Consultation on Tenement Law: Compulsory Owners' Associations

Response by the Centre for Scots Law at the University of Aberdeen

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NB: There appears to be a typographical error on page XI of the consultation document. The reference to the 'Insolvency Act 1987' is presumably to the Insolvency Act 1986.

1. What information or data do consultees have on the potential economic impact of any option for reform proposed in this Discussion Paper? (Paragraph 1.35)

As we are responding to this consultation as academic lawyers, we cannot offer empirical data regarding the potential economic impact of the options for reform discussed in the Discussion Paper. In principle, there are obvious benefits in properties being better maintained. However, whether any of the reforms discussed would have an overall positive economic impact would depend on whether the economic benefits arising from a higher standard of property maintenance would outweigh such attendant costs as those associated with registration, dispute resolution and administration of the owners' associations, as well as, say, increases in council tax being used to fund local authorities' role as applicant of last resort where a remedial manager has to be appointed (a possibility discussed below in answer to question 7). If there is eventually a net economic benefit following the introduction of compulsory owners' associations, it may owe more to the implementation of other possible reforms outside the scope of this consultation (e.g. the introduction of five-yearly inspections). Those caveats aside, we are generally supportive of the proposal to introduce compulsory owners' associations for Scottish tenements. We can see the potential economic benefits of introducing such associations, although such benefits are unlikely to arise unless the regime legally compels otherwise apathetic owners to participate in the scheme.

The TMS has not led to significant improvement in the maintenance of tenement buildings, although this is perhaps unsurprising as large parts of the 2004 legislation simply codified existing practice.

2. Do consultees envisage any non-economic impact arising from the reforms proposed in this Discussion Paper particularly as that may apply to any individual or group characteristics? (Paragraph 1.35)

The introduction of compulsory owners' associations may, in addition to the economic benefits stemming from properties being better maintained, carry certain other benefits as a result of owners being compelled to interact with one another more regularly. Even if an owners' association did not require its members to effect improvements to the tenements, the fact that the owners would be in more regular contact may make it more likely for such improvements to be discussed. Compulsory owners' associations may also carry the incidental benefits of promoting harmony among neighbours, providing clearer mechanisms for dispute resolution and

fostering a sense of community more generally, again by virtue of the fact that they would compel the owners of a given tenement to interact with one another.

We can also see practical benefits in the ownership of tenement flats being made more transparent, as by obviating the problem of an apathetic landlord stymying repairs and of the letting agency acting on the landlord's behalf refusing to disclose his or her identity.

Finally, better maintenance of buildings may carry certain aesthetic benefits, allowing the occupants of buildings to take greater pride in their environment.

3. (a) Should the OA be subject to the following mandatory duties:

(i) To appoint a manager within six months of the position becoming vacant?

Yes. The owners' association should be required to appoint a manager within six months of the position becoming vacant.

There was some discussion among the working group as to whether 'manager' was an inappropriate title, the hierarchical connotations of which might breed resentment among the 'non-manager' owners. Perhaps a more neutral term, such as 'factor', would better describe the person administering the property. Even so, we can see the practical benefit of using the term 'manager'. The term is more easily understood than, say, 'factor'. It would also be more consistent with the language of the Development Management Scheme. At the same time, the concerns regarding the hierarchical connotations of 'manager' might be satisfactorily addressed through education. For instance, there could be a publicity campaign or simply an easily accessible guide (similar to the sort of guide already employed on the tenement management scheme website) to clarify that the manager in an owners' association is a manager of property, not people.

(ii) To comply with any registration requirement arising under the legislation?

The working group is in favour of there being a requirement of registration.

(iii) To hold an annual general meeting of members within 12 months of the creation of the OA, and in every 15 months thereafter?

The working group is in favour of the owners' association being required to hold an annual general meeting but it may also be worthwhile to allow such a meeting to be dispensed with in a given year if the members agreed on this by, say, a special majority of 75%.

