Ministers may by order amend schedule 2 to this Act.

(7) In section 12 of the Land Registration (Scotland) Act 1979 (c. 33), in subsection (3) (which specifies losses for which there is no entitlement to be indemnified by the Keeper under that section), after paragraph (p) there shall be added—

"(q) the loss arises in consequence of an inaccuracy in any information

contained in a notice of potential liability for costs registered in pursuance of—

(i) section 10(2A)(a) or 10A(3) of the Title Conditions (Scotland) Act 2003 (asp 9); or

(ii) section 12(3)(a) or 13(3) of the Tenements (Scotland) Act 2004 (asp 11).”

13A Third party’s right to recover debt from owners

(1) This section applies where—

(a) a tenement owners’ association for a tenement owes a debt which is constituted by—

(i) decree, or

(ii) a document which has been registered for execution in the Books of Council and Session or (as the case may be) in the appropriate sheriff court books kept for any sheriffdom, and

(b) either—

(i) the creditor has executed diligence but has not recovered the debt in full, or

(ii) it does not appear that the association has any assets which reasonably could be recovered by diligence.

(2) The creditor is entitled to recover a proportion of the debt from each of the owners of flats in the tenement who are liable for the costs to which the debt relates under the association’s rules.

(3) The proportion recoverable from each owner is the proportion for which the owner is liable under the rules.

(4) Subsection (5) applies where all or part of the proportion of the debt owed by an owner cannot be recovered from the owner for some reason such as that—

(a) the owner is insolvent, or

(b) the owner cannot, by reasonable inquiry, be identified or found.

(5) The creditor is entitled to recover from each other owner mentioned in subsection (2) an equal share of the amount that cannot be recovered.

(6) The owner mentioned in subsection (4) is liable to each other owner for any amount which the other owner pays under subsection (5).

14 Former owner’s right to recover costs

An owner who is entitled, by virtue of the rules of a tenement management scheme or any provision of this Act, to recover any costs or a share of any costs from the association or any other owner shall not, by virtue only of ceasing to be an owner, cease to be entitled to recover those costs or that share.

15 Prescriptive period for costs to which section 12 relates

In Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (c. 52)(obligations affected by prescriptive periods of five years to which section 6 of that Act applies)—

(a) after paragraph 1(ab) there shall be inserted—

"(ac) to any obligation to pay a sum of money by way of costs to which section 12 of the Tenements (Scotland) Act 2004 (asp 11) applies;"; and

(b) in paragraph 2(e), for the words "or (ab)" there shall be substituted ", (ab) or (ac)".

16 Common property: disapplication of common law right of recovery

Any rule of law which enables an owner of common property to recover the cost of necessary maintenance from the other owners of the property shall not apply in relation to any common property in a tenement where the maintenance of that property is provided for in the management scheme which applies as respects the tenement.

17 Access for maintenance and other purposes

(1) Where an owner or an owners' association for a tenement gives reasonable notice to the owner or occupier of any other part of the tenement that access is required to, or through, that part for any of the purposes mentioned in subsection (3) below, the person given notice shall, subject to subsection (5) below, allow access for that purpose.

(2) ...

(3) The purposes are—

(a) carrying out maintenance or other work by virtue of the management scheme which applies as respects the tenement;

(b) carrying out maintenance to any part of the tenement owned (whether solely or in common) by the person requiring access;

(c) carrying out an inspection to determine whether it is necessary to carry out maintenance;

(d) determining whether the owner of the part is fulfilling the duty imposed by section 8(1) of this Act;

(e) determining whether the owner or occupier of the part is complying with the prohibition imposed by section 9(1) of this Act;

(f) doing anything which the owner giving notice is entitled to do by virtue of section 19(1) of this Act;

(g) where floor area is relevant for the purposes of determining any liability of owners, measuring floor area; and

(h) where a power of sale order has been granted in relation to the tenement building or its site, doing anything necessary for the purpose of or in connection with any sale in pursuance of the order (other than complying with paragraph 4(3) of schedule 3 to this Act).

(4) Reasonable notice need not be given as mentioned in subsection (1) above where access is required for the purpose specified in subsection (3)(a) above and the maintenance or other work requires to be carried out urgently.

(5) An owner or occupier may refuse to allow—

(a) access under subsection (1) above; or

(b) such access at a particular time,

if, having regard to all the circumstances (and, in particular, whether the requirement for access is reasonable), it is reasonable to refuse access.

(6) Where access is allowed under subsection (1) above for any purpose, such right of access may be exercised by—

(a) the owner who or owners' association which gave notice that access was required; or

(b) such person as the owner or, as the case may be, owners' association may authorise for the purpose (any such person being referred to in this section as an "authorised person").

(7) Where an authorised person acting in accordance with subsection (6) above is liable by virtue of any enactment or rule of law for damage caused to any part of a tenement, the owner who or owners' association which authorised that person shall be severally liable with the authorised person for the cost of remedying the damage; but an owner or, as the case may be, owners' association making any payment as respects that cost shall have a right of relief against the authorised person.

(8) Where access is allowed under subsection (1) above for any purpose, the owner who or owners' association which gave notice that access was required (referred to as the "accessing owner or association") shall, so far as reasonably practicable, ensure that the part of the tenement to or through which access is allowed is left substantially in no worse a condition than that which it was in when access was taken.

(9) If the accessing owner or association fails to comply with the duty in subsection (8) above, the owner of the part to or through which access is allowed may—

(a) carry out, or arrange for the carrying out of, such work as is reasonably necessary to restore the part so that it is substantially in no worse a condition than that which it was in when access was taken; and

(b) recover from the accessing owner or association any expenses reasonably incurred in doing so.

(10) In this section, "owners' association" means—

(a) a tenement owners' association, or

(b) an owners' association established by the development management scheme.

Insurance

18 Obligation of owner to insure

(1) It shall be the duty of each owner to effect and keep in force a contract of insurance against the prescribed risks for the reinstatement value of that owner's flat and any part of the tenement building attaching to that flat as a pertinent.

(2) The duty imposed by subsection (1) above may be satisfied, in whole or in part, by way of a common policy of insurance arranged for the entire tenement building.

(3) The Scottish Ministers may by order prescribe risks against which an owner shall require to insure (in this section referred to as the "prescribed risks").

(4) Where, whether because of the location of the tenement or otherwise, an owner—

(a) having made reasonable efforts to do so, is unable to obtain insurance against a particular prescribed risk; or

(b) would be able to obtain such insurance but only at a cost which is unreasonably high,

the duty imposed by subsection (1) above shall not require an owner to insure against that particular risk.

(5) Any owner may by notice in writing request the owner of any other flat in the tenement, and the tenement owners' association for the tenement (if any) may by notice in writing request the owner of any flat in the tenement, to produce evidence of—

(a) the policy in respect of any contract of insurance which the recipient is required to have or to effect; and

(b) payment of the premium for any such policy,

and not later than 14 days after that notice is given the recipient shall produce to the owner giving the notice or (as the case may be) the association the evidence requested.

(6) The duty imposed by subsection (1) above on an owner may be enforced by any other owner or the tenement owners' association for the tenement (if any).

Installation of service pipes etc.

19 Installation of service pipes etc.

(1) Subject to subsections (2) and (3) below and to section 17 of this Act, an owner shall be entitled—

(a) to lead through any part of the tenement such pipe, cable or other equipment; and

(b) to fix to any part of the tenement, and keep there, such equipment,

as is necessary for the provision to that owner's flat of such service or services as the Scottish Ministers may by regulations prescribe.

(2) The right conferred by subsection (1) above is exercisable only in accordance with such procedure as the Scottish Ministers may by regulations prescribe; and different procedures may be so prescribed in relation to different services.

(3) An owner is not entitled by virtue of subsection (1) above to lead anything through or fix anything to any part which is wholly within another owner's flat.

(4) This section is without prejudice to any obligation imposed by virtue of any enactment relating to—

(a) planning;

(b) building; or

(c) any service prescribed under subsection (1) above.

Demolition and abandonment of tenement building

20 Demolition of tenement building not to affect ownership

(1) The demolition of a tenement building shall not alone effect any change as respects any right of ownership.

(2) In particular, the fact that, as a consequence of demolition of a tenement building, any land pertaining to the building no longer serves, or affords access to, any flat or other sector shall not alone effect any change of ownership of the land as a pertinent.

21 Cost of demolishing tenement building

(A1) Where a tenement has a tenement owners' association, the cost of demolishing the tenement building is an association cost.

(A2) Subsections (1) to (3) apply in relation to a tenement which does not have a tenement owners' association.

(1) Except where a tenement burden otherwise provides, the cost of demolishing a tenement building shall, subject to subsection (2) below, be shared equally among all (or both) the flats in the tenement, and each owner is liable accordingly.

(2) Where the floor area of the largest (or larger) flat in the tenement is more than one and a half times that of the smallest (or smaller) flat the owner of each flat shall be liable to contribute towards the cost of demolition of the tenement building in the proportion which the floor area of that owner's flat bears to the total floor area of all (or both) the flats.

(3) An owner is liable under subsection (1) for the cost of demolishing a tenement building—

(a) in the case where the owner agrees to the proposal that the tenement building be demolished, from the date of the agreement; or

(b) in any other case, from the date on which the carrying out of the demolition is instructed.

(4) This section applies as respects the demolition of part of a tenement building as it applies as respects the demolition of an entire tenement building but with any reference to a flat in the tenement being construed as a reference to a flat in the part.

(5) In this section references to flats in a tenement include references to flats which were comprehended by the tenement before its demolition.

(6) This section is subject to section 123 of the Housing (Scotland) Act 1987 (c. 26) (which makes provision as respects demolition of buildings in pursuance of local authority demolition orders and recovery of expenses by local authorities etc.).

22 Use and disposal of site where tenement building demolished

(1) This section applies where a tenement building is demolished and after the demolition two or more flats which were comprehended by the tenement building before its demolition (any such flat being referred to in this section as a "former flat") are owned by different persons.

