

This summary relates to my [proposal for a Member's Bill in Session 3 of the Scottish Parliament](#)

There was insufficient time for me to lodge a final proposal and publish my summary last session. I have therefore published my summary in December 2011 to facilitate my proposal in this session of the Scottish Parliament.

PROPOSED BUILDING REPAIRS (SCOTLAND) BILL

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SUMMARY OF CONSULTATION RESPONSES

Introduction

1. The intention of the proposal is to make provision for local authorities to identify, carry out works to and recover costs in respect of defective and dangerous buildings.
2. The consultation document accompanying the draft proposal for the Building Repairs (Scotland) Bill was issued on 18 December 2010 and was open for comment until 11 March 2011.
3. The consultation document was made available from a link on the Proposals for Members Bills webpage on the Scottish Parliament Website: The Scottish Parliament: - Bills - Proposals for Members' Bills at <http://www.scottish.parliament.uk/business/bills/membersBills.htm>. It was also issued to 272 organisations and individuals with an interest in the issue; recipients were encouraged to bring the consultation to the attention of anyone else they thought might have an interest in the subject matter. A number of late submissions were received after the closing date; these were accepted and have been included in this analysis.
4. I answered requests for up to another 6 copies to be sent out either electronically or in hard copy.

Additional Activity

5. In addition to carrying out the public consultation, I have taken part in a number of activities related to the subject of building repairs in order to inform the development of this policy. These included
 - Meeting with interested parties including Scottish Association of Building Standards Managers (SABSM), MSPs and

representatives from the Town and City Centre Development CPG as well as the Inverness Provost.

- Published article on the bill in the Association of Scottish Community Councils' magazine, Spring 2011.

General

6. In total 43 responses were received; these were made up of the following groups:

- 21 local authorities (Note: 2 responses were submitted from East Lothian Council)
- 5 individuals
- 5 community councils
- 4 representative bodies
- 2 non-governmental organisations
- 2 housing associations/representative body for housing associations
- 1 Government body
- 1 property management company
- 1 Member of Parliament

7. The consultation document proposed one primary change to cost recovery in respect of building repairs while consulting more widely on other possibilities relating to dangerous and defective buildings. The key change proposed was the reintroduction of charging orders as a means of cost recovery for both dangerous and defective building notices. Additionally it was proposed that there should be a change in the timescale requirement for owners to carry out repairs on defective buildings to ensure that there was adequate time for owners to make arrangements prior to the authority carrying out such work.

8. The majority of respondents agreed that the current legislation relating to defective and dangerous buildings needed to be reviewed and supported the proposed introduction of charging orders or similar **mechanism as a method for the recovery of costs.**

	<i>Number</i>	<i>%</i>
Support	35	81.3
Against proposals	4	9.3
Neither supports nor opposes	4	9.3
Total	43	100

9. 35 respondents (81%) supported the proposals either in whole (14 respondents) or in part (21 respondents).

10. In responding to the consultation, the Scottish Federation of Housing Associations (SFHA) pointed out that, according to Shelter,¹ "in

¹ Shelter media briefing note 4th February 2011

Scotland around 48,000 potential homes are lying vacant. It is thought that up to one third of these are unoccupied because the owners cannot afford the cost of necessary repairs.”²

11. The SFHA therefore welcomed the proposal for a Building Repairs (Scotland) Bill as it would “give a better incentive for local authorities to get involved with repairs to defective buildings and make it easier for them to recoup their expenditure on both dangerous and effective buildings.”³

12. Likewise, Strathaven Community Council stated:

We are delighted that steps are being taken to re-launch the consultation on the issue of building repairs to dangerous and defective buildings and would hope that any new legislation that is introduced will enhance the powers of local authorities to enforce owners to repair defective properties.⁴

13. Less than 10% of respondents (four respondents) stated that they did not support the proposals, the principal reason being that they did not consider that further legislation was necessary.

14. For example, Consumer Focus Scotland indicated that it was not convinced that there was a gap requiring further legislation. It pointed out that, in relation to residential houses, local authorities have existing powers under the Housing (Scotland) Act 2006 through which they had powers to enforce a maintenance plan and recover costs from owners through repayment charges.⁵

15. A further four respondents neither supported the proposals nor opposed them.

16. Respondents were less certain whether the other changes proposed in the consultation were necessary or deliverable; namely, the proposed extension to twelve weeks for repair works; the automatic apportionment of costs in equal shares in cases of shared ownership and a new certification and registration scheme. Each proposal is discussed in more detail below under the relevant questions.

Responses

17. The consultation document posed 14 questions; a summary of the responses to each question is outlined below.

² Response 26. Scottish Federation of Housing Associations

³ Response 26. Scottish Federation of Housing Associations

⁴ Response 10. Strathaven Community Council

⁵ Response 18. Consumer Focus Scotland

Question 1

What do you believe are the current problems with the enforcement of dangerous and defective buildings legislation?

