

Response

on Behalf of

The Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)

The Building Repairs (Scotland) Bill Consultation



SOLAR welcomes the opportunity to respond to the consultation on this proposed Bill. As legal advisers to the local authorities charged with obligations under the relevant legislation, this is a matter which we feel we could contribute to in some detail if the Bill is to progress.

Of necessity the consultation is at this stage at a high level. However, as an opening remark it is worth noting that the legislation which was in place before the Buildings (Scotland) Act 2003¹ had provision for charging orders. The then Scottish Executive, as a matter of policy, decided that it was no longer appropriate to have charging orders when introducing the Bill that became law as the 2003 Act.

Answers to Specific Consultation Questions

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

The 2003 Act provides a robust set of measures for Councils to take action on dangerous and defective buildings. In particular, the ability to enforce repairs on defective buildings which are not as yet technically dangerous is potentially useful.

Other sectors of local government can no doubt advise the Bill's promoters on any practical issues arising from the legislation, and on the frequency of its use. However, anecdotal evidence suggests that local authorities are reluctant to use the full range of powers available under the 2003 Act because of the difficulty of the recovery of costs. Clearly local authorities do act where a building has become dangerous. However, it is not clear how often the building repair provisions are used.

There is a persistent problem with identifying owners, which causes time delays and additional costs. A provision that places the obligation on owners to identify themselves along the lines of s.125(3)(e) of the Town and Country Planning (Scotland) Act 1997, together with specific cost recovery provisions for the cost of title investigations, would be helpful in this regard.

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

The consultation paper rightly refers to the other legislation which is available for local authorities in the case of dangerous or defective buildings, most notably the Civic Government (Scotland) Act 1982 (The 1982 Act) and the Housing (Scotland) Act 1987 (The 1987 Act). It is worth also mentioning in this context the power to advance wellbeing under sections 20-22 of The Local Government in Scotland Act 2003, which some authorities have invoked in relation to taking action on dangerous or defective buildings.

SOLAR considers that there is probably a need for an overall review of the legislation relating to dangerous or defective buildings. The 1982 Act, in particular, takes no account of changes to the law of the tenement and, whilst the 1987 Act has a specific relevance to housing, ultimately the problem of dangerous or defective buildings covers the full range of building types. With that in mind, 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 was thought were worth keeping.

¹ The Buildings (Scotland) Acts 1959-1970

In reality the assessment of whether a building is defective or dangerous is one that calls for technical expertise which is best delivered in a joined up manner by the local authority. With that in mind, it would seem sensible to review the legislation and establish if the 2003 Act, with any necessary amendments, could be seen as the first resort for the local authorities wishing to take action. It should be feasible to establish, as a matter of policy, when a local authority can intervene in relation to a dangerous or defective building, and what action it can take.

In this regard the provisions of the Planning (Listed Buildings and Conservation Areas) Act 1997, and the Housing (Scotland) Act 2006, would also be relevant, as well as the new provisions in the Heritage (Amendment) Bill.

Aside from that general comment, SOLAR agrees that, in principle, the reintroduction of Charging Orders would probably give local authorities added confidence in going forward with action under the 2003 Act as there is far greater likelihood of cost recovery.

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?

See above.

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

Charging Orders as they previously existed under the 1959 to 1970 Acts, enabled recovery over a thirty year period. There would still be no recovery if the owner could not be found or was insolvent. However, none of these disadvantages outweigh the advantages of being able to secure the debt against the land. Although Charging Orders could be seen as something of a sledgehammer to crack a nut on occasion, enough flexibility could be built into the legislation to allow owners and local authorities to come to different financial arrangements under Charging Orders than the norm if this was deemed to be mutually acceptable.

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

The benefits of Charging Orders lie principally with the local authority - and, by extension, the public interest - in securing repayment for works carried out at the public expense. However, making the civil debt run with the land does at least allow owners certainty, as well as affording purchasers clarity on what financial obligations remain outstanding.

It should be considered whether the sale of a site subject to a Charging Order should trigger repayment.

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

Clearly the existence of a debt secured against the land in this way may cause difficulties for owners and lenders. In particular, the position of Charging Order as regards a heritable creditor in possession would have to be made clear in the legislation.

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

Ultimately any notice period for defective buildings will be arbitrary. The twelve week period would probably work well in most cases. However, there will be cases where a shorter notice period would be appropriate, and possibly even cases where twelve weeks would not be reasonable. Accordingly, it is suggested that the existing legislation gives the required degree of flexibility to deal with cases where twelve weeks would be too short, and also cases where, if the condition of the property was such that it might become dangerous if not treated more quickly, then more rapid action would be possible. See response to answer 9, below.

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?

See answer to question 7, above.

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

There are several advantages to the proposal, as discussed above. None of the disadvantages would appear to outweigh the advantages.

However, there are some matters which the drafters of a future Bill should consider carefully. One such matter is the proposed twelve week notice period, referred to above.

In addition, whilst local authority building standards officers can clearly identify where a building is, at the point of their inspection, 'dangerous' under the legislation, there are situations where a building, whilst not technically dangerous at the point of inspection, will become dangerous if left for much longer. In those situations the local authority could of course serve a Defective Buildings Notice. However, if an event such as high winds or heavy rain would render the building dangerous in the interim, the Defective Building Notice might be overtaken by events.

The drafters of the Bill might wish to consider whether the concept of a 'dangerous building' should be extended to cover such situations.

Finally, any appeal process needs to be fit for purpose in the context of a building which is either dangerous or has the potential to become dangerous. Lessons should be learned from the enforcement notice appeals provisions of the planning legislation, which often appear to operate as a disincentive to local authorities to take action. It is suggested that a short notice period for application to the Sheriff would provide sufficient comfort for owners here.

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 clear advantages of an automatic equal shares provision for the local authorities in cost recovery for work carried out by them is the simplicity of the proposal. It will allow them to take action much more quickly than if detailed investigations on title deeds are required. However, there are considerable disadvantages to owners even if they can, as under the Edinburgh Act, take action against other owners to recover sums paid.

There is clearly a tie in with the Tenements (Scotland) Act 2004 and the drafters of the Bill would have to have regard to this. However, another way of achieving a more equitable solution might be to give owners a very short period to produce title deeds demonstrating that the apportionment should be in a different proportion than equally.

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

The implications of a certificate and inspection regime for buildings is a matter which other sectors of local government might be better qualified to answer. However, it is likely that there would be significant resource implications in such a proposal for both building owners and local authorities.

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

SOLAR has no added comments on the proposed financial implications of the proposals other than as above.

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

It should be perfectly feasible to draft legislation which would be able to enforce the proposals. However, it is likely that many of the detailed provisions would be better left to regulations.

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

SOLAR is not aware of any equality issues that arise from the proposals.