It should also be possible to hold the AGM virtually.

(iv) To approve an annual budget?

Yes, we agree.

(b) If not, what changes would you recommend to the mandatory duties suggested above, and/or which additional duties would you propose?

(Paragraph 4.20)

N/A

4. Should provision be made for a remedial management scheme through which mandatory duties on the OA can be enforced? (Paragraph 4.24)

Yes, provision should be made for a remedial management scheme through which mandatory duties on the owners' association could be enforced. The modernised judicial factors' scheme proposed in the Judicial Factors (Scotland) Bill may serve as a useful model for such provision. Even if a bespoke regime is felt to be more appropriate, it may still be useful for it to cross-refer to the regime governing judicial factors.

5. Should it be possible to appoint a person as a remedial manager only where they are:

(i) the owner of a flat in the relevant tenement; or (ii) entered on the Scottish Property Factor Register? (Paragraph 4.27)

Yes, but note also that if the regime governing judicial factors were used as a model (see above), the court could appoint anyone considered fit and proper as a judicial factor.

6. Should a court order be required for appointment of a remedial manager? If not, why not? (Paragraph 4.34)

Yes, a court order should be required for the appointment of a remedial manger.

This does raise the question: where should the expenses of obtaining such an order lie? Should they, for example, be met by the owners' association funds?

It should also be considered what type of court procedure would be appropriate for the appointment of a remedial manager (e.g. simplified procedure).

7. If a court order is required for appointment of a remedial manager:

(a) Should any person with an interest in the effective operation of the OA be entitled to make an application for a remedial manager order?

Yes.

(b) Should the local authority be under a duty to apply for a remedial manager order where: (i) the circumstances are such that an application would likely be granted;

and (ii) an application has not been made, nor does it appear likely that one will be made, by any other person?

While we are in favour of the local authority being under a duty to apply for a remedial manager order in the circumstances outlined in para 4.31 of the Discussion Paper, some consideration should be given to the nature of this duty and any remedies for its breach. For instance, would a failure by the local authority to apply for a remedial manager order give rise to liability in the form of damages and, if so, who would be able to claim them? It would presumably be incompetent for members of the relevant owners' association to claim such damages given that it is partly their failure to comply with the association's mandatory duties that would give rise to the local authority's duty.

A few practical matters should also be considered. How would the local authority become aware of an owners' association failing to comply with its mandatory duties? One could envisage, say, the local authority being informed of this by one of the residents in a neighbouring tenement, but would there be any restriction on the persons who could competently bring the matter to the local authority's attention? Would the local authority have the power to inspect the relevant tenement? There is also the question of how this additional burden on the local authority would be funded. Would there need to be an increase in council tax?

(c) Should a court be empowered to make a remedial manager order where: (i) the OA has failed to adhere to its mandatory duties; and (ii) it is reasonable in all the circumstances of the case? (Paragraph 4.35)

Yes.

8. Should the application for a remedial manager order be required to identify the proposed remedial manager and confirm their willingness to act? (Paragraph 4.36)

Yes. The local authority should also have the power to refer to the court to have a judicial factor appointed. See the answers to questions 4 and 5 (above).

9. (a) Should the local authority be required to act as remedial manager in circumstances where it has not been possible to identify another candidate?

Yes. It is difficult to conceive of anyone other than the local authority who could fulfil this role.

There are obvious resource implications. Would local authorities have the resources to act as remedial managers? There could be some consideration of the use of security in the form of charging orders over the properties belonging to the relevant owners' association to allow the local authority to recover its expenses arising from having to act as remedial manager. Such security already exists in other contexts regarding building maintenance by local authorities (see e.g. the Housing (Scotland) Act 1987, Sch 9, and Housing (Scotland) Act 2006, s 172).

(b) If not, who should be appointed in such circumstances instead?

N/A

(c) When acting as the remedial manager of last resort, should the application of the Property Factors (Scotland) Act 2011 to local authorities be suspended? Why or why not? (Paragraph 4.40)

The application of the 2011 Act should be suspended. It would create an unnecessary additional layer of regulation.