18. 38 respondents answered this question. Respondents highlighted a range of difficulties associated with the enforcement of dangerous and defective buildings legislation.

19. The key issues identified were financial. For example, respondents pointed to the limited resources available to local authorities in terms of staffing and finances to enforce repairs, as well as the difficulties of cost recovery in cases where the local authority had been obliged to undertake the repair work itself.

20. The Built Environment Forum Scotland (BEFS) considered that the scale of the problem and the potential financial implications were a major disincentive to local authorities. It noted further that the extent of the problem was likely to increase:

There are [however] estimates from the Scottish House Condition Survey (2009) which indicate that almost eighty percent (78%) of dwellings in Scotland have some disrepair. When it is considered that new built property only adds 1% to the existing stock and that the majority of the current 99% of buildings will still be standing by 2050 then the scale of defective or dangerous buildings is potentially enormous.⁶

21. Highland Council indicated that:

The staff resource most Local Authorities (LAs) have for dealing with defective and dangerous buildings means the LAs can only provide a reactionary level of service.⁷

22. For its part, the Scottish Associations of Building Standards Managers (SABSM) emphasised that “with regard to dangerous buildings, the main problem is the recovery of costs for work legally organised by a Local Authority, if the owner does not carry out the work specified in a dangerous building notice.”⁸

23. A number of respondents pointed to provisions in the Housing (Scotland) Act 2006 which assisted in the repair and cost recovery in respect of domestic premises and the lack of equivalent powers in relation to commercial properties. The plethora of legislation providing differing powers was a common theme. As the City of Edinburgh Council pointed out that:

⁶ Response 11. Built Environment Forum Scotland

⁷ Response 37. Highland Council

⁸ Response 39. Scottish Associations of Building Standards Managers

No single Act currently meets the majority of circumstances and each has significant barriers to their implementation on a regular basis.⁹

24. The difficulties in identifying ownership in respect of multiple-ownership properties were also highlighted. Local authority respondents indicated that searches for this information and use of data protection legislation were often protracted and resource-intensive.

25. For example, Scottish Borders Council reported that it currently uses “a range of methods including writing to people at the address of the defective property; legal searches through Registers Direct and through undertaking detailed searches through search companies. Nevertheless, sometimes property owners cannot be traced and even where we are able to secure a lead on the location of any owner, we regularly encounter barriers under the Data Protection Act.”¹⁰

26. The Scottish Federation of Housing Associations (SFHA) also confirmed that there could be problems in tracing owners in mixed tenure blocks, especially given the popularity of “buy to let” flats.¹¹

27. A number of respondents considered that the lack of a clear definition of what was meant by a “defective” building was a further obstacle to enforcement. Argyll & Bute Council pointed out that:

Unlike dangerous buildings, where Local Authorities have a statutory duty to act to remove danger, when dealing with defective buildings, the Building (Scotland) Act 2003 does not place a statutory obligation on Local Authorities but provides discretionary powers to act. Section 28 (1) of the 2003 Act states that a Local Authority ‘may serve’ a defective building notice. This allows the interpretation of what constitutes a ‘defective building’ open to the discretion of each Local Authority. Currently, there is no definition or guidance of the issues which would fall into this category being so generic.¹²

28. One respondent considered that local authorities failed to take action where buildings in need of repair were identified and had, on occasion, impeded progress.¹³

Question 2

In your opinion, what changes should be made to current legislation to allow for a more effective system of identification and enforcement?

29. 33 respondents answered this question. There was largely consensus on the key changes that should be made to create a more effective

⁹ Response 16. City of Edinburgh Council

¹⁰ Response 8. Scottish Borders Council

¹¹ Response 26. Scottish Federation of Housing Associations

¹² Response 43. Argyll & Bute Council

¹³ Response 3. Individual

system of identification and enforcement in respect of building repairs. These were:

- Rationalisation and simplification of the plethora of legislation relating to defective and dangerous buildings;
- A more effective system of costs recovery.

30. SOLAR considered that there was probably a need for an overall review of the legislation relating to dangerous or defective buildings.¹⁴ While Stirling Council suggested that: “Rationalisation of the current legislation dealing with defective and dangerous buildings in to a more focussed piece of legislation would be beneficial.”¹⁵

31. The SABSM took a similar view and stated that:

Given the plethora of legislation, it would make sense for a single piece of legislation to apply consistently across all building types unless there were particular aspects relating to dwellings which it thought were worth keeping.¹⁶

32. However, SABSM was strongly of the view that the re-introduction of charging orders powers into the 2003 Act should be actioned now. Renfrewshire Council supported this part of the proposal stating that:

A reintroduction of charging orders similar to the provisions contained within the Building (Scotland) Act 1959 would allow local authorities to carry out work to dangerous and defective buildings with the confidence that incurred costs could eventually be recovered.¹⁷

33. Hacking and Paterson stated that:

We do not believe that there is presently any problem with the enforcement of the present system should any local authority be financially able to do so.

