



# **A RESPONSE FROM THE SCOTTISH FEDERATION OF HOUSING ASSOCIATIONS**

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**CONSULTATION ON PROPOSED SCOTTISH PARLIAMENT MEMBER'S BILL:  
BUILDING REPAIRS (SCOTLAND) BILL**

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**March 2011**

## 1 Introduction

- 1.1 As the national representative body for housing associations and co-operatives in Scotland, SFHA welcomes the opportunity to respond to David Stewart MSP's *Keeping Scotland Safe* consultation paper on a proposed Building Repairs (Scotland) Bill. We have discussed the issues raised in the consultation paper in detail with our members and this response reflects those discussions.
- 1.2 Housing associations and co-operatives have been working to provide, manage and maintain housing throughout Scotland since the 1960s and have a track record of making a significant contribution to improving housing for the people of Scotland.
- 1.3 There are some important and distinctive features of housing associations and co-operatives. They are:
- Independent businesses with goals aligned to the Scottish Government in providing and managing high quality affordable accommodation and housing services;
  - Responsible for accessing and managing public and private resources;
  - Managing our businesses, not to make a profit but using resources imaginatively and inventively to benefit housing and communities;
  - Accountable to our members, who live or have other interests in the communities of interest and of place which we create;
  - Publicly accountable and thus regulated given our use of government resources;
  - Able to demonstrate added value in terms of care and support, wider role and financial inclusion;
  - Adaptable to changing circumstances.
- 1.4 Our membership comprises organisations at different scales, with different histories, purposes and goals. They collaborate in different ways with each other, with the private sector and with local authorities according to our particular business imperatives. They share practice through forums of the SFHA and they use procurement and benchmarking groups.
- 1.5 Housing associations and co-operatives continue to make a significant contribution to the new supply of housing in Scotland in different tenures. And they make an enduring contribution as owners and managers, providing some 11% of the accommodation available in Scotland (much of it in mixed tenure blocks), and factoring on behalf of countless other owners.

## 2 General Comments

- 2.1 SFHA welcomes the proposal for a Building Repairs (Scotland) Bill. It would give a better incentive for local authorities to get involved with repairs to defective building and make it easier for them to recoup their expenditure on both dangerous and defective buildings. This would have a beneficial impact on our sector, as its investment in mixed tenure accommodation would be better protected and the immediate environment for tenants would be improved.

- 2.2 It would also assist in increasing the supply of much needed houses to rent. According to Shelter, in Scotland around 48,000 potential homes are lying vacant.<sup>1</sup> It is thought that up to one third of these are unoccupied because the owners cannot afford the cost of necessary repairs. The proposals contained in the Bill could go some way to getting these properties back to being habitable and available for rent.

### **3 Section One: The Current Situation**

- 3.1 The Consultation Paper opens by highlighting that the current enforcement regime for dealing with dangerous and defective buildings does not work well. As a result, there is a substantial backlog of repairs needing to be completed for defective buildings and considerable outstanding costs to local authorities - in the form of unpaid debts - for repairs that they have carried out to both dangerous and defective buildings. One consequence of this is that a number of local authorities are not carrying out proactive work to defective buildings before these buildings deteriorate to the point of being dangerous.
- 3.2 Moreover, there are a number of private owners who are not acting responsibly and inspecting their buildings regularly to detect any sign of significant defects. The fatal accident at Ryan's bar in Edinburgh in 2000 is cited as evidence.

#### ***Question 1: What do you believe are the current problems with the enforcement of dangerous and defective buildings legislation?***

- 3.3 As highlighted in the Consultation Paper, the lack of success in recouping their expenditure has dissuaded local authorities from getting involved in the repair of defective buildings (where the owners will not take responsibility to organise repairs). There can also be problems in tracing owners in mixed tenure blocks, especially given the popularity of 'buy to rent' flats.
- 3.4 Local authorities have the power at present to place a charging order on properties on which they have had to carry out work. Anecdotal evidence suggests that this route is seldom pursued by local authorities. The reasons underlying this reluctance would have to be confirmed to ensure that they are addressed in any proposed legislation.

