

**MEMBERS BUILDING REPAIRS (SCOTLAND) BILL CONSULTATION
“KEEPING SCOTLAND SAFE” – PROPOSED BY DAVID STEWART MSP**

SCOTTISH GOVERNMENT RESPONSE

This is a response from Scottish Government Building Standards Division (BSD). This response includes feedback from two meetings held recently. The first was with the Scottish Association of Building Standards Managers (SABSM) representing local authority building standards services. The second meeting was with other interested parts of government including:

- SG Housing Markets and Supply
- SG Planning - Legislation and Enforcement
- SG Property Advice Division
- SG Civil Law – Family and Property Law
- Historic Scotland

Full list of consultation questions

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

The current problems are:

1. Confusion over which legislation is the most appropriate for defective buildings
2. Lack of clarity which local authority service has delegated authority for defective buildings
3. Lack of budget provision and lack of staff resources leading to reluctance to take formal enforcement action for defective buildings

Legislation

Local authorities (LAs) currently have wide ranging powers under various sets of legislation for dealing with dangerous buildings and those which are in disrepair. Some of which have only recently been introduced.

- Building (Scotland) Act 2003
- Housing (Scotland) Act 1987 and 2006
- Town and Country Planning (Scotland) Act 1997; and
- Historic Environment (Amendment) (Scotland) Act 2011.

Dangerous buildings are usually dealt with under the Building (Scotland) Act 2003. This Act also has powers for defective buildings. Although there is scope for action under other legislation the intention behind each differs. The main aims being to:

- prevent the building deteriorating significantly and becoming dangerous
- ensure that housing is in a reasonable state of repair and meets the tolerable standard; and
- protect Scotland’s historic environment.

Further information on the current legislation is provide in Annex A.

Dangerous buildings

The situation for dangerous buildings is clear. LAs have a duty under the Building (Scotland) Act 2003 to prevent access to a dangerous building or make the building safe. The main problem LAs cite is their difficulty in recovering their reasonable costs from the owner. If the owner does not pay the expenses then the normal debt recover process is necessary. This can create problems when the owner cannot be found or becomes bankrupt. Also the debt is attached to the owner and not the building in any way. So when the owner sells the debt moves with the old owner. The LAs also state that the removal of the charging orders regime that was possible under the previous Building (Scotland) Act 1959 (until 2005) has

made debt recovery more difficult. However, even with this difficulty, LAs must take the necessary action so dangerous buildings are dealt with. It is the subsequent financial implications that LAs are concerned about.

Defective buildings

The main problem for defective buildings is also financial. Firstly, LAs are concerned that they have difficulties in recovering their expenses when taking action under the Building (Scotland) Act 2003. This could be when the owner has not started the remedial work or when the LA undertakes it in default of the owner. Secondly and more importantly, most LAs do not have sufficient budgets set aside or resources to proactively deal with defective buildings. A reactive approach is taken when an issue is brought to their attention. There is also a possible reluctance to even issue a notice in the first place when they are not convinced they will undertake the work in default of the owner.

Powers to take action on defective buildings are optional and different legislation could be used depending on the building. This can create problems when these powers are delegated to different areas of the LA either Building Standards; Planning; Housing or Environmental Health. Again, the budget and business objectives for each service may differ and have different priorities. Another possible factor is that whilst the delegated authority to serve a notice sits with the Head of Service, carrying out work may need permission from elected members.

The use of the powers under the other legislation is less clear due to them only having been recently implemented.

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

The only change should be a review of the cost recovery method under the Building (Scotland) Act 2003. This could be charging orders or similar mechanisms to those contained in the Housing (Scotland) Act or Historic Environment (Amendment) (Scotland) Act 2011. They may also differ for dangerous and defective buildings.

The defective building powers available under the Building (Scotland) Act 2003 are intended primarily to deal with protecting the building fabric and preventing “future” dangerous buildings. These powers cover all types of buildings, including most Crown buildings. They are not specifically intended to address unsightly or unpleasant buildings.