34. The Housing Strategy and Environmental Health divisions of East Lothian Council suggested that, rather than re-introducing charging orders, the legislation should be aligned to the Housing (Scotland) Act 2006 which used repayment charges as the means of recovering costs. The Council noted that repayment charges could not currently be used to secure debt against a non-domestic building and that an inability to recover costs from businesses had been an issue in cases where commercial premises were involved in housing repairs.¹⁸

35. The Scottish Government indicated in its response that the Building Standards Division was currently reviewing the debt recovery powers in

¹⁴ Response 31. SOLAR

¹⁵ Response 34, Stirling Council

¹⁶ Response 39. Scottish Association of Building Standard Managers

¹⁷ Response 9. Renfrewshire Council

¹⁸ Response 24. East Lothian Council

the 2003 Act to consider introducing charging orders or similar mechanisms to those contained in the Housing (Scotland) Act or Historic Environment (Amendment) (Scotland) Act 2011.¹⁹

36. Respondents also called for clarity in the use and application of section 28 (defective building notices) of the Building (Scotland) Act 2003 including when such notices should be served, to whom, delivery and standardisation of form and the definition of “defective”.

37. East Lothian Council agreed that there should be a clearer definition of defective building “so that it does not require action on “trivial” maintenance and repair issues.²⁰ While Clackmannanshire Council suggested that the defect should be “of such significance that if not repaired may impinge on the future safety of the building, adjacent property, occupants or public in general.”²¹

38. A number of respondents sought a solution for cases where an owner could not be identified or refused to co-operate. For example, SOLAR suggested a provision that places an obligation on owners to identify themselves along the lines of section 125(3)(e) of the Town and Country Planning (Scotland) Act 1997.²² While Perth and Kinross Council pointed out that, in cases where an owner could not be identified or refused to contribute to the work, there should be provision to allow the local authority to take on a part share in conjunction with those owners who are willing to do the work. The Council suggested that legislation should be amended “to make this an option.”²³

39. Finally, several respondents proposed:

- A clear emphasis on the responsibility of owners to maintain and keep their buildings in good repair;
- A better system of insurance which would make owners more willing to contribute to the costs;
- The introduction of a regular survey or “health check” of buildings; and
- Provision of information to owners regarding financial support available to buildings of “historical significance”.

Question 3

What do you see as the benefits of charging orders in enabling local authorities to recover costs from owners of dangerous and defective buildings?

40. As noted above, a key strand of the consultation document was the proposal to re-introduce charging orders in cases where the local

¹⁹ Response 27. Scottish Government

²⁰ Response 24, East Lothian Council

²¹ Response 29, Clackmannanshire Council

²² Response 31. SOLAR

²³ Response 14. Perth & Kinross Council

authority had been obliged to carry out repair works in the absence of action by owners and had been unable to recover such costs. The use of charging orders as a cost recovery method had previously been available to local authorities under the Building (Scotland) Act 1959.

41. Evidence presented in the consultation document suggested that the lack of costs recovery acted as a disincentive to local authorities to take appropriate action.

42. 35 respondents answered this question, 33 of which identified benefits resulting from the re-introduction of charging orders. One respondent simply stated their support for charging orders and one other respondent considered that charging orders could be open to abuse by local authorities.

43. The main benefits identified of re-introducing charging orders were:

- Greater certainty to local authorities that they would ultimately recover their costs;
- Charging orders attach to the property rather than to the owner, therefore providing some security in cases where the owner cannot be traced or does not have sufficient funds;
- Avoids the legal costs involved in pursuing the debt through a civil action;
- Would bring the position in line with the Housing (Scotland) Act 2006 which makes provision for the use of Repayment Charges.

44. In its response to the consultation Scottish Borders Council emphasised that:

As a charging order is placed on a property rather than on an individual it allows greater security to local authorities by enabling a claim against the property. This would allow, in circumstances where the owner cannot be traced, a more timely resolution to the defects and provide for an additional method of debt recovery, with reduced cost outlay for their production and registration.²⁴

45. East Ayrshire Council commented that: “The introduction of Charging Orders would enable a possible saving to local authorities by avoiding legal action against owners if pursuing civil debt through court action.”²⁵

46. In a similar vein, the City of Edinburgh Council stated that: “Charging orders are a useful tool in recovering monies and their absence has been detrimental to the process.”²⁶ Although it noted that charging orders were not the best solution in every case.

²⁴ Response 8. Scottish Borders Council

²⁵ Response 13. East Ayrshire Council

²⁶ Response 16. City of Edinburgh Council

47. Clackmannanshire Council considered that: "Councils would have greater confidence in achieving cost recovery, which may persuade some Local Authorities to be more proactive when dealing with defective buildings."²⁷

48. While pointing to the benefits, several respondents qualified their support by emphasising that:

- Repayment changes should be used rather than charging orders to provide consistency with the position in relation to domestic properties;
- Owners should have sufficient time to carry out repairs and pay before implementation of a charging order;
- Charging orders were less suitable for defective buildings.