### **Section Two: Current Legislation**

- 3.5 Local authorities' powers and responsibilities in relation to dangerous buildings and defective buildings are primarily covered in the Buildings (Scotland) Act 2003. There are three other pieces of legislation relevant to the issue of dangerous and defective buildings and are considered in this consultation; these are the Civic Government (Scotland) Act 1982, the Housing (Scotland) Act 1987 and the City of Edinburgh District Council Order Confirmation Act 1991.
- 3.6 With reference to dangerous and defective buildings, the key provisions of the 2003 Act are:

For dangerous buildings  
Councils can serve dangerous building notices requiring owners to make repairs

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<sup>1</sup> Shelter media briefing note 4<sup>th</sup> February 2011

Where necessary councils can carry out these repairs themselves and recover costs through procedures for pursuing civil debt  
The Sheriff makes the final decision on aspects of liability and recovery in the event of disputes over apportionment between owners

For defective buildings

Councils can serve defective building notices requiring owners to commence repairs within 7 days and complete the repairs within a further 21 days

Councils can carry out these repairs themselves and recover costs through procedures for pursuing civil debt

The Sheriff makes the final decision on aspects of liability and recovery in the event of disputes over apportionment between owners

- 3.7 The Civic Government (Scotland) Act 1982 allows local authorities to place a 'charging order' on the property, rather than the individual, ensuring that repair costs are recovered at a future sale of the property.
- 3.8 The Housing (Scotland) Act 2006 introduced 'repayment charges' but the guidance produced by the Scottish Government states 'Local authorities should continue to issue charging orders under schedule 9 of the Housing (Scotland) Act 1987 where it has enforced demolition or closing orders under the Act'.
- 3.9 The City of Edinburgh Council has its own unique legislation in relation to dangerous and defective buildings – the City of Edinburgh District Council Order Confirmation Act 1991 (the Edinburgh Act). The main difference from the Buildings (Scotland) Act 2003 is that where there is shared ownership of a property (that is, in a tenement building) the terms of the 'Edinburgh Act' requires the authority to recover costs on an 'equal share basis' regardless of any conditions to the contrary that might be contained in Deeds of Title or private contracts.

#### **4 Section Three: Problems with Enforcement and Cost Recovery**

- 4.1 Despite the Buildings (Scotland) Act 2003 giving local authorities significant powers in theory to deal with dangerous and defective buildings there is a problem in practice with the enforcement of this legislation.
- 4.2 While there is a legal obligation on local authorities to act upon buildings which endanger public safety, in a number of cases the local authority has not been able to recover from the building owners the costs incurred in making safe.
- 4.3 There is no legal obligation for local authorities to act to repair defective buildings. Consequently, the cost recovery issue acts as a deterrent to authorities considering getting involved before the building becomes dangerous.
- 4.4 The consultation paper acknowledges that the common problem for local authorities whether dealing with dangerous or defective buildings is cost recovery. The paper outlines some of the legislation covering cost recovery but implies that there is confusion about what powers local authorities have at their disposal
- 4.5 The consultation document proposes 'a system to enable charging orders to be used efficiently on both dangerous and defective buildings to enable local authorities to recover costs effectively'.

## 5 Section 4: Charging Orders

- 5.1 The consultation document argues that Charging Orders have a number of distinct advantages as a mechanism to recovering costs compared with recovery as a civil debt:

### Charging Order

Charging Order is placed upon property rather than the individual ensuring cost recovery at a future sale of property if not before

In most cases a charging order has priority over other debts

Cost is significantly cheaper as local authorities can record the charge themselves at the Land register. This typically costs less than £100.

### Civil Debt

Cost of tracing and pursuing individual

Joins queue of other creditors

Requires a court judgment so leads to significant extra cost – typically up to £5000 in legal expenses

***Question 2: In your opinion, what changes should be made to current legislation to allow for a more effective system of identification and enforcement?***

- 5.2 Following the fatal accident at Ryan's Bar in Edinburgh, the City of Edinburgh Council embarked upon a very proactive inspection regime. The fact that they subsequently issued many Statutory Notices emphasises the need for a system of identification and enforcement. The underlying question is 'How would we fund a more expensive system of identification and enforcement'.
- 5.3 One SFHA member suggested that any owner should be able to raise a defect with the local authority and ask them to take action; a proviso being that the owner should be able to demonstrate that they had already tried to get the owner to carry out the work or get agreement for common works to be repaired prior to the matter being passed to the local authority.