(2) Except in so far as—

(a) the owners of all (or both) the former flats otherwise agree; or

(b) those owners are subject to a requirement (whether imposed by a tenement burden or otherwise) to erect a building on the site or to rebuild the tenement,

no owner may build on, or otherwise develop, the site.

(3) Except where the owners have agreed, or are required, to build on or develop the site as mentioned in paragraphs (a) and (b) of subsection (2) above, any owner of a former flat or the tenement owners' association for the tenement (if any) shall be entitled to apply for power to sell the entire site in accordance with schedule 3.

(4) Except where a tenement burden otherwise provides, the net proceeds of any sale in pursuance of subsection (3) above shall, subject to subsection (5) below, be shared equally among all (or both) the former flats and the owner of each former flat shall be entitled to the share allocated to that flat.

(5) Where—

(a) evidence of the floor area of each of the former flats is readily available; and

(b) the floor area of the largest (or larger) former flat was more than one and a half times that of the smallest (or smaller) former flat,

the net proceeds of any sale shall be shared among (or between) the flats in the proportion which the floor area of each flat bore to the total floor area of all (or both) the flats and the owner of each former flat shall be entitled to the share allocated to that flat.

(6) The prohibition imposed by subsection (2) above on an owner of a former flat may be enforced by any other such owner.

(7) In subsections (4) and (5) above, "net proceeds of any sale" means the proceeds of the sale less any expenses properly incurred in connection with the sale.

(8) In this section references to the site are references to the solum of the tenement building that occupied the site together with the airspace that is directly above the solum and any land pertaining, as a means of access, to the tenement building immediately before its demolition.

23 Sale of abandoned tenement building

(1) Where—

(a) because of its poor condition a tenement building has been entirely unoccupied by any owner or person authorised by an owner for a period of more than six months; and

(b) it is unlikely that any such owner or other person will occupy any part of the tenement building,

any owner or the tenement owners' association for the tenement (if any) shall be entitled to apply for power to sell the tenement building in accordance with schedule 3.

(2) Subsections (4) and (5) of section 22 of this Act shall apply as respects a sale in pursuance of subsection (1) above as those subsections apply as respects a sale in pursuance of subsection (3) of that section.

(3) In this section any reference to a tenement building includes a reference to its solum and any land pertaining, as a means of access, to the tenement building.

Liability for certain costs

24 Liability to non owner for certain damage costs

(1) Where—

(a) any part of a tenement is damaged as the result of the fault of any person (that person being in this subsection referred to as "A"); and

(b) the management scheme which applies as respects the tenement makes provision for the maintenance of that part,

any owner of a flat in the tenement (that owner being in this subsection referred to as "B") who is required by virtue of that provision to contribute to any extent to the cost of maintenance of the damaged part but who at the time when the damage was done was not an owner of the part shall be treated, for the purpose of determining whether A is liable to B as respects the cost of maintenance arising from the damage, as having been such an owner at that time.

(1A) Where there is a tenement owners' association for a tenement mentioned in subsection (1), the association is to be treated, for the purpose of determining whether A is liable to the association as respects the cost of maintenance arising from the damage, as having been an owner of the damaged part of the tenement at the time when the damage was done.

(2) In this section "fault" means any wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages.

Miscellaneous and general

25 Amendments of Title Conditions (Scotland) Act 2003

The Title Conditions (Scotland) Act 2003 (asp 9) shall be amended in accordance with schedule 4.

26 Meaning of "tenement"

(1) In this Act, "tenement" means a building or a part of a building which comprises two related flats which, or more than two such flats at least two of which—

(a) are, or are designed to be, in separate ownership; and

(b) are divided from each other horizontally,

and, except where the context otherwise requires, includes the solum and any other land pertaining to that building or, as the case may be, part of the building; and the expression "tenement building" shall be construed accordingly.

(2) In determining whether flats comprised in a building or part of a building are related for the purposes of subsection (1), regard shall be had, among other things, to—

(a) the title to the tenement; and

(b) any tenement burdens,

treating the building or part for that purpose as if it were a tenement.

27 Meaning of "management scheme"

References in this Act to the management scheme which applies as respects any tenement are references to—

(a) ...

(b) if the development management scheme applies as respects the tenement, that scheme; or

(c) in any other case, the rules of the tenement owners' association for the tenement (see section 3D(1)).

28 Meaning of "owner", determination of liability etc.

(1) In this Act, references to "owner" without further qualification are, in relation to any tenement, references to the owner of a flat in the tenement.

(2) Subject to subsection (3) below, in this Act "owner" means, in relation to a flat in a tenement, a person who has right to the flat whether or not that person has completed title; but if, in relation to the flat (or, if the flat is held *pro indiviso*, any *pro indiviso* share in it) more than one person comes within that description of owner, then "owner" means such person as has most recently acquired such right.

(3) Where a heritable security has been granted over a flat and the heritable creditor has entered into lawful possession, "owner" means the heritable creditor in possession of the flat.

(4) Subject to subsection (5) below, if two or more persons own a flat in common, any reference in this Act to an owner is a reference to both or, as the case may be, all of them.

(5) Any reference to an owner in sections 5(1) and (2), 6(1), 8(3), 9, 10, 12 to 14, 17(1), (6) and (7), 18(5) and (6), 19, 22, 23 and 24 of, and schedule 3 to, this Act shall be construed as a reference to any person who owns a flat either solely or in common with another.

(6) Subsections (2) to (5) above apply to references in this Act to the owner of a part of a tenement as they apply to references to the owner of a flat, but as if references in them to a flat were to the part of the tenement.

(7) Where two or more persons own a flat in common—

(a) they are severally liable for the performance of any obligation imposed by virtue of this Act on the owner of that flat; and

(b) as between (or among) themselves they are liable in the proportions in which they own the flat.

29 Interpretation

(1) In this Act, unless the content otherwise requires—

"association costs" means costs incurred by a tenement owners' association,

"association decision" means a decision of a tenement owners' association made in accordance with the association's rules,

"association property" has the meaning given by paragraph 6 of schedule A1,

"chimney stack" does not include flue or chimney pot;

"close" means a connected passage, stairs and landings within a tenement building which together constitute a common access to two or more of the flats;

"demolition" includes destruction and cognate expressions shall be construed accordingly; and demolition may occur on one occasion or over any period of time;

"the development management scheme" has the meaning given by section 71(3) of the Title Conditions (Scotland) Act 2003 (asp 9);

"door" includes its frame;

"emergency work" means work which, before an association decision can be made in relation to the work, requires to be carried out to association property—

(a) to prevent damage to any part of a tenement, or

(b) in the interests of health and safety,

"flat" includes any premises whether or not—

(a) used or intended to be used for residential purposes; or

(b) on the one floor;

"lift" includes its shaft and operating machinery;

"local authority" means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39);

"owner" shall be construed in accordance with section 28 of this Act;

"power of sale order" means an order granted under paragraph 1 of schedule 3 to this Act;

"register", in relation to a deed creating, varying or discharging tenement owners' association conditions, a deed of application under section 71 of the Title Conditions (Scotland) Act 2003, a notice of potential liability for costs, a notice of discharge or power of sale order, means register the deed or (as the case may be) the information contained in the notice or order in the Land Register of Scotland or, as appropriate, record the deed or (as the case may be) the notice or order in the Register of Sasines, and "registered" and other related expressions shall be construed accordingly;

"sector" means—

(a) a flat;

(b) any close or lift; or

(c) any other three dimensional space not comprehended by a flat, close or lift, and the tenement building shall be taken to be entirely divided into sectors;

"solum" means the ground on which a building is erected;

"tenement" shall be construed in accordance with section 26 of this Act;

"tenement burden" means, in relation to a tenement, any real burden (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) which affects—

(a) the tenement; or

(b) any sector in the tenement;

"tenement owners' association" means an association established by section 3A,

"tenement owners' association conditions" is to be construed in accordance with section 3D(2),

"title to the tenement" shall be construed in accordance with section 1(2) of this Act; and

"window" includes its frame.

(2) The floor area of a flat is calculated for the purposes of this Act by measuring the total floor area (including the area occupied by any internal wall or other internal dividing structure) within its boundaries; but no account shall be taken of any pertinents or any of the following parts of a flat—

(a) a balcony; and

(b) except where it is used for any purpose other than storage, a loft or basement.

30 Giving of notice to owners

(1) Any notice which is to be given to an owner under or in connection with this Act (other than under or in connection with the rules of a tenement owners' association) may be given in writing by sending the notice to—

(a) the owner; or

(b) the owner's agent.

(1A) Any notice which is to be given to a tenement owners' association under or in connection with this Act (other than under or in connection with the association's rules) may be given in writing by sending the notice to the association.

(2) The reference in subsection (1) or (1A) above to sending a notice is to its being—

(a) posted;

(b) delivered; or

(c) transmitted by electronic means.

(3) Where an owner cannot by reasonable inquiry be identified or found, a notice shall be taken for the purposes of subsection (1)(a) above to be sent to the owner if it is posted or delivered to the owner's flat addressed to "The Owner" or using some similar expression such as "The Proprietor".

(4) For the purposes of this Act—

(a) a notice posted shall be taken to be given on the day of posting; and

(b) a notice transmitted by electronic means shall be taken to be given on the day of transmission.

31 Ancillary provision

(1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of this Act.

(2) An order under this section may modify any enactment (including this Act), instrument or document.

32 Orders and regulations

(1) Any power of the Scottish Ministers to make orders or regulations under this Act shall be exercisable by statutory instrument.

(2) A statutory instrument containing an order or regulations under this Act (except regulations mentioned in subsection (2A) or an order under section 34(2) or, where subsection (3) applies, section 31) shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

(2A) Regulations under section 3D(2)(c)(ii), paragraph 13(1) of schedule A1 or paragraph 1(2) of schedule A3 are subject to the affirmative procedure.

(3) Where an order under section 31 contains provisions which add to, replace or omit any part of the text of an Act, the order shall not be made unless a draft of the statutory instrument containing the order has been laid before, and approved by a resolution of, the Parliament.