10. (a) Should the function of the remedial manager be to support the OA to meet its mandatory duties?

Yes, although perhaps some term other than 'support' would be more apt here.

(b) In order to fulfil this function, should the remedial manager have the same powers and duties as a non-remedial manager? If not, what changes would you suggest?

Yes, the remedial manager should have the same powers and duties as a non-remedial manager.

(c) Are there circumstances other than the appointment of a (non-remedial) manager which should bring the role of the remedial manager to an end? (Paragraph 4.43)

Yes. Other relevant circumstances might include death, bankruptcy, imprisonment or, where the remedial manager was appointed in their capacity as registered factor, being removed from the Property Factor Register. Consideration would need to be given to a process for replacement of the remedial manager in such circumstances. It is worth considering whether a remedial factor has the ability to resign unilaterally or whether this would require them to go to court.

The question also arises: what happens if the remedial manager cannot have a non-remedial manager appointed?

11. Do consultees agree that the rules of the OAS should operate as background law, applicable only where provision in the tenement titles is absent or incomplete? (Paragraph 4.53)

Yes.

12. Following the entry into force of OA legislation, should any deed purporting to create a title condition which would modify the application of the OAS be required to set out in full the amended OAS? If not, why not? (Paragraph 4.62)

Title deeds should have primacy over the OA legislation. It would be good practice for new title deeds to provide details of the OA, but a failure to do so should not invalidate the title deed.

13. (a) After a fixed period, should legislation disapply existing title conditions to the extent that they modify the application of the OA scheme?

No, the OA scheme should not be imposed retrospectively. It is very important for people to be able to rely on the Register and not to have rights arising from express title conditions overridden. It would be inappropriate to allow inaction or inertia by owners of tenement properties to favour the disapplication of title conditions in this context. It is a cardinal principle of property law and contract law that rights and obligations can only be changed by consent. Practically there is danger of a vital title condition being disapplied. This regime will apply to a huge variety of properties and one size will not fit all. Comparisons to the abolition of feudal tenure would be inapt here, considering that this represented a paradigmatic shift in the property law regime in Scotland.

(b) What should be the duration of the fixed period?

N/A

(c) Should the OA be under a duty to register a preservative deed of conditions on request by any owner, subject to the right of any other owner to challenge this request?

N/A

(d) Should members of the OA be able to take a special majority decision to refuse to register a preservative deed of conditions, subject to the same voting threshold as for registration of a deed of conditions?

We consider that any change in this context should require unanimity rather than a special majority.

(e) Do you have any other comments on our provisional proposals in relation to standardisation of existing tenement title conditions? (Paragraph 4.71)

No.

14. (a) Should the OA be named "The Tenement Owners' Association of" followed by the address of the tenement building?

Yes.

(b) Should the address of the OA be the address of the manager? (Paragraph 5.11)

There could be two addresses, one of which is the manager's address. It should be made clear which of the two addresses is the manager's address.

15. Which is the better option for identification of the OA:

(a) The manager should be placed under a duty to verify the details of the OA on request (option 1)?

(b) The OA should be subject to a requirement to enter its details in the Land Register within a short period after the OA's creation (option 2(a))?

Yes, the manager should be placed under a duty to verify the details of the OA on request (option 1) and/or the OA should be subject to a requirement to enter its details on the Land Register within a short period after the OA's creation (option 2(a)). In other words, we favour option 1, option 2(a) or both. We can see the value of registration in terms of publicity/third parties dealing with the OA. In the absence of registration of details in the land register, it may be difficult for an external party to identify details of the OA. At the same time, the costs associated with registration should also be kept to a minimum.

(c) The OA should be subject to a requirement to enter its details in the Land Register within a longer period of the OA's creation, tied to registration of a standardised deed of conditions where appropriate (option 2(b))?