Question 4

What do you see as the disadvantages of charging orders?

49.32 respondents answered this question, 28 of whom identified disadvantages. The remaining four responses did not specifically refer to the disadvantages of charging orders. The key disadvantages identified were:

- There could be a long delay between making the charging order and costs recovery;
- The local authority will still have to pay the upfront costs;
- A charging order cannot guarantee that costs will be recovered; it may expire after 30 years;
- The charging order will be ranked with other securities;
- With declining house prices, the charging order may be higher than the equity.

50. As South Lanarkshire Council pointed out:

While charging orders may be better than the current system it still means a council will incur expenditure with no certainty if and when the debt will be repaid. Debt recovery may need to wait until the property is sold and even then the value will be dependent on the state of the property and market value at that time.²⁸

51. Likewise, Aberdeenshire Council commented that the costs to carry out the work may actually be greater than the value of the site resulting in the site having a negative value.²⁹

52. West Dunbartonshire Council pointed out that charging orders did not address the situation where owners are willing to take responsibility for their property but simply could not fund the work. In such cases, it

²⁷ Response 29. Clackmannanshire Council

²⁸ Response 15. South Lanarkshire Council

²⁹ Response 28. Aberdeenshire Council

noted that, owners will be forced to give up responsibility for the repair work and have to allow the Council to take over and remedy the situation.³⁰

53. The BEFS raised concerns regarding the possible negative impact of charging orders on home owners noting that:

Members of the Community may regard the charging order punitive and therefore create animosity with the local authority – affecting future collaborative working with the community to create better places.³¹

54. The BEFS therefore called for full consultation and education with the community before commencing “a more robust regime”.

55. While SABS M supported the introduction of charging orders, it emphasised that legislators should “include flexibility within the Charging Order procedures to allow owners and Local Authorities to come to different financial arrangements if this was deemed to be mutually acceptable to negate perceived disadvantages.”³²

56. A number of respondents also made the following points:

- Repayment charges should be used rather than charging orders to retain consistency with the Housing (Scotland) Act 2006;
- The local authority may be used as an interim, possibly long term lender;
- Local authorities should be able to charge interest;
- Charging orders were more appropriate for dangerous buildings than defective buildings and their introduction would not ensure that the latter system was improved.

Question 5

What do you see as the benefits of charging orders to owners of dangerous and defective buildings?

57. 30 respondents answered this question, 28 of whom identified benefits to owners resulting from the use of charging orders in respect of dangerous and defective buildings. Two respondents did not identify any benefits.

58. The key benefit of charging orders highlighted was that owners would not be liable for the cost of repairs until the property changed hands meaning that those who had insufficient funds would only become liable at sale of property.

59. As the City of Edinburgh Council pointed out:

³⁰ Response 38. West Dunbartonshire Council

³¹ Response 11. Built Environment Forum Scotland

³² Response 39. Scottish Association of Building Standards Managers

This would be an option for owners who may not have sufficient capital at the time to allow them to privately arrange the repairs or fully to meet their liability if these are carried out in default. This may be of particular interest to those on low income or pension.³³

60. Likewise West Dunbartonshire Council affirmed that: “Placing of a charging order could be a solution for some owners who are facing short term financial issues,...as a charging order would allow them to have the defect remedied now and pay sometime later.”³⁴

61. Respondents also noted that:

- The comfort provided by charging orders to local authorities would assist greatly in ensuring that damaged properties received the necessary repairs thereby ensuring public safety;
- The threat of charging orders might encourage co-owners to co-operate;
- Charging orders usually exclude VAT thereby potentially enabling owners to pay less than they would if they themselves arranged for the repair work.

Question 6

What do you see as the disadvantages of charging orders to owners of dangerous and defective buildings?

62. 27 respondents answered this question. 21 respondents identified disadvantages to owners if charging orders were re-introduced to cover costs incurred by a local authority in the repair of dangerous and defective buildings. Five respondents considered that there were no disadvantages to owners and one respondent did not comment directly on the disadvantages.

63. The key disadvantages identified were:

- A charging order on a property could affect its value or delay sale;
- The use of charging orders could be open to abuse by over-zealous local authorities.

64. For example, SABSM acknowledged that: “The presence of a Charging Order on a property could act as a deterrent to the sale of some properties in that the repayment of a Charging Order could reduce the monetary gain to the owner from selling the property.”³⁵

³³ Response 16. City of Edinburgh Council

³⁴ Response 38. West Dunbartonshire Council

³⁵ Response 39. Scottish Association of Building Standards Managers

65. While East Ayrshire Council pointed out that: “In the event of extensive remedial works, including demolition works where the costs are substantial there may be little, if any, equity left in the building/site rendering the building/site valueless to the owner either as security on a sale.”³⁶

66. One individual sought to identify steps that could be taken by local authorities to reduce the need to rely on charging orders and suggested that:

Local authorities could instead provide expertise to assist owners to address building defects through sourcing of funding, agreeable timescales and encouraging proactive uptake of insurance designed for older, historic or high risk material properties.³⁷

Question 7

What would be the benefits or disadvantages of changing the notice period in relation to defective building notices?