33 Crown application

This Act, except section 18, binds the Crown.

34 Short title and commencement

(1) This Act may be cited as the Tenements (Scotland) Act 2004.

(2) This Act (other than this section, section 25 and schedule 4) shall come into force on such day as the Scottish Ministers may by order appoint; and different days may be appointed for different purposes.

(3) Section 25 and schedule 4 shall come into force on the day after Royal Assent.

SCHEDULE A1

(introduced by section 3A(4))

TENEMENT OWNERS' ASSOCIATIONS

PART 1

THE ASSOCIATION

Status

1 A tenement owners' association is a body corporate.

Membership

2 (1) The members of a tenement owners' association are the owners, for the time being, of each flat in the tenement to which the association relates.

(2) Where two or more persons own a flat in the tenement in common, both or (as the case may be) all of them are members of the association.

Name and address

3 (1) The name of a tenement owners' association is "The Tenement Owners' Association of [*address of the tenement building*]".

(2) The association has the following addresses—

(a) the address of the tenement building, and

(b) the address of the manager of the association (if any).

Function and general powers

4 (1) The function of a tenement owners' association is to manage the tenement for the benefit of the members of the association.

(2) The association may do anything which appears to it—

(a) to be necessary or expedient for the purposes of, or in connection with, the performance of its function, or

(b) to be otherwise conducive to the performance of its function.

(3) The association may, in particular—

(a) carry out maintenance, improvements or alterations to association property,

(b) carry out inspections of association property to determine whether or to what extent it is necessary to carry out maintenance to the property,

(c) enter into a contract of insurance in respect of the tenement or any part of it,

(d) purchase or otherwise obtain the use of moveable property,

(e) open and maintain an account with a bank or building society,

(f) invest any money held by the association,

(g) borrow money,

(h) engage employees or appoint agents,

(i) enforce any obligation owed by one member to another, the manager or the association under the association's rules or this Act,

(j) execute and register a deed creating, varying or discharging tenement owners' association conditions in relation to the tenement,

(k) execute and register a deed of application under section 71 of the Title Conditions (Scotland) Act 2003 (development management scheme) on behalf of the owners of the flats in the tenement,

(l) instruct demolition of all or part of the tenement.

(4) But the association may not—

(a) acquire heritable property,

(b) carry on a trade, whether for profit or otherwise.

(5) The association has an insurable interest in the tenement.

5 Nothing may be done by or on behalf of a tenement owners' association unless it is done—

(a) in accordance with a decision of the association, or

(b) by the manager of the association in accordance with this Act or the association's rules.

Meaning of "association property" and "maintenance"

6 (1) In this Act, "association property" means, in relation to a tenement, any or all of the following—

(a) any part of the tenement—

(i) which is the common property of two or more of the owners, or

(ii) the maintenance of which, or the cost of maintaining which, is, by virtue of a tenement burden, the responsibility of two or more of the owners,

(b) the following parts of the tenement building, other than a part mentioned in sub-paragraph (2), so far as not association property by virtue of paragraph (a)—

(i) the ground on which it is built,

(ii) its foundations,

(iii) its external walls,

(iv) its roof (including any rafter or other structure supporting the roof),

(v) if it is separated from another building by a gable wall, the part of the gable wall that is part of the tenement building, and

(vi) any wall (not being one falling within the preceding sub-paragraphs), beam or column that is load bearing

(2) The parts referred to in sub-paragraph (1)(b) are—

(a) any extension which forms part of only one flat,

(b) any—

(i) door,

(ii) window,

(iii) skylight,

(iv) vent, or

(v) other opening,

which serves only one flat,

(c) any chimney stack or chimney flue.

7 (1) In this Act, "maintenance", in relation to a tenement, includes—

(a) work carried out in order to comply with section 8(1) (duty to maintain so as to provide support and shelter etc.),

(b) other work involving—

(i) repairs and replacement,

(ii) the installation of insulation,

(iii) cleaning, painting and other routine works,

(iv) the removal, deterrence or control of vermin or other pests, mould, harmful plants or any similar potentially harmful thing,

(v) gardening,

(vi) the day to day running of the tenement,

(vii) the reinstatement of part (but not most) of the tenement building.

(2) But "maintenance" does not include demolition, alteration or improvement unless reasonably incidental to the maintenance.

PART 2

KEY DUTIES

Key duties of the association

8 (1) A tenement owner's association must—

(a) appoint a manager in accordance with paragraph 9(1) and (2),

(b) hold annual general meetings in accordance with paragraph 10,

(c) approve a budget in respect of association costs for each financial year,

(d) make applications in relation to tenement identification information in accordance with paragraph 11.

(2) The association need not comply with sub-paragraph (1)(c)—

(a) where the association is established under section 3A(2)(a), until the appointed day,

(b) where the association is established under section 3A(2)(b), until the end of the period of one year beginning with the later of—

(i) the appointed day, or

(ii) the first day on which the tenement may be occupied,

(c) where the association is established under section 3A(3) before the appointed day, until the appointed day.

(3) Paragraph 12 makes provision about the application of sub-paragraph (1) to certain tenements.

(4) For the purposes of this Part, the first day on which a tenement may be occupied is—

(a) the day on which temporary permission to occupy or use a flat in the tenement is granted under section 21 of the Building (Scotland) Act 2003, or

(b) where no such permission is granted, either—

(i) the day on which a completion certificate is accepted in respect of the construction or conversion of the tenement under section 18 of the Building (Scotland) Act 2003, or

(ii) such other day as the First-tier Tribunal determines, on the application of a person with an interest in the tenement, is the day on which the construction or conversion was completed.

Appointment of manager

9 (1) A tenement owners' association must appoint its first manager—

(a) where the association is established under section 3A(2)(a), before the end of the period of 6 months beginning with the appointed day,

(b) where the association is established under section 3A(2)(b), before the end of the period of 18 months beginning with the later of—

(i) the appointed day, or

(ii) the first day on which the tenement may be occupied,

(c) where the association is established under section 3A(3), before the end of the period of 6 months beginning with the later of—

(i) the appointed day, or

(ii) the day on which the association is established.

(2) If the office of manager becomes vacant, the association must appoint a new manager within the period of 6 months beginning with the day on which the office becomes vacant.

(3) A certificate of appointment must be signed, within the period of one month beginning with the day of a manager's appointment, by—

(a) the manager, and

(b) a member of the association on behalf of the association.

(4) For the purposes of sub-paragraph (3), a certificate of appointment is a document stating—

(a) the name of the association,

(b) the name of the person appointed as manager, and

(c) the period of the person's appointment.

(5) The actings of the manager are valid regardless of any defect in the manager's appointment.

(6) A manager's appointment comes to an end—

(a) in accordance with the terms of the appointment, or

(b) if the association decides to terminate the appointment.

Annual general meetings

10 (1) A tenement owners' association must hold its first annual general meeting—

(a) where the association is established under section 3A(2)(a), before the end of the period of one year beginning with the appointed day,

(b) where the association is established under section 3A(2)(b), before the end of the period of two years beginning with the later of—

(i) the appointed day, or

(ii) the first day on which the tenement may be occupied,

(c) where the association is established under section 3A(3), before the end of the period of one year beginning with the later of—

(i) the appointed day, or

(ii) the day on which the association is established.

(2) An annual general meeting—

(a) must be called at least once in each calendar year, and

(b) must be held no more than 15 months after the day on which the previous annual general meeting was held.

Tenement identification information

11 (1) A tenement owners' association must make an application under section 64A(1)(a) (tenement identification information) of the Land Registration etc. (Scotland) Act 2012 ("the 2012 Act") in relation to the tenement—

(a) where the association is established under section 3A(2)(a), before the end of the period of two years beginning with the appointed day,

(b) where the association is established under section 3A(2)(b), before the end of the period of three years beginning with the later of—

(i) the appointed day, or

(ii) the first day on which the tenement may be occupied,

(c) where the association is established under section 3A(3), before the end of the period of two years beginning with the later of—

(i) the appointed day, or

(ii) the day on which the association is established.

(2) Sub-paragraph (3) applies where—

(a) a note of tenement identification information in relation to the tenement is entered in the Land Register of Scotland or (as the case may be) recorded in the Register of Sasines under section 64A of the 2012 Act, and

(b) that information changes.

(3) The association must, within the period of 6 months beginning with the day on which the information changes, make an application—

(a) under section 64A(1)(b) of the 2012 Act to amend the information in any note of tenement identification information entered in the Land Register of Scotland to reflect the new information,

(b) under section 64A(1)(a) of that Act to record a note of tenement identification information containing the new information in the Register of Sasines.

(4) In this paragraph, "tenement identification information" has the meaning given by section 64A(2) of the 2012 Act.

Disapplication of certain duties in relation to small and single-owner tenements

12 (1) Sub-paragraph (2) applies to a tenement—

(a) which is comprised of two or three flats, or

(b) each flat in which has the same owner.

(2) The tenement owners' association for the tenement need not comply with paragraph 8(1)(a), (b) and (c).

(3) But where the association appoints a person as its manager, this Act applies to that person as it applies to a manager appointed under paragraph 9.

(4) Where sub-paragraph (2) ceases to apply to the tenement, paragraphs 8(2), 9(1) and 10(1) do not apply to the association and instead—

(a) where sub-paragraph (2) ceases to apply to the tenement before the appointed day, the association need not comply with paragraph 8(1)(c) until the appointed day,

(b) the association must, if it does not already have a manager, appoint a manager before the end of the period of 6 months beginning with the later of—

(i) the appointed day, or

(ii) the day on which sub-paragraph (2) ceases to apply to the tenement,

(c) the association must hold an annual general meeting before the end of the period of one year beginning with the later of—

(i) the appointed day, or

(ii) the day on which sub-paragraph (2) ceases to apply to the tenement.

Meaning of "appointed day"

13 (1) In this Part, the "appointed day" means a day appointed by the Scottish Ministers by regulations.

(2) Regulations under sub-paragraph (1) may appoint different days for different purposes.