(d) No provision for identification of the OA should be made within the legislation

introducing the OA scheme?

(e) An alternative option? If so, please provide details. (Paragraph 5.23)

16. (a) Which option do you prefer:

(i) The OA legislation should apply to small tenements, subject to modification or disapplication of inappropriate mandatory duties;

or

(ii) The OA legislation should not apply to small tenements, except where owners of flats in a small tenement "opt in" to the legislation subject to modification or disapplication of inappropriate mandatory duties?

We have mixed views regarding these options and can see arguments in both directions. Perhaps on balance (i) is preferable, but it will depend on the precise form that modification/disapplication takes.

(b) Should a "small tenement" be defined as a tenement building of three flats or fewer? If not how should a "small tenement" be defined and why? (Paragraph 5.34)

There is something to be said for defining a small tenement as a tenement with two flats. Arguably, however, the OA legislation may not be needed for two flats, at least to its full extent. The OA legislation in its standard form should apply only to tenements with three flats or more.

17. (a) Which option do you prefer:

(i) The OA legislation should apply to tenements in single ownership, subject to modification or disapplication of inappropriate mandatory duties;

or

(ii) The OA legislation should not apply to tenements in single ownership, except where the owner "opts in" to the legislation subject to modification or

disapplication of inappropriate mandatory duties? (Paragraph 5.36)

For so long as a tenement is in sole ownership, the OA legislation should not apply.

18. Where a tenement is managed as part of a wider development, should the mandatory duties imposed on the OA be satisfied where they have been met for the development as a whole, rather than for the tenement in particular? (Paragraph 5.40)

Yes.

19. Should the OA legislation be disapplied from tenements subject to a DMS? (Paragraph 5.43)

Yes.

20. Are there other circumstances in which the OA legislation should be disapplied, or its application modified, in relation to particular categories of tenement? If so, please provide details. (Paragraph 5.45)

There are no circumstances beyond those mentioned above in which the OA legislation should be disapplied, or its application modified, in relation to particular categories of tenement.

21. (a) Should the OA be a bespoke body corporate created in any new legislation?

Yes.

As a practical point, it will be important for banks to be engaged with and made aware of the existence of this new body corporate, given that owners' associations will need bank accounts.

(b) If not, what form should the OA take? (Paragraph 6.17)

22. Should legislation provide that an OA is created:

(a) For tenements completed prior to the introduction of the OA legislation, on the date when the relevant provisions of the OA legislation are brought into force?

Yes.

(b) For tenements completed following the entry into force of the relevant provisions of the OA legislation, on the date when the building completion certificate is approved? (Paragraph 6.21)

Yes.

The question arises how conversions of buildings into tenements covered by the scheme are to be addressed. We presume that there would always be a completion certificate in those cases also, but this should be considered.

23. (a) Should the members of the OA be the registered owners, unregistered holders and heritable creditors in possession of flats in the tenement?

Yes, although there should perhaps be some consideration as to whether unregistered holders in this context include corporate insolvency practitioners (e.g. liquidators and administrators).

(b) Do you have any comments on the position of non-owner occupiers of flats in the tenement? (Paragraph 6.28)

We agree that membership of the OA should be confined to the categories of person mentioned in Question 23(a). Tenants should not be included as members of the OA.

24. (a) Should the "scheme property" to be managed by the OA be defined in the same way as "scheme property" in the TMS?

Yes, it would be good for 'scheme property' to be defined consistently as between the OA scheme and the TMS given that there is already familiarity with the latter.

(b) If not, what changes would you suggest? (Paragraph 6.36)

25. (a) Should the manager be under a duty to maintain a list of names and contact details of members of the OA?

Yes, although the question arises: what are the legal repercussions of the manager's failing to fulfil this duty? Is there, for example, a power to compel the manager to fulfil the duty and/or a right to claim damages?

(b) Should members of the OA be under a duty to provide the first manager with their name and contact details within three months of the manager's appointment, and to inform the manager of any changes to their name and contact details within one month of their occurrence?

