

David Stewart MSP  
The Scottish Parliament  
Room M1.05  
Holyrood  
EDINBURGH  
EH99 1SP

Date 07 March 2011  
Your ref  
Our ref PC//MMcL/LMcL

Dear Mr Stewart

**Building Repairs (Scotland) Bill  
Response to Scottish Parliament Consultation**

I refer to your consultation paper on the Building (Scotland) Bill and have pleasure in enclosing the response from The City of Edinburgh Council which was approved by the Regulatory Committee of 4 March 2011.

I hope the attached is of assistance. If you have any queries, please contact Murdo Macleod, Property Manager, on 0131 529 4296 or by email at [murdo.macleod@edinburgh.gov.uk](mailto:murdo.macleod@edinburgh.gov.uk)

Yours sincerely



**Dave Anderson**  
Director of City Development

Enc: Response to Parliament Consultation

cc. Sue Bruce, Chief Executive, The City of Edinburgh Council  
Janis Dunn, Corporate Property and Contingency Planning  
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## The City of Edinburgh Council

### The Building Repairs (Scotland) Bill Response to Scottish Parliament Consultation

#### General

The following observations are based on the understanding that the proposed Members Bill would not be seeking to disapply or repeal the provisions of the City of Edinburgh District Council Order Confirmation Act 1991. Whilst that local provision may be seen in certain respects to be missing some powers, it is still a hugely important and effective tool used by the Council to ensure the maintenance and repair of private property within the city.

No.	Q/A	Question and Response
1.	Q	What do you believe are the current problems with the enforcement of dangerous and defective buildings legislation?
	A	<p>There is currently a raft of diverse legislation available to local authorities allowing them to ensure that dangerous or defective privately owned properties are repaired. This includes, but is not exclusive to, the Civic Government (Scotland) Act 1982, the Building (Scotland) Act 2003, the Tenements (Scotland) Act 2004, and the Housing (Scotland) Act 2006. No single Act currently meets the majority of circumstances and each has significant barriers to their implementation on a regular basis.</p> <p>The main barriers are seen as being:</p> <ul style="list-style-type: none"><li>• The identification of liable owners for both serving of Notices and for cost recovery.</li><li>• The requirement for time consuming and often costly non-recoverable discussions with owners on repair requirements, repair proposals and appeals.</li><li>• The recovery process does not include for charging orders.</li><li>• The cost and recovery allocation procedures are not sufficiently detailed and therefore open to interpretation. This has potential for confusion and opportunities for legal challenge that may result in Councils being involved in costly actions and/or having to pay the capital cost of any repair.</li></ul>
2.	Q	In your opinion, what changes should be made to current legislation to allow for a more effective system of identification and enforcement?
	A	<p>A national register of land/property ownership including data being logged to a national address-point register. Currently addresses can be registered in a number of ways – for example the Top floor flat at number 5 High Street can be registered as 5 (Top Floor 1), 5 (Top Floor Left), 5 (8<sup>th</sup> Flat), 5 (3<sup>rd</sup> Floor West) or by name (The Pines) etc. This has proven to be a major disadvantage in the identification of owners, in advising them of their responsibilities and liabilities, and any subsequent recovery of costs.</p>

		<p>Cost allocation and recovery of works including administrative charges should be detailed, nationally standardised and included in legislation. The “Equal Shares” process used in the Edinburgh Confirmation Act has proved to be robust and very effective. It does not prejudice any right that owners may have under Title or otherwise to subsequently privately reallocate costs. It is simply a means by which the authority can recover monies properly spent. It should also be noted that Title is not binding on a third party (the Council for example) and as such cannot be enforced by that third party.</p> <p>The standardisation of Repair Notices would allow national consistency. This is to include when a Notice is to be served, on whom, periods of response, action and appeal procedures. The inclusion of parties that hold interest in properties (mortgage providers etc) in the serving of Notices (as in the Housing Act) has proven to be difficult, costly to administrate and a major disincentive.</p> <p>A standardised register of Notices served, either national or Council centric. This will inform buyers/sellers of liability and also allow authorities an overview of the condition of the properties within their area of responsibility and allow proactive planning. Any registration system, however, requires being simple and economical and not a burden on the authority. Registration for example of 32,000 Notices to individuals per annum (as currently served in Edinburgh) at a fee of £25 each would introduce a significant financial burden (£800k for the example given and potentially non-recoverable) and could itself inhibit the use of the legislation (as is the case with the Housing Act).</p>
3.	Q	<p>What do you see as the benefits of charging orders in enabling local authorities to recover costs from owners of dangerous and defective buildings?</p>
	A	<p>Most authorities have experience of trying to recover modest to large sums for buildings repaired in default. Charging orders are an useful tool in recovering monies and their absence has been detrimental to the process although charging orders are not the best solution in each case.</p> <p>The repair of defective buildings can result in a large number of small liabilities which by volume amount to significant sums and processing costs. Recovering such costs via charging orders is not realistic and via the courts is time consuming and expensive, particularly if the value is small. Recovery is time-barred and consequently Councils face the difficulty of collection or having to write-off such charges. Experience has shown that recovery at point of sale/conveyance is a solution but interest charges on such monies are not currently available.</p> <p>Notwithstanding that charging orders may not be appropriate in every case; they will provide an additional alternative method of recovery for authorities.</p> <p>Charging orders would be an additional tool in allowing a more proactive approach to be taken to ensure safety in the build</p>