67. At present a defective building notice under section 28 of the Building (Scotland) 2003 must specify (a) a date not less than 7 days after the date of service of the notice by which the owner must have begun the work required by the notice, and (b) a date not less than 21 days after the date specified under paragraph (a) by which the owner must have completed that work.

68. The consultation document recognised that in introducing charging orders, it would be paramount to ensure that owners were able to have sufficient time to attempt repairs themselves. The consultation document therefore proposed increasing the notice period for owners to commence work to 12 weeks.

69. 33 respondents answered this question. 8 respondents identified only benefits in respect of this proposal, the key message being that owners should have sufficient time to carry out repairs before a charging order would be placed on a property. 15 respondents noted both advantages and disadvantages in respect of this proposal.

70. In pointing to the advantages of this proposal, West Dunbartonshire Council considered that an extension of the time limit could mean that owners had “time to be able to source a range of contractors, possibly resulting in a reduction in the overall cost.”³⁸

71. A number of respondents argued that there should be flexibility in the timescales applied dependent on the urgency and extent of the repairs. In this regard, Consumer Focus Scotland stated its preference for a

³⁶ Response 13. East Ayrshire Council

³⁷ Response 3. Individual

³⁸ Response 38. West Dunbartonshire Council

flexible approach, “to allow local authorities to set timetables that suit individual situations, rather than a “one size fits all” approach”.³⁹

72. Likewise, the SFHA pointed out “A disadvantage of changing the timescales is that there will be repairs needed where it would be unacceptable to wait up to 12 weeks before the local authority got involved. For example, rectifying a damaged common drain if some co-owners are unwilling to organise the repair themselves.”⁴⁰

73. A further 10 respondents saw no advantages to this proposal. They argued that the current legislation provides minimum timescales only and that there is sufficient flexibility within statute for the time periods to be extended. It was pointed out that local authorities could specify different commencement and completion times in the notice. Perth and Kinross Council reflected the position of a number of local authorities when it pointed out that “the system has a great deal of flexibility as local authorities can set realistic timescales which are proportionate to the level of risk or seriousness of the damage.”⁴¹

Question 8

Do you think this would allow adequate time for owners to carry out repairs to their properties and please give a reason for your response?

74. 35 respondents answered this question. Six respondents considered that 12 weeks would be adequate time for owners to carry out repairs to their properties. For example, the Institute of Historic Building Conservation indicated that three months was “a reasonable period and would allow for winter difficulties in complying with a shorter notice period to be overcome.”⁴²

75. One respondent, Strathaven Community Council, supported an increase in the timeframe permitted for repair work but considered that an extension to 12 weeks was excessive. It suggested, instead, that eight weeks might be more reasonable.⁴³

76. 14 respondents considered that there should be flexibility in the timeframe applied. In general, they accepted that in some cases 12 weeks would be sufficient time in which to complete repairs works, but also noted that in other cases this period could be too long, particularly where the repair work was urgent or, indeed, too short. These respondents therefore did not support a specific time limit being set in statute.

77. SABS commented that:

³⁹ Response 18. Consumer Focus Scotland

⁴⁰ Response 26, Scottish Federation of Housing Associations

⁴¹ Response 14. Perth & Kinross Council

⁴² Response 35. Institute of Historic Building Conservation

⁴³ Response 10. Strathaven Community Council

Where large scale works like roof repairs or other structural work is required, 12 weeks is likely to be insufficient, particularly in communal properties.

78. On the other hand, it noted, that a defective or missing gutter causing water penetration should not need that length of time to comply.⁴⁴

79. A further 14 respondents confirmed that they did not support an extension to 12 weeks given that the existing legislation provided for sufficient flexibility.

Question 9

What do you see as the advantages or disadvantages of the proposal?

80. The consultation document set out how I envisaged the enforcement regime operating following the implementation of his proposed Bill. This was as follows:

Dangerous buildings

- A notice to be served on owners of dangerous buildings.
- The notice to specify the date by which work must be carried out.
- Action by the local authority if not taken by owners: repairs and notification of costs to owners.
- Charging order to be issued to recover costs and expenses incurred by the Local Authority.
- Appeal to an Ombudsman or Sheriff if owner not satisfied at an appropriate point.

Defective buildings

- A notice to be served on owners of defective buildings.
- The notice to specify the date by which work must be carried out.
- The date specified would be no less than 12 weeks from the notice being issued.
- Action by the local authority if not taken by owners: repairs and notification of costs to owners.
- Charging order to be issued to recover costs and expenses incurred by the Local Authority.

⁴⁴ Response 39. Scottish Association of Building Standards Managers

- Appeal to an internal panel and Ombudsman or Sheriff at an appropriate point.

81. Question 9 sought the views of respondents on the proposed structure. Thirty-two respondents answered this question. Eight respondents identified only advantages in respect of the proposed framework. A further 20 respondents identified both advantages and disadvantages. While four respondents identified only disadvantages.