LAs normally become aware of defective buildings through members of the public or neighbours contacting them. Those parts of the LA with the delegated powers may identify defective buildings through local knowledge. Also, other parts of the council or other agencies may identify them through the course of their work. The exception to this is City of Edinburgh Council who have a dedicated team taking a more proactive approach to identifying defective buildings under their own local legislation. The council have been successful in the over arching aim of getting work done on buildings however there have been concerns raised over the method and equality of the recharging.

It is not advisable to change legislation to make dealing with defective buildings a duty on LAs, as with dangerous buildings. This change in emphasis is likely to result in an inconsistent approach being taken across Scotland and the resourcing concerns would increase. Without a targeted risk-based approach it would be burdensome for LAs and could even result in an over zealous approach being taken in some cases. This would not be consistent with the intention to protect the public interest.

For enforcement, debt recovery is a big concern for LAs in particular for the action they must take under the Building (Scotland) Act for dangerous buildings. This is less of an issue for

defective buildings. When a dangerous building is identified it needs dealing with quickly to protect the occupiers, the public and other buildings. If not dangerous, a building may be identified as having a range of defects. The severity and impact of these can vary considerably. Some may be urgent and need rectifying in the short term and some may be typical of the age and type of building.

Although cost recovery must be a disincentive for LAs to take formal action there is no certainty that their introduction would result in defective buildings becoming a higher priority.

The current legislation is wide ranging and deliberately flexible to allow each case to be dealt with on its own merits. The Building (Scotland) Act 2003 powers covering all types of defective buildings, including most Crown buildings.

Building Standards Division are currently reviewing the debt recovery powers in the Act to consider introducing charging orders or similar mechanisms to those contained in the Housing (Scotland) Act or Historic Environment (Amendment) (Scotland) Act 2011. The purpose to provide LAs with improved powers to recover their for dangerous or defective buildings.

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?

The benefits of charging orders include:

1. Places a burden on the property rather than the owner
2. Raises the profile of the need for proper maintenance of buildings to avoid defects
3. Acts as a deterrent before formal enforcement becomes necessary

As mentioned above, LAs have stated they have difficulties in recovering costs when taking action under the Building (Scotland) Act 2003. The Scottish Association of Building Standards Managers (SABSM) have surveyed their members and identified the level of outstanding debt for action taken on dangerous buildings. The main benefits of charging orders or a similar mechanism is for LAs to be able to link the outstanding expenses to the property or subsequent owner and put an entry on the land registry.

Although charging orders may be suitable for dangerous buildings, as they were up until 2005, they are probably less suitable for defective buildings where the range of work to be undertaken can vary significantly from minor work to extensive repairs.

4. What do you see as the disadvantages of charging orders?

Although charging orders would help LAs cost recovery at the point of sale of the property, there may be other charge holders (banks, building societies) who also have an interest. Even with a charging order a LA may not get their expenses back quickly or even at all. This will make no difference to the year on year resourcing needed for a proactive approach to defective buildings.

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

None. However a repayment charge as contained in the Housing (Scotland) Act 2006 would require the owner to make 30 equal annual payments. This may be a benefit to owners who do not have the means to repay in full immediately, but may be seen as a difficulty for LAs because of the timescale.

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

None. As with all the legislative enforcement powers, they would only apply to those owners

who did not meet their legal responsibilities.

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

None. The notice period under Section 28 of the Building (Scotland) Act 2003 already provides flexibility for starting and completing the work. This is set by the LA depending on the nature and severity of the defect and building.

The Section 28 defective building notice allows the LA to specify when the remedial work must be started and when the work must be completed. The LA must also allow the owner at least 21 days from starting the work to completing it. These dates should be assessed taking into account all aspects of the case such as the specific defect, the building and any other relevant issue.

After the LA has served a notice they can subsequently withdraw a notice. They can also waive or relax any aspect of it, including changing the specified dates. This allows the owner, once they have received the notice, to discuss it with the LA. If the LA see fit they can amend the notice.

The owner has the opportunity to appeal any aspect of the notice and has 21 days from the date of the notice to appeal to the sheriff.

If timescales stated on a Section 28 create genuine difficulties for responsible owners, this should not be due to the legislation. It is more likely to be the application of the legislation.

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?

No. This is not necessary. As detailed in 8. above the Section 28 notice allows a flexible approach to be taken and the views of the owner can be taken into consideration.