Yes, but it would also be useful for other information to be provided, e.g. whether contact is to be via an agent and also whether the members consent to electronic communication, in which case they could provide email addresses etc.

(c) Should a member, on disposal of their flat, be obliged to notify the manager of (i) any change to their contact details; (ii) the name and contact details of the new owner; (iii) the name and address of the .agent acting for the new owner; (iv) the date on which the new owner will be entitled to take entry?

(d) Should a member of the OA be entitled to obtain the name and contact details of another member or members where necessary in connection with the management and maintenance of the building or the operation of the OA? (Paragraph 6.39)

The legislation should be drafted in such a way as to pre-empt (potentially specious) arguments regarding the GDPR which, for example, a letting agent might invoke to avoid disclosing the name and contact details of a given member. It is vital for the fulfilment of the policy underpinning the OA scheme that there is a right to obtain members' contact details.

26. Should the manager have power to sign documents and execute deeds on behalf of the OA? (Paragraph 6.41)

Yes. However, once again, liability issues will need to be considered here, if e.g. a manager seeks to sign documents and/or execute deeds without permission or having been expressly forbidden to do so.

27. Where the OA regime requires information to be sent:

(a) Should it be competent to send by post, by delivery or by any reasonable electronic means used by the recipient in connection with the business of the OA in the previous year?

Yes, all of these modes of communication should be competent.

(b) Should sending information to the agent of a member be deemed to meet any requirement to send it to the member?

Yes. Indeed, it is especially important that it is competent to send information to the agent of a member given the prevalence of letting agents.

(c) Where a member cannot be identified or found after reasonable enquiry, should it suffice to send information to the flat they own in the tenement addressed to "the owner" or equivalent term? (Paragraph 6.45)

Yes.

28. Do you agree that OAs should be excluded from the definition of "property factor" in the Property Factors (Scotland) Act 2011? If not, why not? (Paragraph 6.49)

Yes, OAs should be excluded from the definition of 'property factor' in the Property Factors (Scotland) Act 2011. We agree with the reasons given in the Discussion Paper, including that an owners' association is not a commercial enterprise and to align with the position for the DMS.

29. (a) Should the function of the OA be to manage the tenement for the benefit of members?

(b) Should the OA have the general power to do anything necessary in connection with that function?

Yes, the function of the OA should be to manage the tenement for the benefit of members. Perhaps the OA's general power should be to do anything that is *reasonably* necessary in connection with its management function.

There is perhaps some ambiguity in the word 'benefit'. Clearly, this word would encompass repairs but, beyond that, it is a somewhat open-ended term.

(c) If you answered "no" to (a) or (b) above, what alternative would you suggest? (Paragraph 7.9)

30. In the OAS:

(a) Should the general power of the OA be supplemented by a non-exhaustive list of specific powers which it may wish to exercise?

(b) If a non-exhaustive list is provided, should it include the list of key powers set out in paragraph 7.10? If not, what changes or additions to this list would you suggest? (Paragraph 7.14)

We tentatively agree that the general power of the OA should be supplemented by a non-exhaustive list of specific powers it may wish to exercise along the lines of the DMS powers listed

in paragraph 7.10 of the Discussion Paper. At the same time, some members of the group expressed reservations about the inclusion of powers relating to improvements. Arguably, the circumstances rendering a power to effect improvements appropriate in the context of the DMS would not apply in the context of an owners' association. The DMS concerns whole developments. For these reasons, we would query whether improvements ought to be covered by the OA regime (although we acknowledge that even if improvements were not covered by the OA regime, the existence of OAs may, incidentally, lead to such improvements). If improvements are to be included in a non-exhaustive list of powers, perhaps this power should be: (1) confined to reasonable improvements and (2) exercisable only by special majority or in cases of unanimity.

Finally, if improvements are not covered by the OA, it would be worthwhile to consider and/or clarify the branches of law which do cover improvements, e.g. common property law, contract law and title conditions.