82. The key advantages identified were:

- The proposal could encourage local authorities and owners to work together;
- It would simplify processes;
- The structure would provide greater security for local authorities in terms of cost recovery.

83. For example, Aberdeenshire Council commented that:

The simplification of the legislation would be a good thing resulting in a greater appreciation of what the legislation requires.⁴⁵

84. For its part, Highland Council considered that the re-introduction of charging orders would mean that local authorities had a greater probability of recovering costs incurred in repairing defective and dangerous buildings.⁴⁶

85. Although the majority of respondents appeared to agree that the building repair system needed to be reviewed and recognised that this proposal was attempting to address the current shortcomings, there were a number of reservations regarding the proposed framework. These included:

- The framework was still dependent on local authorities having sufficient resources in place;
- There were a number of other pressing issues that this proposal did not address and, in this regard, the whole system needed to be reviewed.

86. A small number of respondents also expressed concerns regarding the perceived mandatory obligations on local authorities with regard to defective buildings. West Dunbartonshire Council considered that “discretion on whether to take action by serving a notice [in relation to defective buildings] must still remain a decision for the Council.”⁴⁷

87. Renfrewshire Council confirmed this stating:

⁴⁵ Response 28. Aberdeenshire Council

⁴⁶ Response 37. Highland Council

⁴⁷ Response 38. West Dunbartonshire Council

Any shift towards a mandatory requirement for local authorities to repair a defective building if an owner were to default upon a notice, should be regarded with caution. We believe that local authorities should have mandatory responsibility for public safety in respect to dangerous building incidents only.⁴⁸

88. Finally, several respondents commented on the proposed appeal arrangements. In particular, SOLAR emphasised that any appeals process needed to be fit for purpose in the context of a building which is either dangerous or has the potential to become dangerous. It suggested that a short notice period for application to the Sheriff would provide sufficient comfort for owners.⁴⁹

Question 10

What do you see as the advantages and disadvantages of an automatic equal shares provision for local authorities in cost recovery for work carried out by them on dangerous and defective buildings?

89. In addition to charging orders, the consultation document highlighted two further developments that could help provide a more effective and robust enforcement and cost recovery mechanism in relation to dangerous and defective buildings. I therefore sought the views of respondents on:

- Automatic apportionment of costs of repairs on an equal shares basis in the case of shared ownership;
- Introducing a requirement for building owners to submit to a regular certification and regular inspection regime of their property.

90. Question 10 sought the views of respondents on the proposal to automatically apportion costs on an equal shares basis in cases of shared ownership.

91. 34 responded to this question. While four respondents identified only advantages with regard to this proposal, the majority of respondents (21 respondents) pointed to both advantages and disadvantages. Seven respondents identified only disadvantages. Finally, one respondent indicated that they required further clarification on the detail of the proposal and one other respondent simply set out their own approach to distributing costs in multiple-ownership buildings.

92. The advantages of this proposal highlighted by respondents included:

- It would remove local authorities from potential litigation, which could be carried out among owners;
- The process would be much simpler and straightforward;

⁴⁸ Response 9. Renfrewshire Council

⁴⁹ Response 31. Solar.

- It should encourage a more strategic approach.

93. The City of Edinburgh Council had experience of this approach through its own specific legislation and pointed out that:

The advantages have been well proven with the Confirmation Act over 20 years of its use in Edinburgh. It simplifies the process, is clear and easy to understand and minimises the administrative financial burden on both the owners and any enforcing authority.”⁵⁰

94. Other respondents highlighted a number of disadvantages with this proposal, which included:

- The system could produce inequity in cases among different sized properties;
- The mechanism was likely to be of most benefit to commercial properties as these were likely to be larger than the residential properties in the same building;
- The equal shares proportions might be in conflict with existing legislation;
- Such a step was unnecessary as the Tenements (Scotland) Act 2004 made provision for the division of costs.

95. For example, the Scottish Government recognised that recovery of costs on an automatic shares basis “is a simple concept and may speed up the debt recovery”. However, it was concerned that “title deeds often have provisions for repairs to be divided up based on such criteria as size and therefore it would seem inequitable to ignore these agreements.”⁵¹

96. Consumer Focus Scotland pointed out that where there are gaps in the title deeds or they are silent, the Tenement Management Scheme applies.⁵²

97. Merchant City Community Council also noted the potential for inequity and indicated that:

Commercial occupiers very often occupy considerably more space than individual residents and take on more risk in relation to public liability; their share should not be subsidised by residential occupiers.⁵³

98. Clackmannshire Council pointed out that, in such cases, larger property owners may be encouraged not to carry out repairs under their own volition as waiting until the local authority intervened in the process could reduce the cost paid by them.⁵⁴

⁵⁰ Response 16. City of Edinburgh Council

⁵¹ Response 27. Scottish Government

⁵² Response 18, Consumer Focus

⁵³ Response 33. Merchant City Community Council

⁵⁴ Response 29, Clackmannshire Council

Question 11

What do you see as the advantages and disadvantages of a certification and inspection regime for buildings?