PART 3

THE MANAGER

General functions of association manager

14 (1) The role of the manager of a tenement owner's association is to manage the tenement on behalf of the association.

(2) The manager has the functions conferred by this Act and the association's rules.

(3) Any duty to which the manager is subject under this Act or the association's rules is owed to the association and to the members of the association.

(4) In exercising the manager's functions, the manager is an agent of the association.

Compliance with association's duties

15 The manager of a tenement owners' association must ensure compliance by the association with its duties under paragraph 8(1).

Implementation of association decisions

16 (1) The manager of a tenement owners' association must implement any decision of the association.

(2) But the manager must not implement such a decision to the extent that the decision is contrary to any provision of this Act or the association's rules.

Compliance with association directions

17 (1) The manager of a tenement owners' association must, so far as reasonably practicable, comply with any direction given by the association to the manager.

(2) But the manager must not comply with such a direction to the extent that the direction is contrary to any provision of this Act or the association's rules.

Power of manager to carry out emergency work

18 The manager of a tenement owners' association may instruct or carry out emergency work to association property.

Enforcement of obligations and rules

19 (1) The manager of a tenement owners' association may enforce—

(a) any obligation owed by a member of the association to the association,

(b) the association's rules.

(2) The manager must monitor compliance by the members with their duty to take out insurance on any part of the tenement owned by the member.

(3) Nothing in sub-paragraph (2) requires the manager to obtain a valuation of any part of the tenement.

Financial administration

20 The manager of a tenement owners' association must—

(a) fix the financial year for the association,

(b) keep proper financial records for the association,

(c) prepare the association's accounts for each financial year.

Inspection of documents

21 The manager of a tenement owners' association must make available for inspection any document which relates to the management of the tenement (other than correspondence with individual members) on the request of any member of the association.

PART 4

ADMINISTRATION

Record of association members

22 (1) The manager of a tenement owners' association must maintain a record of—

(a) the name of each member of the association, and

(b) contact details for each member.

(2) A person who becomes a member of the association must give the manager the member's name and contact details—

(a) within one month of becoming a member of the association, or

(b) where there is no manager when the person becomes a member, within one month of a manager being appointed.

(3) A member of the association must inform the manager of any change to the member's name or contact details within one month of that change occurring.

(4) The manager must, on request, provide a member of the association with the name and contact details of another member of the association if it is necessary to do so in connection with the management and maintenance of association property or the operation of the association.

(5) For the purposes of this paragraph and paragraph 24, a person's contact details—

(a) are details of how the person is to be contacted by the manager or a member of the association in connection with the operation of the association, and

(b) must include details of how the person may be contacted in writing.

Provision of information under association rules

23 (1) This paragraph applies where any information is to be given to a person under or in connection with the rules of a tenement owners' association.

(2) Where the information is to be given to a member who has provided contact details to the manager under paragraph 22, the information may be given to the member—

(a) using those contact details, or

(b) by being delivered to the member in writing in accordance with sub-paragraph (4).

(3) In any other case, the information may be given to the person—

(a) by being sent to the person at any postal or electronic address used by the person in connection with the association during the preceding year, or

(b) by being delivered to the person in writing in accordance with sub-paragraph (4).

(4) Information in writing is delivered to a person in accordance with this sub-paragraph if—

(a) it is delivered by hand—

(i) to the person,

(ii) at the person's residence, to another person who lives there, or

(iii) at the person's place of business, to an employee of the person or a person authorised to receive the document,

(b) where the person is not an individual, it is delivered by hand at the person's place of business to an employee of the person or a person authorised to receive the document, or

(c) after diligent enquiries and where there has been an unsuccessful attempt to deliver the document in accordance with—

(i) paragraph (a), it is left in or at the person's residence or place of business in a manner in which it is likely to come to the person's attention,

(ii) paragraph (b), it is left in or at the person's place of business in such a manner.

(5) Where the information is to be given to a member who has provided contact details to the manager under paragraph 22—

(a) information may be delivered at, or left in or at, a residence or place of business under sub-paragraph (4) only if the contact details include that residence or (as the case may be) place of business,

(b) a reference in sub-paragraph (4)(a), (b) or (c) to the person to whom information is to be given includes a reference to an agent of the member whose details have been provided to the manager under paragraph 22.

(6) Where the information is given to the person—

(a) by being posted, it is taken to be given on the day on which it is posted,

(b) by being sent by electronic means, it is taken to be given on the day on which it is sent.

(7) Where the information is to be given to a member who has died, the information is to be given to the member's executor.

(8) Where the information is to be given to a member or (as the case may be) a member's executor who cannot by reasonable enquiry be identified or found, a document is to be taken for the purposes of this paragraph to be given to the member or executor if it is posted or delivered to the member's flat addressed to "The Owner" or using some similar expression such as "The Proprietor".

Information to be provided on transfer of flat

24 (1) This paragraph applies where a member of a tenement owners' association transfers ownership of the member's flat to another person (the "transferee").

(2) The member must, before the date on which the transferee is entitled to take entry to the flat, give the manager the following information, insofar as the member is aware of it—

(a) the name and postal or email address of the transferee,

(b) the name and postal or email address of the transferee's solicitor or other agent in respect of the transfer,

(c) the date on which the transferee is entitled to take entry,

(d) the member's contact details after that date.

Information to be provided in relation to registration of flats and other parts of the tenement

25 (1) Sub-paragraph (2) applies where a member of a tenement owners' association intends to do something which is likely to result in a title sheet in respect of any part of the tenement being made up or cancelled.

(2) The member must inform the manager of—

(a) the likelihood of the title sheet being made up or cancelled, and

(b) when that is likely to occur.

(3) Where a member of the association becomes aware that a note of tenement identification information relating to the tenement is inaccurate, the member must inform the manager of the inaccuracy as soon as reasonably practicable.

(4) In this paragraph—

"note of tenement identification information" means a note of tenement identification information entered in the Land Register of Scotland or recorded in the Register of Sasines in accordance with section 64A(4) of the Land Registration etc. (Scotland) Act 2012,

"title sheet" means a title sheet made up under section 3 of that Act.

Execution of documents

26 A document is signed by a tenement owners' association if it is signed on behalf of the association by—

(a) the manager of the association acting within the manager's authority, or

(b) a member of the association, or any other person, authorized by the association to sign the document on its behalf.

SCHEDULE A2

(introduced by section 3D(1))

TENEMENT OWNERS' ASSOCIATION RULES: DEFAULT RULES

PART 1

DEFINITIONS

Definitions

1 (1) In these rules, a reference to—

(a) the "association" is to a tenement owners' association to which these rules apply,

(b) the "tenement" is to the tenement to which the association relates,

(c) an "owner" is to the owner of a flat in the tenement,

(d) a "member" is to a member of the association,

(e) the "manager" is to the manager of the association,

(f) a "financial year" is to a financial year of the association,

(g) a numbered rule is to the paragraph of these rules bearing that number.

(2) Any expression used in these rules which is defined in section 29 of this Act has the meaning given by that section.

PART 2

ASSOCIATION DECISIONS

Association decisions

2 A decision of the association is to be made in accordance with this Part.

Allocation of votes

3 (1) For the purposes of making an association decision, one vote is allocated to each flat in the tenement.

(2) A right to vote allocated to a flat may be exercised by—

(a) the owner of the flat, or

(b) a person nominated in writing by the owner to exercise the vote on behalf of the owner.

(3) Where there are two or more owners of a flat, the vote allocated to that flat may be exercised by any of the owners.

(4) But if the owners of the flat disagree as to how the vote is to be cast, the vote is not to be counted unless—

(a) where one of the owners owns more than a half share of the flat, the vote is exercised by that owner,

(b) in any other case, the vote is the agreed vote of the owners who together own more than a half share of the flat.

Votes required for association decisions

4 (1) An association decision is made if at least 50% of the votes allocated under rule 3 are cast in favour of the decision except as provided for in sub-paragraph (2).

(2) Where the decision is—

(a) one mentioned in sub-paragraph (3), the decision is made if at least 75% of the votes allocated under rule 3 are cast in favour of it,

(b) a decision to demolish the tenement building, the decision is made if all of the votes so allocated are cast in favour of it.

(3) The decisions referred to in sub-paragraph (2)(a) are decisions to—

(a) make improvements or alterations to, or replacements of, association property,

(b) demolish part of the association property,

(c) make payments from any reserve fund maintained by the association,

(d) execute and register a deed creating, varying or discharging tenement owners' association conditions in relation to the tenement,

(e) execute and register a deed of application under section 71 of the Title Conditions (Scotland) Act 2003 (development management scheme) in relation to the tenement.

(4) Sub-paragraph (5) applies where a decision mentioned in sub-paragraph (3)(a) or (b) relates to property which is not the common property of the owners (or not the common property of owners who between them own two or more flats in the tenement).

(5) The decision may be implemented only if the owner of the property consents in writing to the improvements, alterations, replacements or demolition in question.

How decisions are to be made

5 (1) An association decision is to be made—

(a) at a general meeting of the association, or

(b) in accordance with sub-paragraph (2).

(2) An association decision is made in accordance with this sub-paragraph by—

(a) the manager—

(i) consulting each owner about the matter to be decided, and

(ii) counting the votes cast, or

(b) a member—

(i) consulting each other owner about the matter to be decided, and

(ii) counting the votes cast.

(3) An owner need not be consulted under sub-paragraph (2)(a)(i) or (b)(i) if it is impractical to do so due to the owner's absence or some other good reason.

(4) Where an association decision is made—

(a) in accordance with sub-paragraph (2)(a), the manager must, as soon as practicable after counting the votes in respect of the decision—

(i) record the votes cast and the decision made, and

(ii) give notice of the decision made to each member of the association by giving them a copy of the record,

(b) in accordance with sub-paragraph (2)(b), the member who carried out the consultation must, as soon as practicable after counting the votes in respect of the decision—

(i) record the votes cast and the decision made,

(ii) give a copy of the record to the manager, and

(iii) either give notice of the decision made to each other member by giving them a copy of the record, or request the manager to do so.