31. In legislation introducing the OA regime:

(a) Should maintenance be defined to include: (i) any work to scheme property required to comply with the duty currently set out in section 8 of the 2004 Act; and (ii) routine maintenance as currently defined by TMS r 1.5?

Yes.

(b) Are any other changes to "maintenance" as defined in TMS r 1.5 required? If so, what changes are required and why? (Paragraph 7.19)

We are not sure whether any changes to 'maintenance' as defined in TMS r. 1.5 are required.

32. Should the non-exhaustive list of powers exercisable by the OA include:

(a) The power to instruct demolition of all or part of the tenement building?

Yes, we agree that the non-exhaustive list should include a power of demolition but subject to a requirement of unanimity.

(b) The power to seek approval from the court for sale of the demolition site and distribution of the proceeds as regulated by the 2004 Act s 22?

Again, yes.

(c) The power to seek approval from the court for sale of an abandoned tenement building and distribution of the proceeds as regulated by the 2004 Act s 23? (Paragraph 7.24)

Again, yes.

33. Should the non-exhaustive list of powers exercisable by the OA include the power to execute a deed modifying the application of the OA legislation to the tenement, including execution of a DMS deed of application? (Paragraph 7.26)

Yes.

34. Should an OA be prohibited from carrying on a trade, whether for profit or not? (Paragraph 7.29)

Yes, we think that, consistently with the approach adopted under the DMS, an OA should be prohibited from carrying on a trade. That said, we do not think that there should be a prohibition against profit-making that is incidental to the core functions of the OA and/or which stems from resources already on the property. For instance, there might be a pop-up shop erected to sell strawberries grown on the property.

35. (a) Should the OA be capable of owning parts of the tenement (including garden ground forming part of the tenement plot)? Why or why not?

The working group had mixed views on this question (see below).

(b) If an OA is capable of owning parts of the tenement, should there be any limitations on which parts of a tenement can be owned? If so, which limitations should be in place, and why? (Paragraph 7.36)

One member of the working group expressed the view that, wherever a proposal regarding compulsory owners' associations is consistent with the approach adopted under the DMS, there is a reasonable presumption in favour of that proposal. However, as regards ownership by the OA of certain parts of the tenement, arguably the proposed OA regime is distinguishable from the DMS. In fact, some members of the working group suggested that empowering an OA to own parts of the tenement might step beyond the policies underlying the introduction of compulsory OAs. Arguably, all powers enjoyed by an OA should be ancillary to its function: regulating maintenance of tenement property. If ownership of part of the tenement by an OA might help the OA to solve maintenance coordination problems then, arguably, OAs should have that power. For instance, suppose that there is a garden pond. Perhaps it would be more straightforward for the OA to acquire ownership of that pond than for the pond to be owned by the members in common. There may be something to be said for a cautious approach, at least in the first incarnation of any legislation, conferring capacity to own property on OAs but limiting that capacity to, e.g., certain parts of the tenement property. If the OA can acquire ownership of certain parts of the tenement property, that power should not extend to parts of the tenement which are essential to the use of flats.

If it were competent for an OA to become owner of a part of the tenement, it would be particularly important to limit the membership of OAs so as to exclude, e.g., mere tenants (see answer to question 23 (above)).

36. Should an OA be capable of owning heritable property which is not part of the tenement? Why or why not? (Paragraph 7.38)

No. To allow an OA to acquire ownership of heritable property not forming part of the tenement would be to overstep the core policy functions of compulsory OAs.

37. Should there be a strict link between allocation of voting rights and allocation of liability for costs within the OAS? Why or why not? (Paragraph 8.15)

We think there should not be a strict link between allocation of voting rights and allocation of liability for costs within the OAS, as discussed in the Discussion Paper.

38. In the OAS:

(a) Should each flat be allocated one vote?