***Question 3: What do you see as the benefits of charging orders in enabling local authorities to recover costs from the owners of dangerous and buildings?***

- 5.4 Charging Orders seem to be similar to a 'Notice of Potential Liability' and would generally be settled when the property is sold. This approach should give local authorities confidence that the debt will be paid at some point. That said, under the Civic Government (Scotland) Act 1982 local authorities can presently utilise charging orders but seem reluctant to use that power. The reasons behind that reluctance would need to be investigated and addressed in the proposed legislation.
- 5.5 One SFHA member has suggested that, within the legislation, there should be some clauses that allow strong methods of debt collection without incurring court fees if this were possible. It would also be important that someone cannot challenge the initial decision to impose an order for a defect once that defect has been repaired. This would ensure that the cause for the debt could not be subsequently challenged – so – could the legislation be framed in such a way that any defect order would have to be challenged during the 12 week proposed

period that the owner will have to carry out the works - and once that has expired the owner could not refuse to pay on the grounds that the defective building order was incorrectly issued. There may need to be some form of Tribunal established by the Act that owners could take the defect to if they want to challenge it.

***Question 4: What do you see as the disadvantage of charging orders?***

- 5.6 There could be a considerable delay between the Council doing the work and the charging order being honoured – when the property is sold, for example. This could result in a deficit in that part of the Council’s budget for dealing with dangerous and defective buildings. It is suggested that the proposed legislation looks at the possibility of charging interest within the charging order.

***Question 5: What do you see as the benefits of charging orders to owners of dangerous and defective buildings?***

- 5.7 Assuming Councils are more encouraged (as a result of charging orders) to get involved with repairing defective and dangerous buildings, the required work should be carried out more quickly – to the benefit of affected co-owners in particular.

***Question 6: What do you see as the disadvantages of charging orders to owners of dangerous and defective buildings?***

- 5.8 If interest was levied as part of the charging order, the debt to the owner would increase. This would be a disadvantage to any owner who had tied all their assets up in the property. However, this would have to be weighed up against delayed cash flow to the local authority. Delays to repairing defective and dangerous buildings can have an unacceptable impact on other affected owners and tenants.

**Section 5: Protection for Owners**

- 5.9 The consultation document agrees that it is important that owners of properties are not unfairly affected by any changes to the revised charging order proposals. To this end, the following safeguards are proposed:
- The Defective Building Notice ‘notice period’ would be increased to 12 weeks (from 28 days) to ensure that owners have adequate time to carry out repairs themselves before a charging order could be placed on the property
  - A requirement on the local authority to demonstrate that ‘all reasonable steps’ had been taken with the owner(s) prior to a charging order being issued.
  - In all cases owners may appeal.

***Question 7: What would be the benefits or disadvantages of changing the notice period in relation to defective building notices?***

- 5.10 A benefit of changing the timescales is that it can prove difficult for a responsible owner to find out the contact details of other affected owners when trying to co-ordinate repairs (consider an owner living abroad who has bought a property to rent out and the administration is handled by an agency). The current time scales to get work done are unrealistic in that situation. Also, depending on the scale of the work required, it would be difficult if not impossible to get the agreement from all owners, draw up a specification, invite competitive tenders for the repair and have the work carried out in 28 days.

- 5.11 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 were unwilling to organise the repair themselves. Consideration should be given to categorising repairs in terms of urgency rather than a fixed timescale. Housing associations are obliged to work to a 'Right to Repair' policy where timescales for some non-emergency repairs are fairly tight. A similar approach may work in relation to the notice period for defective buildings.

***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?***

- 5.12 It would be unwise to generalise; it would depend on the scope of the work. A contractor is likely to be unwilling to deal with, say, all 16 householders in a tenement stair. This means that someone is going to have to co-ordinate various aspects of the project including getting monies from the owners for payment to the contractor. In the absence of a volunteer from their number, some owners may feel that paying the local authorities administration fee on repairs costs is less hassle than commissioning a surveyor or architect.

**Section 6: Member's Proposal**

***Question 9: What do you see as the advantages or disadvantages of the proposal?***

- 5.13 It should give a more consistent approach reflecting that applied by the City of Edinburgh Council which a number of SFHA's members have praised.
- 5.14 One member of the SFHA offered the following comment "This proposal looks good as it would empower the local authority to resolve defects in buildings. However, local authorities should be required by the legislation to act within a certain period on a bona fide request for a defects order raised by another owner in the block – or by someone directly affected by a defect if it is not a common repair.