(5) Where two or more persons own a flat in common, consultation with one of the owners is sufficient for the purposes of sub-paragraph (2)(a)(i) or (b)(i).

Procedural irregularities

6 (1) A procedural irregularity in the making of an association decision does not affect the validity of the decision.

(2) Sub-paragraph (3) applies where an owner—

(a) is directly affected by a procedural irregularity in the making of an association decision, and

(b) either—

(i) was not aware that any association costs were being incurred in relation to the decision, or

(ii) on becoming aware that such costs were being incurred, immediately objected to the incurring of the costs.

(3) The owner is not liable for the costs (whether incurred before or after the date of any objection) and, accordingly, the owner is left out of account for the purposes of determining the share of the costs for which each of the other owners is liable.

Annulment of association decision

7 (1) This rule applies where—

(a) an association decision is made to carry out, or authorise, maintenance to association property,

(b) an owner, or a group of owners, did not vote in favour of the decision, and

(c) that owner or group would be liable for at least 75% of the costs arising from the decision.

(2) That owner or group may annul the decision by giving notice that the decision is annulled to the manager and each of the other members of the association.

(3) Notice under sub-paragraph (2) must be given—

(a) where the decision was made at a general meeting of the association at which the owner or (as the case may be) at least one member of the group of owners was present, before the end of the period of 21 days beginning with the day of the meeting,

(b) otherwise, before the end of the period of 21 days beginning with the day on which the owner or (as the case may be) group of owners was notified of the decision.

(4) Where the members of a group of owners were notified of the decision on different days, the reference in sub-paragraph (3) to the day on which the group of owners was notified of the decision is a reference to the day on which the last of the group was notified of it.

Effect of association decision

8 An association decision is binding on—

(a) the members of the association when the decision is made, and

(b) any future members of the association.

PART 3

MEETINGS

Calling of annual general meeting

9 (1) An annual general meeting to be held in accordance with paragraph 10 of schedule A1 of this Act is to be called by the manager.

(2) But the meeting may be called by a member where—

(a) the manager has not called the meeting when required to do so, or

(b) the association does not have a manager.

General meetings

10 (1) The manager—

(a) may call a general meeting of the association at any time,

(b) must call such a meeting if owners who have at least 25% of the votes allocated under rule 3 require such a meeting to be called.

(2) A member may call a general meeting of the association if—

(a) the manager has not called a general meeting when required to do so by sub-paragraph (1)(b), or

(b) the association does not have a manager.

Attendance at meetings

11 (1) A person may attend an annual or other general meeting of the association—

(a) in person, or

(b) by electronic means.

(2) The manager of the association must take reasonable steps to ensure that a person who wishes to do so may attend a general meeting by electronic means.

Notice to be given of annual or other general meeting

12 (1) A meeting is called under rule 9 or 10 by notice of the meeting being given, in accordance with sub-paragraph (2), not later than 14 days before the day fixed for the meeting.

(2) The notice is to be given—

(a) where the meeting is called by the manager, to each member,

(b) where the meeting is called by a member, to the manager (if any) and each other member.

(3) The notice must state—

(a) the date and time fixed for the meeting,

(b) where attendance at the meeting is to be—

(i) in person, the place at which the meeting is to be held,

(ii) by electronic means, the means by which the meeting is to be held,

(iii) both in person and by electronic means, the place at which, and the means by which, the meeting is to be held,

(c) the business to be conducted at the meeting.

Proceedings at meetings

13 (1) The manager must attend any general meeting of the association unless the manager has a reasonable excuse for not attending.

(2) The members in attendance at a general meeting must select a person to chair the meeting (the "chair").

(3) The chair is to be one of the members in attendance at the meeting.

(4) A vote on any matter at a general meeting is to be taken by—

(a) a show of hands, or

(b) such other method as the chair considers appropriate.

(5) The manager or, where the manager is not at the meeting, a member nominated by the chair, must—

(a) keep a record of the business conducted, including any votes cast and any decision made, at the meeting, and

(b) give a copy of that record to each member (or, as the case may be, each other member) as soon as practicable after the meeting.

(6) A member who is not at the meeting is to be treated as being given notice of any decision made by the association at the meeting by being given a copy of the record of the business conducted at the meeting.

PART 4

OWNERS' LIABILITY FOR ASSOCIATION COSTS

Owners' liabilities

14 (1) The owners of all of the flats in the tenement are liable for association costs in equal proportions except as provided for in sub-paragraphs (2) to (4).

(2) The owners of any association property mentioned in sub-paragraph (5) are liable for maintenance and running costs relating to that property in the proportions in which the owners share ownership of the property.

(3) Where the floor area of any flat in the tenement is more than one and a half times that of another flat in the tenement, sub-paragraph (4) applies to maintenance and running costs relating to any association property other than property mentioned in sub-paragraph (5).

(4) The owners of all of the flats in the tenement are liable for the costs in the proportions which the floor area of the owners' flats bear to the total floor area of all of the flats in the tenement.

(5) The property referred to in sub-paragraphs (2) and (3) is property which is the property of two or more of the owners, other than a roof over the close of the tenement which is common property by virtue of section 3(1)(a) of this Act.

(6) In this rule, "maintenance and running costs" means association costs which are—

(a) costs arising from any maintenance or inspection of association property,

(b) remuneration payable to a person appointed to manage the carrying out of such maintenance as is mentioned in paragraph (a),

(c) running costs relating to any association property (other than costs incurred solely for the benefit of one flat),

(d) costs recoverable by a local authority in respect of work relating to any association property carried out by the authority by virtue of any enactment.

Exempting owner from liability

15 (1) The association may decide that an owner is not liable for such association costs as are specified in the decision.

(2) A vote in favour of such an association decision is not to be counted if any of the following persons is an owner who, by virtue of the decision, would not be liable as mentioned in sub-paragraph (1)—

(a) the owner exercising the vote, or

(b) where the vote is exercised by a person nominated by the owner—

(i) that person, or

(ii) the owner who nominated that person.

(3) Where an owner is not liable for an amount by virtue of sub-paragraph (1), the other owners who are liable for a share of the costs mentioned in that sub-paragraph are liable for a share of that amount in equal proportion.

PART 5

ANNUAL BUDGET, SERVICE CHARGE AND ASSOCIATION FUNDS

Annual budget

16 (1) The association's budget for each financial year must set out—

(a) details of any maintenance work which the manager considers it will be necessary to carry out to association property during that year in order to ensure compliance with section 8 of this Act, including—

(i) the estimated cost of that work,

(ii) how that estimate was arrived at,

(iii) the time line for completion of the work,

(b) details of any other maintenance work proposed to be carried out to association property during that year, including—

(i) the estimated cost of that work,

(ii) how that estimate was arrived at,

(iii) the time line for completion of the work,

(c) details of any other costs expected to be incurred by the association during that year, including the nature of those costs,

(d) details of—

(i) any other amount to be included in the service charge, and

(ii) the reason that amount is included in the charge,

(e) in respect of each owner—

(i) the service charge payable by the owner for that year,

(ii) how that charge was calculated,

(f) the date or dates on which the service charge will be due for payment,

(g) an estimate of any other funds which the association is likely to receive during the year and the source of those funds.

(2) The service charge payable by each owner is to be calculated by reference to the proportion of the costs mentioned in sub-paragraph (1)(a), (b) and (c), and any amount mentioned in sub-paragraph (1)(d), for which the owner is liable to the association.

Approval of budget

17 (1) The manager must—

(a) prepare a draft budget for the association for each financial year, and

(b) give each member a copy of the draft budget.

(2) The association may—

(a) approve the draft budget,

(b) approve the draft budget with such variations as the members may specify, or

(c) reject the draft budget.

(3) Where the association rejects the draft budget, it must direct the manager to, within the period of 6 weeks beginning with the day on which the draft budget is rejected—

(a) prepare a revised draft budget, and

(b) give each member a copy of that revised draft for approval.

(4) Sub-paragraphs (2) and (3) apply to a revised draft budget as they apply to the draft budget.

(5) Where, at the start of a financial year, no budget has been approved under sub-paragraph (2) for the year—

(a) the service charge due by each owner is, until a budget is approved for the financial year, the same as the service charge due by the owner under the budget for the previous financial year, and

(b) the charge is to be paid on the anniversary (or anniversaries) of the date (or dates) on which the charge was due for payment under the budget for the previous financial year.

Additional service charge

18 (1) The manager may from time to time determine that an additional service charge is payable by all or some of the owners.

(2) An additional service charge may be imposed only in respect of—

(a) association costs which—

(i) were not set out in the association's budget for the year, or

(ii) exceed an estimated amount set out in the budget, or

(b) an amount for which an owner becomes liable under rule 15(3) or 19(2).

(3) The additional service charge due by each owner is to be calculated by reference to the owner's liability for the costs to which the charge relates.

(4) The total amount of any additional service charge to be paid by an owner in a financial year must not exceed 25% of the service charge for the owner set out in the budget for that year unless the manager submits to the association at a general meeting a draft supplementary budget setting out—

(a) the amount of the additional service charge due by the owner, and

(b) the date or dates on which the charge is due to be paid.

(5) Rule 17(2) to (4) applies in relation to a draft supplementary budget as it applies to a draft budget.

(6) In calculating the total amount of any additional service charge for the purposes of sub-paragraph (4), no account is to be taken of any additional service charge payable in respect of the cost of emergency work carried out by virtue of paragraph 18 of schedule A1 of this Act or rule 25.

Redistribution of service charge which cannot be recovered

19 (1) Sub-paragraph (2) applies where a service charge or additional service charge cannot be recovered (in whole or in part) from an owner ("owner A") for some reason such as that—

(a) owner A is insolvent, or

(b) owner A cannot, by reasonable inquiry, be identified or found.

(2) Where a portion of the unrecoverable amount of the service charge relates to association costs for which one or more other owners are liable with owner A, those other owners are liable for that portion in equal proportions.

(3) Owner A is liable to each other owner for any amount for which the other owner becomes liable under sub-paragraph (2).