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

Introducing legislation in an area where dangerous and defective buildings are already well covered could create more confusion. The main proposal to improve debt recovery methods for LAs has already been identified as an aspect of the Building (Scotland) Act 2003 that needs reviewing. This could be by way of charging orders or a similar mechanism. The second proposal is not necessary as the Act already contains sufficiently flexible provisions. One of the difficulties may be the way the current legislation is implemented. New or amended legislation is unlikely to address this.

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?

The owners of buildings are ultimately responsible for their buildings and to ensure they do not become defective or even dangerous. If a LA serves notice or wishes to recover their expenses they must first identify the owner or for owners. This can take time and there may be absentee owners. LAs usually use title deeds to determine responsibilities for costs and again this can take time. If there are gaps in title deeds the Tenements (Scotland) Act 2004 provides a structure for maintenance and management of traditional tenements and other kinds of flats (as defined in Section 26 of the Act).

Clearly, where nothing is laid down in title deeds on apportionment of costs, the provisions of the Tenement Management Scheme contained the Tenements (Scotland) Act 2004 are relevant (see rule 4.2). *Common Repair, Common Sense* published by Consumer Focus Scotland is a detailed guide to the management of tenements in Scotland. It contains a

good explanation of the relevant provisions of the Tenement Management Scheme.

Recovery of costs on an automatic equal shares basis is a simple concept and may speed up the debt recovery. However, 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 and leave the various owners to resolve any consequential differences themselves.

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

The owners of buildings are ultimately responsible for their buildings and to ensure they do not become defective or even dangerous. Owners of buildings often only maintain their buildings when there is a need to do so and sometimes only reluctantly. These people would be reluctant to pay for a voluntary scheme and if made mandatory, avoid it completely. A mandatory scheme will need sufficient enforcement both in terms of legislation and resourcing. The overall cost of the inspection regime may be disproportionate when compared to the work that should be done to improve those buildings most in need.

Increasing ownership costs in a fragile property market will be unpopular. Owners are already under pressure and lenders are reluctant to lend on property. Owners face ever rising costs when selling and while a better repaired building may be attractive to a seller, the presence of a charging could be a disincentive. Owners need to be made more aware of their responsibilities and opportunities through other mechanisms such as insurance or mortgage lending should be investigated.

Dangerous and defective buildings relates to both the external and internal fabric. Any inspection regime will need powers allowing inspection of all parts which need considering for personal liberty and privacy. Invasive action may also be needed to investigate hidden areas.

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

Introducing charging orders or similar mechanism in the Building (Scotland) Act 2003 would help LAs to improve their debt recovery for dangerous and defective buildings.

However only those buildings with severe defects are being targeted. To go further would require LAs to have sufficient resources. Although LAs will improve their debt recovery over the medium to long term, the specific services will need additional resources for their yearly budgeting. This would be especially so for them to take a more reactive approach or to carry out work in default of the owner doing it.

The proposal could lead to an increase in work undertaken by owner-occupiers. There are inequities between the owner/occupier and landlords. Owner/occupiers will be hit harder as repairs will attract 20% VAT. Landlords are able to set expenses off against tax or reclaim VAT. However, VAT would not apply to work undertaken by a local authority on behalf of an unwilling owner.

13. Do you have any comments on enforcement of the proposals?

Contained above.

14. Are there any equality issues that arise from these proposals?

Contained above.

**Building Standards Division
March 2011**

ANNEX A

BACKGROUND – DANGEROUS/DEFECTIVE BUILDINGS: CURRENT LEGISLATION

There are currently a wide range of powers currently available to deal with defective buildings. The main pieces of legislation are:

1. Building (Scotland) Act 2003
2. Housing (Scotland) Act 1987 and 2006
3. Town and Country Planning (Scotland) Act 1997, and
4. Historic Environment (Amendment) (Scotland) Act 2011

Other legislation includes:

- Environmental Protection Act, and
- Civic Government (Scotland) Act

1. Building (Scotland) Act 2003

The most wide-ranging powers for dealing with defective buildings are in the Building (Scotland) Act 2003 which came into force in 2005. It replaced the Building (Scotland) Act 1959 and updated existing powers to deal with dangerous buildings that had been available to local authorities since the 1960s. The 2003 Act also contained new powers to deal with defective buildings to supplement the updated dangerous buildings powers. Under the 2003 Act local authorities have a duty to deal with dangerous building and have powers they may use for defective ones.