		<p>environment. For example, Edinburgh has not lost a building due to collapse following neglect since 1958 as a result of a proactive approach to requiring owners undertake repairs.</p> <p>Charging orders would also be an additional legislation tool to be used that would contribute to preserving Scotland's unique architectural heritage, whether listed or not, for the benefit of owners, residents and visitors alike. People choose to live in an established community and the built environment is a significant factor. Separately, Scotland's unique built heritage, and in Edinburgh in particular, is an important element in the tourism industry.</p> <p>Charging orders would also be an additional operational tool in allowing the use of legislation that would assist in preserving the housing stock in a more sustainable approach. In Edinburgh, 60% of housing is made up of traditional tenements and structures consume less to maintain than in building new properties.</p> <p><b>A Charging Order should be viewed as one of a number of payment options available to a local authority and not the only one of an obligatory nature.</b></p>
4.	Q	What do you see as the disadvantages of charging orders?
	A	<p>As previously noted, they would be an alternative option in medium to large sums but unsuitable for small liabilities. There is also the possibility that repairs requiring extensive works may ultimately exceed the market value of the property particularly when interest on outstanding charging orders are included. While property has historically seen an upward trend in value, faster than interest rates, this may not be relied on in future as a means of recovering full costs.</p> <p>The Councils are required to fund the costs until recovery although interest charges do apply.</p> <p>Charging orders are set against the property not the owner and, in cases where an owner has a number of properties, an inhibition, which is a liability set against the individual, may be more appropriate. By having the options, authorities can choose to apply the most appropriate method in each individual case.</p> <p>Not that many Charging Orders have been used by this Council and its statutory predecessor and therefore there is not much evidence available to fully analyse the effectiveness of such Orders. In the past, issues have arisen about the requirement to issue an annual interest charge to the current property owner and if such invoices are not paid within five years each annual charge becomes time barred. Clarification and simplification of the use of Charging Orders should therefore be sought in the presentation and drafting of the Bill.</p>

5.	Q	What do you see as the benefits of charging orders to owners of dangerous and defective buildings?
	A	This would add an option for owners who may not have sufficient capital at the time to allow them to privately arrange the repairs or fully meet their liability if these are carried out in default. This may be of particular interest to those on low income or pension.
6.	Q	What do you see as the disadvantages of charging orders to owners of dangerous and defective buildings?
	A	<p>A charging order may have a detrimental effect on the sale of a property although experience has shown that this has not been a significant barrier to date.</p> <p>The final cost of repair can be more than the property value and result in the property having no residual equity. Notwithstanding, the property's value, particularly in the case of major repairs, would always have been greatly diminished without repairs being affected.</p>
7.	Q	What would be the benefits or disadvantages of changing the notice period in relation to defective building notices?
	A	<p>Although legally required to give a period, the current Acts do not specifically define the period by which works are required to commence or be completed. The Building Act states "a date not less than 7 days" for completion, the Housing Act states that the minimum date for completion must not "be a period of less than 21 days" while the Edinburgh Confirmation Act does not prescribe any time period.</p> <p>In Edinburgh, using the Confirmation Act, repair notices normally specify a time period of 28 days from receipt of the notice in which the owners are to comply. This is interpreted as being diligently taking the matter forward and not necessarily commencement of work. Experience has shown that it can take a considerable amount of time, 6 months is not unreasonable, for owners to meet, agree on scope, obtain tenders, appoint a contractor and start works. This period can be extended if application for financial assistance is made to heritage bodies for example or if any of the owners are difficult to trace.</p> <p>The Confirmation Act states that the Council <b>may</b> enforce the notice after the 28 day period but is under no obligation to do so. The actuality is that no notice is enforced unless the building has deteriorated to the point of concern for public safety or at the express request of an affected owner. The council works with owners to assist them repair their property. This can include owners taking over responsibility even during the enforced works subject to legal agreement and mandate.</p>
8.	Q	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?
	A	The introduction, as proposed, of a minimum 12 week period for completion of the works would not materially effect the process.