(4) But sub-paragraph (2) does not apply to any amount that the local authority has paid under section 4A of this Act in respect of owner A's share of any item of association costs.

Liability for, and collection of, service charge

20 (1) Each owner is liable to the association for—

(a) the amount of the service charge payable by the owner in accordance with the association's budget,

(b) any amount of additional service charge payable by the owner in accordance with rule 18.

(2) Where the association approves its budget, the manager must give each owner a notice requiring payment, on the date (or dates) specified in the budget, of the amount of the service charge specified in the budget as being due by the owner.

(3) Where the manager makes a determination under rule 18(1), the manager must give each owner to whom the determination relates a notice—

(a) requiring payment, on the date (or dates) stated in the notice, of the additional service charge determined under that sub-paragraph, and

(b) explaining why the additional charge is payable.

(4) Where any service charge or additional service charge (or part of it) remains outstanding not less than 28 days after it became due for payment, the manager may give a notice to the owner concerned requiring the owner to pay interest on the sum outstanding at such reasonable rate and from such date as the manager may specify in the notice.

Discharge of owners' liabilities for association costs

21 (1) An owner's liabilities for association costs for a financial year are discharged, in accordance with this paragraph, by the payment of the owner's service charge for the year.

(2) The owner's liabilities are discharged in the order in which the costs become payable by the association.

(3) Sub-paragraph (4) applies where—

(a) more than one amount of association costs become payable on the same day, and

(b) the owner's service charge balance is insufficient to discharge the owner's liabilities for those costs in full.

(4) The owner's liabilities for the costs mentioned in sub-paragraph (3)(a) are discharged—

(a) by the amount of the owner's service charge balance (if any), and

(b) in the proportions that the owner's liabilities for each amount of costs mentioned in that sub-paragraph bear to the owner's liabilities for all of the costs mentioned in that sub-paragraph.

(5) Sub-paragraph (6) applies where the service charge includes, by virtue of rule 16(1)(d), an amount which does not relate to the owner's liability for association costs.

(6) That amount is not to be treated as having been paid until all of the owner's liabilities for association costs for the year have been discharged.

(7) Sub-paragraph (8) applies where the total amount of the service charge paid by the owner during the financial year exceeds—

(a) the amount of the owner's liabilities for association costs payable during that year, and

(b) any other amount included in the service charge by virtue of rule 16(1)(d).

(8) The association is to—

(a) retain the excess amount paid by the owner, and

(b) offset that amount against the owner's service charge for the next financial year.

(9) Nothing in this rule prevents an owner's liability for association costs being discharged (in whole or in part) in any other way (for example, by being met from a reserve fund held by the association or by a third party).

(10) For the purposes of this rule and rule 22—

(a) a service charge includes an additional service charge,

(b) an owner's service charge balance is the amount of the service charge already paid by the owner in a financial year less the amount of the owner's liabilities for association costs already discharged in that year.

Liability for service charge on transfer of ownership of flat

22 (1) This rule applies where the owner of a flat in the tenement (the "transferor") transfers ownership of the flat to another person (the "transferee").

(2) The transferee is severally liable with the transferor for the amount of any service charge for which the transferor is liable on the day on which the transferee acquires right to the flat.

(3) But the transferee is not liable under sub-paragraph (2) for any amount of service charge which relates to association costs for which the transferee is not severally liable under section 12 of this Act.

(4) Except as provided for in sub-paragraph (6), any amount of service charge paid by the transferor is to be retained by the association.

(5) Sub-paragraph (6) applies where—

(a) an amount of service charge paid by the transferor relates to association costs for which the transferor is liable but the transferee is not severally liable, and

(b) the amount paid exceeds the actual amount of the transferor's liability for those costs.

(6) The association must pay the transferor a sum equivalent to the amount by which the amount paid exceeds the actual amount of the transferor's liability.

(7) Any sum retained by the association under sub-paragraph (4) is to be treated as if it were paid by the transferee.

Estimate of owner's liabilities on transfer of flat

23 The manager must, as soon as reasonably practicable after receiving a request to do so from an owner of a flat in the tenement who proposes to transfer ownership of the flat, provide the owner with the following information—

(a) the association costs for which the owner is liable in the financial year in which the proposed date of the transfer falls,

(b) an estimate of the amount of the owner's liability for those costs which will have been discharged before that date,

(c) the amount of any service charge due to be paid by the owner after that date and the date on which any payment is to be made,

(d) an estimate of the amount (if any) by which the amount of the service charge paid by the owner before that date will exceed the amount of the owner's liabilities which will have been discharged before that date.

Association funds

24 (1) Any association funds must be—

(a) held in the name of the association, and

(b) deposited by the manager in a bank or building society account.

(2) But where association funds are likely to be held for some time, the manager must ensure that the funds are—

(a) deposited in an account which is interest bearing, or

(b) invested in such other way as the association may decide.

(3) The manager must ensure that any association funds forming a reserve fund are kept separately from other association funds.

PART 6

EMERGENCY WORK

Authority to carry out emergency work

25 (1) A member may instruct or carry out emergency work to association property.

(2) The association must reimburse a member who pays for emergency work.

SCHEDULE A3

(Introduced by section 3D(8))

DEFAULT TENEMENT OWNERS' ASSOCIATION RULES: TRANSITION PERIOD

Transition period

1 (1) In this schedule, "transition period" means the period of 20 years beginning with the day on which section 2 of the Tenements (Amendment) (Scotland) Act 2025 comes into force.

(2) The Scottish Ministers may by regulations modify sub-paragraph (1) so as to substitute a different period for the period for the time being mentioned there (provided that the period for the time being mentioned there has not expired).

Application of default tenement owners' association rules during transition period

2 (1) This paragraph applies during the transition period where, under section 3D(1)(b), a tenement owners' association's rules are the default association rules.

(2) Those rules apply in accordance with sub-paragraphs (3) to (5).

(3) Part 2 (association decisions) applies unless—

(a) a pre-commencement tenement burden makes provision about the making of decisions by the owners of the flats in the tenement about any matter to be decided by the association, and

(b) that provision is the same for each flat in the tenement.

(4) In Part 4 (owners' liability for association costs)—

(a) rule 14 (owners' liabilities) applies except to the extent that a pre-commencement tenement burden provides that the entire liability for costs specified in the burden is to be met by one or more of the owners,

(b) rule 15 (exempting owner from liability) applies except to the extent that a pre-commencement tenement burden provides how liability for costs specified in the burden is to be redistributed amongst owners of flats in the tenement in the event that the owners decide that one of the them is not liable for a share of those costs.

(5) In Part 5 (annual budget, service charge and association funds)—

(a) rules 16 (annual budget), 17 (approval of budget), 18 (additional service charge) and 20 (liability for, and collection of, service charge) apply except to the extent that a pre-commencement tenement burden makes provision for budgeting for, and collecting payment by the owners of flats in the tenement of, costs specified in the burden,

(b) rule 19 (redistribution of service charge which cannot be recovered) applies except to the extent that a pre-commencement tenement burden provides how liability for costs specified in the burden is to be redistributed amongst the owners of flats in the tenement in the event that a share of the costs is not recoverable from one of the owners,

(c) rule 24 (association funds) applies except to the extent that a pre-commencement tenement burden makes provision about holding funds on behalf of the owners of the flats in the tenement.

(6) A tenement burden mentioned in—

(a) sub-paragraph (3) is to be treated as if it related to the making of association decisions by the owners (as well as any other decisions made by the owners of the flats in the tenement),

(b) sub-paragraph (4) or (5)(b) is to be treated as if it related to liability of the owners for association costs (as well as any other costs specified in the burden),

(c) sub-paragraph (5)(a) is to be treated as if it related to budgeting for, and collecting payment by the owners of, association costs (as well as any other costs incurred by or on behalf of the owners),

(d) sub-paragraph (5)(c) is to be treated as if it related to association funds (as well as any other funds held on behalf of the owners).

(7) In this paragraph a reference to—

(a) a Part is to a Part of schedule A2,

(b) a numbered rule is to a paragraph of that schedule bearing that number,

(c) a "pre-commencement tenement burden" is to a tenement burden which affects the tenement on the day on which section 2 of the Tenements (Amendment) (Scotland) Act 2025 comes into force.

Registration of preservative deed of conditions

3 (1) This paragraph applies during the transition period where—

(a) no tenement owners' association conditions affect a tenement owners' association,

(b) a member of the association requests that the association registers a preservative deed of conditions, and

(c) such a request has not previously been made to the association (by that or any other member).

(2) The manager of the association must, as soon as reasonably practicable after the request is made, inform each other member of the association that—

(a) a request has been made to register a preservative deed of conditions,

(b) the manager will prepare the deed unless the association objects to such a deed being registered,

(c) the association will object to such a deed being registered only if owners having at least 75% of the votes allocated to owners notify the manager that they so object, and

(d) any such objection must be notified to the manager by an owner within the period of 28 days beginning with the day on which the manager informs the owner that the request has been made.

(3) Where the association does not object as mentioned in sub-paragraph (2)(b), the manager must—

(a) prepare the preservative deed of conditions,

(b) give a copy of the deed to each member of the association and inform each member that—

(i) the manager will register the deed unless the association objects to the deed being registered,

(ii) the association will object to the deed being registered only if owners having at least 75% of the votes allocated to owners notify the manager that they so object, and

(iii) any such objection must be notified to the manager by an owner within the period of 28 days beginning with the day on which the manager gives the owner a copy of the deed.

(4) Where the association does not object as mentioned in sub-paragraph (3)(b)(i), the manager must register the deed on behalf of the association.

(5) Where two or more persons own a flat in common—

(a) the reference in sub-paragraph (2)(d) to the day on which the manager informs the owner that the request has been made is a reference to the day on which the manager so informs the last of those persons,

(b) the reference in sub-paragraph (3)(b)(iii) to the day on which the manager gives the owner a copy of the deed is a reference to the day on which the manager gives a copy of the deed to the last of those persons.