A Section 28 notice is used for a defective building and Section 30 notice for a dangerous building. Both notices allow local authorities flexibility to specify:

- what work is needed to be done
- when the work must start, and
- when the work must be completed

The owner may appeal the notice to the Sheriff within 21 days of the date of the notice. The local authority may also vary or relax any requirement of the notice.

The main intention of Building (Scotland) Act 2003 is to protect the public safety and promote sustainability. The Building (Scotland) Act covers all types of building or structure and includes part of a building. Crown immunity was removed in 2009 and there are only a few buildings exempted. The range of powers include carrying out emergency work and serving a notice on the owner to get the work done. If the owner does not do the work the local authority can do it.

The local authority can recover their reasonable costs from the owner, and in the case when a owner cannot be found, compulsory purchase is an option. If the owner does not pay the costs it becomes a debt for the council to pursue. This differs from the previous legislation for dangerous buildings when charging orders were possible.

The dangerous buildings powers under the 2003 Act are delegated in each local authorities to the building standards service, who in most cases also handle defective building powers.

The Scottish Association of Building Standards Managers (SABSM) have made representation to the Building Standards Division of their concerns of the lack of charging orders in the current legislation. They surveyed their members on the use of the powers and the amount of debt outstanding. The debt mostly resulted from dangerous building

enforcement. SABSM are currently surveying their members for the up to date position on debt.

Building Standards Division (BSD) carried out a defective buildings survey of local authority building standards services in 2010. BSD met with SABSM at the end of February to discuss the findings and the report will be published shortly. The main conclusions include.

- Powers contained in Section 28 are not always used
- There are overlaps with powers in other legislation
- Local authorities take a reactive approach to dealing with defective building buildings under Section 28
- Local authorities do not have specific budgets identified for Section 28 action;
- The general powers in Section 28 powers are sufficient
- Local authorities cite difficulties in recovering expenses and
- Local authorities cite difficulty in establishing when intervention is needed for minor work.

In view of the outstanding debt local authorities have regarding dangerous building work BSD will be reviewing the debt recovery aspect of the Building (Scotland) Act 2003. This review can also review the debt recovery aspect for defective buildings.

2. Housing (Scotland) Act 1987

Section 86 of the Housing (Scotland) Act 1987 defines the tolerable standard for housing. A house meets the tolerable standard if it:

- is structurally stable;
- is substantially free from rising or penetrating damp;
- has satisfactory provision for natural and artificial lighting, for ventilation and for heating;
- has satisfactory thermal insulation;
- has an adequate piped supply of wholesome water available within the house;
- has a sink provided with a satisfactory supply of both hot and cold water within the house;
- has a water closet or waterless closet available for the exclusive use of the occupants of the house and suitably located within the house;
- has a fixed bath or shower and a wash-hand basin, each provided with a satisfactory supply of both hot and cold water and suitably located within the house;
- has an effective system for the drainage and disposal of foul and surface water;
- complies with the relevant requirements in relation to the electrical installation for the purposes of that supply;
- has satisfactory facilities for the cooking of food within the house; and
- has satisfactory access to all external doors and outbuildings.

Part 6 of the 1987 Act contains powers for closing and demolition orders for houses which do not meet the tolerable standard, but other enforcement powers have been superseded by provisions in the Housing (Scotland) Act 2006.

3. Housing (Scotland) Act 2006

The Housing (Scotland) Act 2006 has powers to tackle substandard housing. Substandard housing is defined in section 67 of the Act as a house which:

- does not meet the tolerable standard;

- is in a state of serious disrepair; or
- is in need of repair to prevent deterioration or damage to other premises.

Local authorities have enforcement powers under the 2006 Act to get owners to bring any house into a reasonable state of repair.

Under section 30 local authorities can issue a work notice requiring an owner to carry out work to bring any house considered to be substandard into a reasonable state of repair.