**Section 7: Other Considerations for Consultation**

- 6 The paper is also seeking views on two other issues.
- 6.1 The first is: automatic apportionment of shared costs on an 'equal shares basis' in the case of shared ownership.
- 6.2 In the case of mixed tenure tenement buildings, the provisions of the Edinburgh Act currently automatically apportions costs for repairs undertaken by the City of Edinburgh Council on an equal shares basis amongst the owners who are then liable to pay the Council. This power saves time and costs where complicated co-ownership exists. The specific apportionment can be challenged by owners, who may take action against other owners to recover sums paid. This process would not then involve the local authority. SFHA believes that this provision would be useful to other local authorities in the case of such co-ownership.

**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?**

- 6.3 We have assumed that ‘shared ownership’ in this context means co-owners as would likely be the case in a tenement stair, for example, rather than part mortgage part rent properties.
- 6.4 As mentioned above, Edinburgh City Council recharges the cost of any repairs it has carried out on an equal share basis, across all owners, irrespective of any provisions made in the Title Deeds of each property. When approached by the SFHA for their views on this consultation paper, no Edinburgh based member complained of being disadvantaged by the equal shares provision. The general view appears to be that initiatives to speed up the repairs process outweigh the disadvantage of equal shares.
- 6.5 There is one concern – where an owner does not repair a non-common defective element (such as a balcony which is causing water penetration to a flat below). The owner whose property is being damaged will no doubt welcome the local authority being able to enforce a repair but may feel aggrieved if charged a share of the cost.
- 6.6 The second of the other issues on which views are being sought by way of the consultation paper is: introducing a requirement for building owners to submit to a regular certification and regular inspection regime of their property.
- 6.7 As mentioned above, local authorities are not generally proactive in relation to defective buildings. One option to rectify this may be to require owners to hold a ‘certificate of building repair’ stating that the property was not defective and was in a good state of repair.
- 6.8 This certificate would need to be obtained on a regular basis (perhaps every 5 or 10 years) and would work as a form of a ‘property MOT’. The scheme would need to be administered by a local authority but checks not necessarily carried out by it.
- 6.9 In addition to a certification scheme, local authorities could be granted the power to inspect properties on either a regular basis or to carry out spot checks to ensure that the certification scheme was working.

**Question 11: What do you see as the advantages and disadvantages of a certification and inspection regime for buildings?**

- 6.10 In our view, until such an inspection regime is implemented by the Scottish Government, we will not have a true picture of the state of properties. That information ought to be available to inform decisions about future housing needs. Another advantage would be improved safety for occupants of buildings and passersby. For example, the two recent severe winters have caused stone work to ‘blow’ especially older plastic repairs. The main disadvantage would be the cost of the bureaucracy which would necessarily be involved in policing such a regime. A group of owners (e.g. in a tenement building) may find it difficult to agree who carries out the required inspection but this is not insurmountable.
- 6.11 One challenge in implementing the proposal is the current economic climate. Also, if implemented, what happens if it is ignored and the “MOT” expires? The

proposal requires a significant resource commitment.

### **Section 8: Financial and Enforcement Implications.**

- 7 We understand that the philosophy behind the proposed Building Repairs (Scotland) Bill is that by providing an effective cost recovery regime, local authorities will be better able to get payment for the work they do on dangerous buildings owned by others. Moreover, the authority will have more incentive to work on defective buildings where owners are unwilling to do so.
- 7.1 Local authorities would continue to enforce dangerous and defective building legislation and the proposals are intended to allow this to be done more effectively.

#### ***Question 12: Do you have any comments on the financial implications of the proposals?***

- 7.2 The main benefits of the proposed Building Repairs (Scotland) scheme are:
- public safety
  - safeguarding the built environment and the associated investment
  - potentially making habitable several thousand potential homes
- As mentioned above, the proposal has a significant resource requirement which would have to be considered in the light of a constrained Scottish Budget.

#### ***Question 13: Do you have any comments on the enforcement of the proposals?***

- 7.3 By insisting that inspectors of properties are current members of an existing professional institution, e.g. RICS, the 'vetting' of inspectors will be delegated from the local authority to others.
- 7.4 There may be merit in appointing approved factors to enforce the proposals.

#### ***Question 14: Are there any equality issues which arise from these proposals?***

- 7.5 As noted above, the benefits of the proposals extend beyond the property owners themselves into the wider community, which is to be welcomed.

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