(6) In this paragraph—

(a) a "preservative deed of conditions" is a deed creating tenement owners' association conditions which set out the default tenement owners' association rules with (in addition to the modifications required by section 3D(2)(c)(i)) such modifications as—

(i) are required to make the effect of the conditions consistent with the effect of tenement burdens which affect the tenement on the day on which section 2 of the Tenements (Amendment) (Scotland) Act 2025 comes into force, and

(ii) are permitted by regulations made under section 3D(2)(c)(ii),

(b) a reference to preparing a preservative deed of conditions includes a reference to instructing the preparation of such a deed.

SCHEDULE 2
(introduced by section 12(3))

FORM OF NOTICE OF POTENTIAL LIABILITY FOR COSTS

"NOTICE OF POTENTIAL LIABILITY FOR COSTS

This notice gives details of certain maintenance or work carried out, or to be carried out, in relation to the flat specified in the notice. The effect of the notice is that a person may, on becoming the owner of the flat, be liable by virtue of section 12(3) of the Tenements (Scotland) Act 2004 (asp 11) for any outstanding costs relating to the maintenance or work.

Flat to which notice relates:

(see note 1 below)

Description of the maintenance or work to which notice relates:

(see note 2 below)

Person giving notice:

(see note 3 below)

Signature:

(see note 4 below)

Date of signing: "

Notes for completion

(These notes are not part of the notice)

1 Describe the flat in a way that is sufficient to identify it. Where the flat has a postal address, the description must include that address. Where title to the flat has been registered in the Land Register of Scotland, the description must refer to the title number of the flat or of the larger subjects of which it forms part. Otherwise, the description should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.

2 Describe the maintenance or work in general terms.

3 Give the name and address of the person applying for registration of the notice ("the applicant") or the applicant's name and the name and address of the applicant's agent.

4 The notice must be signed by or on behalf of the applicant.

SCHEDULE 3

(introduced by sections 22(3) and 23(1))

SALE UNDER SECTION 22(3) OR 23(1)

Application to sheriff for power to sell

1 (1) Where an owner or tenement owners' association is entitled to apply—

(a) under section 22(3), for power to sell the site; or

(b) under section 23(1), for power to sell the tenement building,

the owner or (as the case may be) association may make a summary application to the sheriff seeking an order (referred to in this Act as a "power of sale order") conferring such power on the owner or (as the case may be) association.

(2) The site or tenement building in relation to which an application or order is made under sub-paragraph (1) is referred to in this schedule as the "sale subjects".

(3) An owner or association making an application under sub-paragraph (1) shall give notice of it to each of the other owners or (as the case may be) each of the owners of the sale subjects.

(3A) Where an application under sub-paragraph (1) is made by an owner, the owner must give notice of the application to the tenement owners' association for the tenement (if any).

(4) The sheriff shall, on an application under sub-paragraph (1)—

(a) grant the power of sale order sought unless satisfied that to do so would—

(i) not be in the best interests of all (or both) the owners taken as a group; or

(ii) be unfairly prejudicial to one or more of the owners; and

(b) if a power of sale order has previously been granted in respect of the same sale subjects, revoke that previous order.

(5) A power of sale order shall contain—

(a) the name and address of the owner or (as the case may be) association in whose favour it is granted;

(b) the postal address of each flat or, as the case may be, former flat comprised in the sale subjects to which the order relates; and

(c) a sufficient conveyancing description of each of those flats or former flats.

(6) A description of a flat or former flat is a sufficient conveyancing description for the purposes of sub-paragraph (5)(c) if—

(a) where the flat or former flat has been registered in the Land Register of Scotland, the description refers to the number of the title sheet;

(b) in relation to any other flat or former flat, the description is by reference to a deed recorded in the Register of Sasines.

(7) An application under sub-paragraph (1) shall state the applicant's conclusions as to—

(a) which of subsections (4) and (5) of section 22 applies for the purpose of determining how the net proceeds of any sale of the sale subjects in pursuance of a power of sale order are to be shared among the owners of those subjects; and

(b) if subsection (5) of that section is stated as applying for that purpose—

(i) the floor area of each of the flats or former flats comprised in the sale subjects; and

(ii) the proportion of the net proceeds of sale allocated to that flat.

Appeal against grant or refusal of power of sale order

2 (1) A party may, not later than 14 days after the date of—

(a) making of a power of sale order; or

(b) an interlocutor refusing an application for such an order,

appeal to the Court of Session on a point of law.

(2) The decision of the Court of Session on any such appeal shall be final.

Registration of power of sale order

3 (1) A power of sale order has no effect—

(a) unless it is registered within the period of 14 days after the relevant day; and

(b) until the beginning of the forty-second day after the day on which it is so registered.

(2) In sub-paragraph (1)(a) above, "the relevant day" means, in relation to a power of sale order—

(a) the last day of the period of 14 days within which an appeal against the order may be lodged under paragraph 2(1) of this schedule; or

(b) if such an appeal is duly lodged, the day on which the appeal is abandoned or determined.

Exercise of power of sale

4 (1) An owner or tenement owners' association in whose favour a power of sale order is granted may exercise the power conferred by the order by private bargain or by exposure to sale.

(2) However, in either case, the owner or (as the case may be) the association shall—

(a) advertise the sale; and

(b) take all reasonable steps to ensure that the price at which the sale subjects are sold is the best that can reasonably be obtained.

(3) In advertising the sale in pursuance of sub-paragraph (2)(a) above, the owner or (as the case may be) association shall, in particular, ensure that there is placed and maintained on the sale subjects a conspicuous sign—

(a) advertising the fact that the sale subjects are for sale; and

(b) giving the name and contact details of the owner or of any agent acting on the owner's behalf or (as the case may be) of the association or of any agent acting on the association's behalf in connection with the sale.

(4) So far as may be necessary for the purpose of complying with sub-paragraph (3) above—

(a) where the power of sale order is granted in favour of an owner, the owner or any person authorised by the owner shall be entitled to enter any part of the sale subjects not owned, or not owned exclusively, by that owner,

(b) where the power of sale order is granted in favour of an association, the association or any person authorised by the association is entitled to enter any part of the sale subjects.

Distribution of proceeds of sale

5 (1) An owner selling the sale subjects (referred to in this paragraph as the "selling owner"), or a tenement owners' association selling the sale subjects, shall, within seven days of completion of the sale—

(a) calculate each owner's share; and

(b) apply that share in accordance with sub-paragraph (2) below.

(2) An owner's share shall be applied—

(a) first, to repay any amounts due under any heritable security affecting that owner's flat or former flat;

(b) next, to defray any expenses properly incurred in complying with paragraph (a) above; and

(c) finally, to pay to the owner the remainder (if any) of that owner's share.

(3) If there is more than one heritable security affecting an owner's flat or former flat, the owner's share shall be applied under paragraph (2)(a) above in relation to each security in the order in which they rank.

(4) If any owner cannot by reasonable inquiry be identified or found, the selling owner or (as the case may be) association shall consign the remainder of that owner's share in the sheriff court.

(5) On paying to an owner ("the recipient") the remainder of that owner's share, the selling owner or (as the case may be) the association shall also give to the recipient—

(a) a written statement showing—

(i) the amount of the recipient's share and of the remainder of it; and

(ii) how that share and remainder were calculated; and

(b) evidence of—

(i) the total amount of the proceeds of sale; and

(ii) any expenses properly incurred in connection with the sale and in complying with sub-paragraph (2)(a) above.

(6) In this paragraph—

"remainder", in relation to an owner's share, means the amount of that share remaining after complying with sub-paragraph (2)(a) and (b) above;

"share", in relation to an owner, means the share of the net proceeds of sale to which that owner is entitled in accordance with subsection (4) or, as the case may be, subsection (5) of section 22.

Automatic discharge of heritable securities

6 Where—

(a) an owner or tenement owners' association—

(i) sells the sale subjects in pursuance of a power of sale order; and

(ii) grants a disposition of those subjects to the purchaser or the purchaser's nominee; and

(b) that disposition is duly registered in the Land Register of Scotland or recorded in the Register of Sasines,

all heritable securities affecting the sale subjects or any part of them shall, by virtue of this paragraph, be to that extent discharged.

SCHEDULE 4
(introduced by section 25)

AMENDMENTS OF TITLE CONDITIONS (SCOTLAND) ACT 2003

1 The Title Conditions (Scotland) Act 2003 (asp 9) shall be amended as follows.

2 In section 3(8)(waiver, mitigation and variation of real burdens), for "the holder" there shall be substituted "a holder".

3 In section 4 (creation of real burdens), in subsection (7), after "sections" there shall be inserted "53(3A),".

4 In section 10 (affirmative burdens: continuing liability of former owner)—

(a) in subsection (2), at the beginning there shall be inserted "Subject to subsection (2A) below,";

(i) after subsection (2) there shall be inserted—

"(2A) A new owner shall be liable as mentioned in subsection (2) above for any relevant obligation consisting of an obligation to pay a share of costs relating to maintenance or work (other than local authority work) carried out before the acquisition date only if—

(a) notice of the maintenance or work—

(i) in, or as near as may be in, the form set out in schedule 1A to this Act; and

(ii) containing the information required by the notes for completion set out in that schedule,

(such a notice being referred to in this section and section 10A of this Act as a "notice of potential liability for costs") was registered in relation to the burdened property at least 14 days before the acquisition date; and

(b) the notice had not expired before the acquisition date.

(2B) In subsection (2A) above—

"acquisition date" means the date on which the new owner acquired right to the burdened property; and

"local authority work" means work carried out by a local authority by virtue of any enactment."; and

(c) at the end there shall be added—

"(5) This section does not apply in any case where section 12 of the Tenements (Scotland) Act 2004 (asp 11) applies.".

5 After section 10 there shall be inserted—

"10A Notice of potential liability for costs: further provision

(1) A notice of potential liability for costs—

(a) may be registered in relation to burdened property only on the application of—

(i) an owner of the burdened property;

(ii) an owner of the benefited property; or

(iii) any manager; and

(b) shall not be registered unless it is signed by or on behalf of the applicant.