If the owner fails to comply with the work notice the local authority may carry out the work required by the notice, and other work which the local authority finds to be required, for the purposes of bringing the house into a reasonable state of repair.

In addition to the work notice, Section 42 of the Housing (Scotland) Act 2006 allows local authorities to issue a maintenance order requiring the owner of a house to prepare a plan (for securing the maintenance of the house to a reasonable standard. Section 49 provides enforcement powers for local authorities.

Under Section 50 local authorities may pay missing shares where a majority of owners agree or are required to carry out maintenance. This section also contains provisions to recover the costs of maintenance from an uncooperative minority. The section refers to owners who are “unable” to contribute and the Housing (Scotland) Act 2010 contains an amendment to apply it to “unwilling” owners as well.

The local authority can recover expenses arising in connection with work notices and maintenance orders and plans. Section 172 and Schedule 5 of the Act allow local authorities to create a repayment charge to recover their expenses. The repayment charge is recoverable in 30 equal annual instalments and is registered in the land registry.

Where there are gaps in title deeds the Tenements (Scotland) Act 2004 provides a structure for maintenance and management. Section 4 and Schedule 1 sets out a tenement management scheme. Under rule 4.3, unless a tenement burden provides that the entire liability for those scheme costs is to be met by one or more of the owners, the costs of work on common property are shared among the owners in the proportions in which the owners share ownership of that property (with some more complex rules for roofs and large flats).

4. Town and Country Planning (Scotland) Act 1997

Section 179 of the Town and Country planning (Scotland) Act 1997 provides planning authorities with the power to serve a notice (known as an Amenity Notice) where they consider that the condition of land or buildings has an adverse effect on the local amenity.

The Amenity Notice must specify the problem, the steps required to correct it and the period within which work must be done. The only restriction on type of buildings is that a notice cannot be served on a designated ancient monument. There is a right of appeal against a notice.

Where the notice is not complied with the planning authority have the power to enter the land and carry out any work required as stated in the notice. The cost of the work and any associated administrative costs can be recovered from the landowner. There are no powers to register this, only to recover as a civil debt.

5. Historic Environment (Amendment) (Scotland) Act 2011

This Act received Royal Assent on 23 February 2011. It is an amending Act designed to improve the management and protection of Scotland's historic environment. Among the new provisions is a power that will enable planning authorities to issue fixed penalty notices as an alternative to prosecution where a person is in breach of a listed building enforcement notice.

The Act also amends existing legislation by enabling a notice of liability for expenses to be registered in the appropriate property register against the building. This new provision will address the difficulties that can arise in terms of recovering costs when ownership of a property changes or when the regulatory authorities have to deal with an absentee owner.

Under the terms of section 49 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (the 1997 Act) a planning authority may execute any works which appear to them to be urgently necessary for the preservation of a listed building in their district. Scottish Ministers have similar powers. The cost incurred through carrying out such works can be recovered under the terms of section 50 of the 1997 Act which empowers local authorities to "give notice to the owner of the building requiring him to pay the expenses of the work". The power to recover the costs from such persons remains but, in addition, the new "notice of liability" powers introduced under the 2011 Act allows for a charge to be placed against the property itself, and also provides that any new owner from time to time of the property will also be liable to pay the costs.

This new power will enable the planning authority or Scottish Ministers to register a notice of liability for expenses of works in the Land Register of Scotland or the Register of Sasines as appropriate.

It should also be noted that the urgent works powers under the 1997 Act are not limited to the point where extensive problems emerge or the structure is deemed dangerous. Indeed, the urgent works powers have been successfully used to allow authorities to undertake relatively minor works – such as the removal of plants from guttering etc – before a building becomes seriously damaged by water ingress. This Act received Royal Assent in February 2011. It is an amending Act designed to improve the management and protection of Scotland's historic environment. Among the new provisions is the power to enable planning authorities to issue fixed penalty notices as an alternative to prosecution where a person is in breach of a listed building enforcement notice.

One of the amended provisions is the power to register a notice of liability for expenses in the land registry. The intention being, when a planning authority undertakes urgent work to preserve a listed building, to address the difficulties in them recovering costs when ownership of a property has changed or there is an absentee owner.

**Building Standards Division
March 2011**