99.33 respondents answered this question. While seven respondents indicated support for the proposal in principal, the majority of these required further information about the proposed structure. 21 respondents highlighted both advantages and disadvantages with this proposal. Four respondents required further detail before expressing a view and one respondent pointed to disadvantages only with the proposed scheme.

100. The key message emerging from the responses to this question was that, while it was recognised that a mandatory property “MOT” could improve Scotland’s built environment, further examination and consultation on such a scheme was required before it could be supported or should be taken forward. In particular, respondents sought clarification and information on who would be responsible for administering and enforcing the scheme and how it would be financed and resourced.

101. For example, East Ayrshire Council reflected the views of a number of respondents when it commented that:

It is difficult to assess the merits of a scheme of certification and inspection, particularly in the absence in the consultation paper of any detail, laudable though it would appear to be at first glance.⁵⁵

102. In terms of the advantages of such a scheme, respondents suggested that it would:

- reinforce that owners were responsible for the maintenance and state of repair of their buildings;
- ensure that defective buildings were repaired in a timely manner;
- ensure that the number of dangerous buildings would be reduced;
- ensure that Scotland’s built environment was maintained;
- give a coherent overview of the state of Scotland’s built environment.

103. Renfrewshire Council commented that: “We see merit in the creation of a scheme which requires building owners to take greater responsibility for the ongoing maintenance and upkeep of their buildings.”⁵⁶

⁵⁵ Response 13. East Ayrshire Council

⁵⁶ Response 9. Renfrewshire Council

104. However, respondents noted a number of disadvantages with the proposed scheme. The principal concern, as noted above, was the cost and resource implications. Respondents indicated that the scheme would have significant resource implications if the scheme was to be administered, monitored and enforced by local authorities and, given the current financial climate and staff cuts, this was a source of concern.

105. For example, while supporting a property “MOT”, the BEFS pointed out that “this would require a regulatory or registration framework to be established to verify and accredit such a regime and contractors involved.”⁵⁷

106. Consumer Focus Scotland considered that a certification and inspection regime was not a proportionate solution to the difficulties faced:

The proposals would require significant investment in local authority housing departments to ensure certificates were received and inspections carried out.⁵⁸

107. Several respondents suggested that the proposed scheme could also represent a significant financial burden to property owners who were already facing rising costs when selling property.

108. Aberdeen City Council raised concerns regarding the status of a certificate and where liability might fall: “What if a certificate is signed and an incident occurs thereafter – who is liable?”⁵⁹

109. A number of respondents commented on the scope of the proposed inspection regime. It was argued that many buildings were in a good state of repair or had existing arrangements in place for property maintenance such as a factoring scheme or an effective residents association. For example, Scottish Borders Council indicated that:

Given that the focus within this authority area has been on tenement properties, this Council would not support an inspection regime for detached or semi-detached houses.⁶⁰

110. A number of respondents pointed to existing legislation in which there was provision for this type of assessment. Several respondents referred to the Housing (Scotland) Act 2006 which contained provision for Maintenance Orders. Reference was also made to Schemes of Assistance. It was suggested that consideration should be given to extending the use of these mechanisms before creating a completely new regime. As East Lothian Council pointed out:

⁵⁷ Response 11. Built Environment Forum Scotland

⁵⁸ Response 18. Consumer Focus Scotland

⁵⁹ Response 19, Aberdeen City Council

⁶⁰ Response 8. Scottish Borders Council

The proposals outlined here appear to have a similar aim to the existing legislative powers and it is unclear the extent to which they would provide an additional benefit in the majority of situations, where housing forms part of the building which is dangerous.⁶¹

111. With a view to reducing the burden on local authorities, several respondents suggested that this scheme could be undertaken through insurance, in the same way that car MOTs are undertaken. Nevertheless, one respondent pointed to the potential for abuse if insurance companies identified work that should be undertaken to achieve certification but was, in fact, unnecessary.

112. Alternatively, where they existed, it was suggested that such inspections could be undertaken by property factors.

Question 12

Do you have any comments on the financial implications of the proposals?