(2) A notice of potential liability for costs may be registered—

(a) in relation to more than one burdened property in respect of the same maintenance or work; and

(b) in relation to any one burdened property, in respect of different maintenance or work.

(3) A notice of potential liability for costs expires at the end of the period of 3 years beginning with the date of its registration, unless it is renewed by being registered again before the end of that period.

(4) This section applies to a renewed notice of potential liability for costs as it applies to any other such notice.

(5) The Keeper of the Registers of Scotland shall not be required to investigate or determine whether the information contained in any notice of potential liability for costs submitted for registration is accurate.

(6) The Scottish Ministers may by order amend schedule 1A to this Act."

6 In section 11 (affirmative burdens: shared liability), after subsection (3) there shall be inserted—

"(3A) For the purposes of subsection (3) above, the floor area of a flat is calculated by measuring the total floor area (including the area occupied by any internal wall or other internal dividing structure) within its boundaries; but no account shall be taken of any pertinents or any of the following parts of a flat—

(a) a balcony; and

(b) except where it is used for any purpose other than storage, a loft or basement.".

7 In section 25 (definition of the expression "community burdens"), in subsection (1)(a), for "four" there shall be substituted "two".

8 In section 29 (power of majority to instruct common maintenance)—

(a) in subsection (2)—

(i) in paragraph (b)—

(A) for the words from the beginning to "that" where it first occurs there shall be substituted "subject to subsection (3A) below, require each"; and

(B) for sub-paragraph (ii) there shall be substituted—

"(ii) with such person as they may nominate for the purpose,"; and

(ii) paragraph (c) shall be omitted;

(b) after subsection (3) there shall be inserted—

"(3A) A requirement under subsection (2)(b) above that each owner deposit a sum of money—

(a) exceeding £100; or

(b) of £100 or less where the aggregate of that sum taken together with any other sum or sums required (otherwise than by a previous notice under this subsection) in the preceding 12 months to be deposited under that subsection by each owner exceeds £200,

shall be made by written notice to each owner and shall require the sum to be deposited into such account (the "maintenance account") as the owners may nominate for the purpose.

(3B) The owners may authorise a manager or at least two other persons (whether or not owners) to operate the maintenance account on their behalf.";

(c) in subsection (4), for "(2)(b)" there shall be substituted "(3A)";

(d) after subsection (6) there shall be inserted—

"(6A) The notice given under subsection (2)(b) above may specify a date as a refund date for the purposes of subsection (7)(b)(i) below.";

(e) in subsection (7)(b)—

(i) in sub-paragraph (i), for "the fourteenth" there shall be substituted—

(A) where the notice under subsection (2)(b) above specifies a refund date, that date; or

(B) where that notice does not specify such a date, the twenty-eighth";

(ii) in sub-paragraph (ii), for "(4)(h)" there shall be substituted "(3B)";

(f) after subsection (7) there shall be inserted—

"(7A) A former owner who, before ceasing to be an owner, deposited sums in compliance with a requirement under subsection (2)(b) above, shall have the same entitlement as an owner has under subsection (7)(b) above.";

(g) in subsection (8), for "(2)(b)" there shall be substituted "(3A)"; and

(h) after subsection (9) there shall be inserted—

"(10) The Scottish Ministers may by order substitute for the sums for the time being specified in subsection (3A) above such other sums as appear to them to be justified by a change in the value of money appearing to them to have occurred since the last occasion on which the sums were fixed.".

9 After section 31 there shall be inserted—

"31A Disapplication of provisions of sections 28, 29 and 31 in certain cases

(1) Sections 28(1)(a) and (d) and (2)(a), 29 and 31 of this Act shall not apply in relation to a community consisting of one tenement.

(2) Sections 28(1)(a) and (d) and 31 of this Act shall not apply to a community in any period during which the development management scheme applies to the community.".

10 In section 33 (majority etc. variation and discharge of community burdens)—

(a) in subsection (1)(b), the words "where no such provision is made," shall be omitted; and

(b) in subsection (2)(a), at the beginning there shall be inserted "where no such provision as is mentioned in subsection (1)(a) above is made,".

11 In section 35 (variation and discharge of community burdens by owners of adjacent units), in subsection (1), the words "in a case where no such provision as is mentioned in section 33(1)(a) of this Act is made" shall be omitted.

12 In section 43 (rural housing burdens)—

(a) in subsection (1), after "burden" where it first occurs there shall be inserted "over rural land"; and

(b) in subsection (6), for "on rural land or to provide rural" there shall be substituted "or".

13 In section 45 (economic development burdens), subsection (6) shall be omitted.

14 In section 53 (common schemes: related properties), after subsection (3) there shall be inserted—

"(3A) Section 4 of this Act shall apply in relation to any real burden to which subsection (1) above applies as if—

(a) in subsection (2), paragraph (c)(ii);

(b) subsection (4); and

(c) in subsection (5), the words from "and" to the end,

were omitted."

15 In section 90 (powers of Lands Tribunals as respects title conditions), in subsection (8A), for "application" there shall be substituted "disapplication".

16 In section 98 (granting certain applications for variation, discharge, renewal or preservation of title conditions), in paragraph (b)(i), for the words "the owners of all" there shall be substituted "all the owners (taken as a group) of".

17 In section 99 (granting applications as respects development management schemes), in subsection (4)(a), for the words "the owners" there shall be substituted "all the owners (taken as a group)".

18 In section 119 (savings and transitional provision etc.), subsection (9) shall be omitted.

19 In section 122(1) (interpretation)—

(a) the definition of "flat" shall be omitted;

(b) after the definition of "Lands Tribunal" there shall be inserted—

""local authority" means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39);"; and

(c) for the definition of "tenement" there shall be substituted—

""tenement" has the meaning given by section 26 of the Tenements (Scotland) Act 2004 (asp 11); and references to a flat in a tenement shall be construed accordingly;".

20 After schedule 1 there shall be inserted—

"SCHEDULE 1A

(introduced by section 10(2A))

Form of notice of potential liability for costs

"Notice of potential liability for costs

This notice gives details of certain maintenance or work carried out in relation the property specified in the notice. The effect of the notice is that a person may, on becoming the owner of the property, be liable by virtue of section 10(2A) of the Title Conditions (Scotland) Act 2003 (asp 9) for any outstanding costs relating to the maintenance or work.

Property to which the notice relates:

(see note 1 below)

Description of the maintenance or work to which notice relates:

(see note 2 below)

Person giving notice:

(see note 3 below)

Signature:

(see note 4 below)

Date of signing:"

Notes for completion
(These notes are not part of the notice)

1 Describe the property in a way that is sufficient to identify it. Where the property has a postal address, the description must include that address. Where title to the property has been registered in the Land Register of Scotland, the description must refer to the title number of the property or of the larger subjects of which it forms part. Otherwise, the description should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.

2 Describe the maintenance or work in general terms.

3 Give the name and address of the person applying for registration of the notice ("the applicant") or the applicant's name and the name and address of the applicant's agent.

4 The notice must be signed by or on behalf of the applicant."

Appendix D: List of respondents to the Discussion Paper

List of respondents to the Discussion Paper on Tenement law: compulsory owners' associations (SLC No 176, 2024)[1]

Aberdeen City Council

Argyll and Bute Council, Housing Services

Argyll Community Housing Association

Gemma Beher

Shona Blainey

Mike Blair

Built Environment Forum Scotland (BEFS)

Morna Burdon

Euan Campbell

Centre for Scots Law, University of Aberdeen

Chartered Institute of Building

City of Edinburgh Council

C-urb Factoring (subsidiary of The Link Group)

Tom Duffin

Dowanhill, Hyndland and Kelvinside Community Council

EALA Impacts CIC

Edinburgh Building Retrofit and Improvement Collective (EdinBRIC)

Edinburgh World Heritage

[1] In total, 60 responses were received during this public consultation process. One response was submitted in confidence.

Energy Saving Trust

Existing Homes Alliance

Factor One

Faculty of Advocates

James Gibb

Glasgow City Council

Hacking and Paterson Management Services

Home Royal House, Edinburgh (5 residents)

Hughenden Phase 2 Owners' Association

Ian Hay

Inverclyde Council

Edmund Kapusniak

Florance Kennedy

Katherine Lawson

Ailsa Macfarlane

James McLean

Allan Parkinson

Perth & Kinross Council, Housing and Communities

Property Managers Association Scotland Ltd (PMAS)[2]

R3, Association of Business Recovery Professionals

Redpath Bruce Property Management Ltd

Registers of Scotland

Professor Colin Reid

Professor Kenneth Reid

Royal Incorporation of Architects in Scotland (RIAS)

[2] In May 2025, PMAS merged with The Property Institute to become TPI Scotland.

Stuart Russell

Scottish Association of Landlords

Scottish Borders Council

Scottish Empty Homes Partnership

Scottish Federation of Housing Associations (SFHA)

Scottish Property Federation

Senators of the College of Justice

Liz Smith

Peter Smith

Speirs Gumley

Kevin Sturgeon

Tenement Maintenance Working Group

Under One Roof

Flora Vern

Morag Wallace

Gordon Wilton

Appendix E: List of Advisory Group Members

List of Advisory Group Members

Jill Andrew, Connell & Connell WS

Jim Bauld, First-Tier Tribunal and formerly TC Young Solicitors

Professor Sue Bright, New College, University of Oxford[693]

Professor Stewart Brymer, Brymer Legal Limited and University of Dundee

Malcolm Combe, University of Strathclyde

Scott Geekie, Lindsays and Tenement Action Group

Charles Hay, Brodies LLP

Sheriff (retired) Kenneth McGowan

Andrew Todd, Springfield Group and formerly Law Society of Scotland Property and Land Law Reform Subcommittee

Dr Lu Xu, University of Lancaster

[693] Professor Bright sat on the Advisory Group until July 2025.

Published on behalf of the Scottish Law Commission by APS Group Scotland

This Document is also available for download from:
www.scotlawcom.gov.uk/

ISBN 978-1-0686139-7-5

PPDAS1678946 (12/25)