9.	Q	What do you see as the advantages or disadvantages of the proposal?
	A	<p>There are no advantages of having a minimum 12 weeks for completion of works. As previously stated, and while it is dependant on scale and complexity, it is difficult for owners, particularly of buildings in joint ownership (tenements etc) to meet these timescales. There is a legal requirement to have a fixed date to show compliance but having a fixed completion date is difficult to determine. Additional works may be required once repairs commence, weather may intercede etc all leading to a position where it is impossible to owners, even with the best will, to comply.</p> <p>The introduction of a minimum timescale to commence the works is a better indication of whether owners are able to repair their property. This allows the owners reasonable time to start the process without undue financial commitment but allows the authority the opportunity, if operationally necessary or following requests from an owner, to legally assist at the earliest. This minimises ongoing deterioration of the building and associated repair costs while preventing additional public safety concerns.</p>
10.	Q	What do you see as the advantages and disadvantages of an automatic equal shares provision for local authorities in cost recovery for works carried out by them on dangerous and defective buildings?
	A	<p>The advantages have been well proven with the Confirmation Act over the 20 years of its use in Edinburgh. It simplifies the process, is clear any easy to understand and minimises the administrative financial burden on both the owners and any enforcing authority.</p> <p>The alternatives for example of using floor area (would require access survey and would not be a recoverable cost if the owners comply with the Notice) or Title (not binding on a third party so the council cannot enforce) are not available or deemed not cost effective.</p> <p>While there is the potential that owners of disproportional smaller properties in a joint-ownership building may be initially billed for an equal share, this does not prejudice any right competent on them to seek adjustment from their co-owners under Title or otherwise. On a number of occasions, owners have agreed a different method of allocation with the Council and this has been agreed subject to a legally binding mandate. Again this demonstrates that flexibility of approach taking in individual project/owner requirements can be facilitated as long as there is a robust fail-safe position.</p>
11.	Q	What do you see as the advantages and disadvantages of a certification and inspection regime for buildings?
	A	<p>This is the most contentious proposal in the Bill. While the advantages of such a proposal could be stated as:</p> <ul style="list-style-type: none"> <li>• A legal requirement with penalties for non-compliance</li> <li>• Assisting in the buying/selling of properties (the building</li> </ul>

equivalent to an MOT)

- Assisting owners in planned preventative maintenance as opposed to reactive maintenance and hence reduced running costs in the longer term.
- Maintenance of the built heritage
- Maintenance of the housing stock
- Reducing the risk of injury from falling building materials.
- Having the potential of reduced insurance requirement

There are, however, significant obstacles to such a scheme; in particular

- There is no culture of such building inspection/certificates in Scotland and there is likely to be considerable opposition to such a proposal
- It would require the proactive cooperation of owners in joint properties (tenements) and experience has shown that this is very difficult to achieve.
- The requirement to provide significant detailed guidance on the content of surveys, report and certificates.
- There are significant implications for the conveyancing and insurance suppliers.
- There would require being an administrative control, monitoring and policing role for authorities and currently they do not have the resources, and potentially the expertise, to provide such a service.
- While costs would need to be recovered, it places new and potentially onerous duties on authorities in an area where there is no previous history of involvement.

Certification and regular inspection proposals could potentially add a significant workload to local authorities, as well as having legal liability issues. At present there is no duty upon local authorities to survey private properties within their boundaries. The current local and national statutory provisions are permissive, and entirely a matter of discretion in their operation. In other words they do not require a local authority to survey buildings in their area, nor do they require service of a notice where there are defects in a building. It is only where a building is considered dangerous that the Council is obliged to use its powers under the Building (Scotland) Act 2003 and enforce repairs.

There are obvious concerns about the suggestion that such a scheme be administered by a local authority, even if checks are not necessarily carried out by it. One would not wish additional legal liability to attach to the Council through any inspection duties imposed. This goes beyond the current statutory framework and legal liabilities.

This matter requires detailed investigation and consultation with affected stakeholders and as such it is recommended that this proposal is removed from the current consultation and is separately investigated

12.	<b>Q</b>	Do you have any comments on the financial implications of the proposals?
	<b>A</b>	<p>The proposals would simplify and give clarity on the way authorities can help deal with defective and dangerous buildings.</p> <p>The introduction of charging orders and an equal shares allocation and recovery process in particular would make a significant difference to the financing of such support and, if required, intervention.</p> <p>The proposal to introduce a certification and inspection requirement for properties requires further development and consultation but has the potential to be financially and technically onerous to authorities.</p> <p>It is further proposed that consideration be given to allowing authorities the option of recovering costs, properly incurred under default powers, on an interim payment basis. This would allow authorities the option to recover monies and reduce indebtedness for specific projects where the overall cost and/or the contract period is significant.</p>
13.	<b>Q</b>	Do you have any comments on enforcement of proposals?
	<b>A</b>	<p>The introduction of charging orders and an equal shares allocation and recovery process would allow a simpler, more easily understood and financially beneficial process for both owners and councils.</p> <p>While the Bill proposes to encapsulate the initiatives and changes within a separate new Act, consideration should be given to amending or adding provision to the current Building (Scotland) Act 2003. This would allow input from all affected stakeholders, be potentially quicker to implement and give all Scottish authorities the same powers. It would also prevent overlap or duplication with existing legislation contained within the current Building Act.</p>
14.	<b>Q</b>	Are there any equality issues that arise from these proposals?
	<b>A</b>	<p>The introduction of the proposals would allow owners who may not have the immediate ability to pay for repairs to enter into an individual agreement with authorities to meet their liability.</p>