113. 27 respondents highlighted financial implications of the proposals. 16 of which commented specifically on the re-introduction of charging orders and the potential financial impact. Respondents considered that this step would assist in ensuring that local authorities eventually recouped repair costs. This view as summed up by East Ayrshire Council, which noted that:

The present system for recovering civil debt is not an effective means of cost recovery for local authorities, with many costs incurred when dealing with dangerous buildings regularly having to be written off. The proposal to introduce charging orders as an effective cost recovery regime would provide the necessary re-assurance to local authorities that costs incurred will eventually be recovered at a later date.⁶²

114. East Lothian Council shared this view indicating that:

Charging Orders for dangerous buildings has to be an improvement to enable recovery of costs for emergency work that Local Authorities must carry out to meet the requirements of the legislation.⁶³

115. However, it was pointed out that local authorities would still be required to pay costs upfront and that it could take a long time before the costs were recouped. West Dunbartonshire Council pointed out

⁶¹ Response 30. East Lothian Council Community Housing and Property Maintenance

⁶² Response 13. East Ayrshire Council

⁶³ Response 24. East Lothian Council

that: “Council would still require to access funds at present time in order to meet its costs. Repayment of these costs to Councils via charging orders can be many years later, with Councils requiring to absorb this until such time as repayment is made.”⁶⁴

116. As a result, several respondents suggested that local authorities should be provided with an initial pot of money on the basis that the scheme would eventually become self-financing.
117. One respondent considered that the introduction of charging orders could be open to abuse by local authorities if it was used speculatively.⁶⁵
118. In terms of the other proposals raised in the consultation document, three respondents indicated that the proposal to make local authority action in relation to defective buildings mandatory, which represented a shift from the existing discretionary position, would have significant resource implications. For example, Renfrewshire Council pointed out that local authorities are currently not legally obliged to conduct any defective building work. It noted that, if this position was to change, it would present an additional cost.⁶⁶
119. Finally, seven respondents took the opportunity to reiterate concerns regarding the financial implications for local authorities of the proposed inspection and certification regime (see discussion above) and reaffirmed that this proposal warranted further examination before being taken forward.

Question 13

Do you have any comments on enforcement of the proposals?

120. 25 respondents took the opportunity to comment on the enforcement issues arising from these proposals.
121. Several respondents noted that there was a wide range of legislation applicable to building repairs and that this might affect enforcement of any new provisions, including the ability of local authorities to identify when such provisions should be used. To counter this difficulty, it was suggested that, rather than creating an additional new piece of legislation, the Bill should seek to amend the Building (Scotland) Act 2003.
122. It was generally acknowledged that the introduction of charging orders should give more confidence to local authorities in pursuing owners whose property was in need of repair.

⁶⁴ Response 38. West Dunbartonshire Council

⁶⁵ Response 3. Individual

⁶⁶ Response 9. Renfrewshire Council

123. A number of respondents expressed concern regarding the enforcement of the certification and registration scheme and queried whether this responsibility should fall to local authorities given current financial constraints.

124. East Ayrshire Council indicated that:

It may be that enforcement procedures would need to be looked at to ensure that if, following inspection of buildings, owners fail to carry out repair or upgrading works deemed to be necessary to bring the building up to the required standard.”⁶⁷

125. It was also considered that further resources would need to be made available if proposals relating to defective buildings were to be effective. Several respondents reaffirmed that, if there was to be proper enforcement of these proposals, there would need to be a clear definition of “defective” buildings.

Question 14

Are there any equality issues that arise from these proposals?

126. 29 respondents answered this question, nine of which indicated that the proposals might raise equality issues.

127. It was suggested, for example, that the proposals might affect detrimentally older and disabled people through the institution of strict deadlines and the use of charging orders. Age Scotland emphasised that:

[It] will be necessary to ensure that older people without a ready supply of disposable capital be given sufficient time to release funds to pay for works required on their property. While we appreciate the need for agreed deadlines with regard to financial matters, it is a concern that such rigid timescales as contained in the proposed Bill could risk unintentionally disadvantaging some of the most vulnerable members of society.”⁶⁸

128. Several respondents considered that the application of equal shares might be inequitable to individuals with smaller properties and it was also suggested that the proposals might differentiate between landlords and owners.

129. One respondent considered that the proposals appeared to apply to urban rather than rural properties and expressed concern that

⁶⁷ Response 13. East Ayrshire Council

⁶⁸ Response 2. Age Scotland

those living in rural and remote areas might be disqualified through lack of available information and support.⁶⁹

130. Glasgow Housing Association commented that a full equality impact assessment should be carried out, noting that there was a possibility that people with particular “protected characteristics” as set out in the Equality Act 2010 might be affected more than others and pointing out that an example of this might be older people on low incomes who live in buildings with multiple owners.⁷⁰

131. 20 respondents did not consider that the proposals raised any equality issues or were not aware of any equality issues.

Summary

132. The consultation provided an interesting range of responses and included a high percentage from Scotland’s local authorities, the bodies probably the most directly affected by the implementation of issues raised in the consultation document. There were, however, few responses from private individuals (e.g. householders, landlords) which may have provided a different perspective.

133. Respondents have suggested that it may be possible to amend the Building (Scotland) Act 2003 in relation to debt recovery powers although it has also been pointed out that care may be required in considering any implications in this area of legislation.

134. The legislation relating to building repairs is extensive and respondents to the consultation seemed more ambivalent about the other changes proposed in the document.

Conclusions

135. The responses to consultation have provided a number of ideas that I will consider and use to further develop the policy before completing a drafting of the bill.

December 2011

⁶⁹ Response 3. Individual

⁷⁰ Response 36. Glasgow Housing Association