Yes, each flat should be allocated one vote. While there is a logic in equating liability for costs to floor size in some instances, there is a practical benefit in having a clear and simple rule.

(b) Is any special rule needed for situations where the number of flats in the building changes, and if so, what? (Paragraph 8.19)

No special rule is required for the situation in which the number of flats in the building changes. For every new flat, there should be an additional vote.

39. In the OAS:

(a) Should decisions to exercise the powers of the OA generally be taken by a simple majority of votes allocated? If not, what alternative threshold do you suggest?

We think that, as a general rule, decisions should be taken by a simple majority of votes. However, there will be many instances in which a special majority or unanimity should be required.

(b) Where votes are tied, so that 50% of votes are in favour of a decision, should that be sufficient to allow the decision to be made?

Yes, we agree that where votes are tied, that should be sufficient to allow the decision to be made. This accords with the broader policy of favouring action over passivity.

(c) Should decisions which require a special majority be taken by 75% of votes allocated? If not, what alternative threshold do you suggest?

Yes, decisions which require a special majority should be taken by 75% of the votes allocated. Such a figure for special majorities is familiar in such other contexts as company law (for special resolutions).

Interesting issues might arise in cases involving three flats. Here it would not be possible to have a special majority of 75%. If, in a four-flat tenement, certain decisions would require at least three of the owners (i.e. 75% of them) to vote in the affirmative, how should such decisions be taken in a three-flat tenement? Should they have to be taken by a majority of two of the three owners or unanimously?

(d) Which decisions should require a special majority?

We agree with the proposals in the Discussion Paper as to the sorts of decisions which should require a special majority or unanimity. There could also be a nuanced approach. Suppose there is a decision requiring unanimity but the person who has not agreed is simply absent or inactive. In such special cases, perhaps the decision could be taken by special majority, so long as reasonable efforts were made to contact the absent or apathetic party and so long as there was some (time-limited) right on the part of the absent person to challenge any decision taken in court.

(e) Where a special majority decision relates to a part of the tenement not in common ownership, should the owner's consent to the decision be required?

Yes, the relevant owner's consent should be required; otherwise, the right to property under the European Convention of Human Rights (A1 P1) would be undermined.

(f) Should unanimity be required for a decision to demolish the tenement? (Paragraph 8.34)

Yes.

40. In the OAS:

(a) Should the owner or any person nominated by the owner be able to cast a vote?

Yes.

(b) Where the owner wishes to nominate a person to act on their behalf, should that nomination require to be in writing?

Yes, for the sake of certainty.

(c) Where a flat is co-owned, should a majority of co-owners be entitled to cast the vote for that flat? (Paragraph 8.38)

Yes, we agree that a majority of co-owners should be entitled to cast the vote for the flat. However, if there are two co-owners and they disagree on a certain OA issue, we would argue that the co-owners should forfeit the right to vote on that issue. In answer to an earlier question, we agreed with the approach proposed in the Discussion Paper to the effect that where, say, two out of four members vote in favour of a certain decision and the other two members vote against it, the outcome should be deemed to be one in favour of the decision. That ties in with the broader policy rationale of favouring action over inaction. However, it would be going beyond that policy rationale, and arguably undermining the law of common property, to say that, where two co-owners cannot reach an agreement as to a certain OA-related decision, the co-owner in favour of that decision ought to be favoured.

41. In the OAS:

(a) Should the manager have a duty to call the annual general meeting?

Yes, the manager should have a duty to call the AGM, although, as with any duty, questions arise as to the legal consequences of a failure to perform it.

(b) Should the manager have a duty to call any other general meeting when required to do so by owners having not less than 25% of the voting allocation in the tenement?

Yes.

(c) Should the manager have the power to call a general meeting at any time?

The manager should have the power to call a general meeting but only if it is reasonable to do so.

(d) Should any member have the power to call a general meeting where the manager has failed to do so, or where there is no manager?

Yes.

(e) Should any member have the power to call a meeting in other circumstances, and if so, which circumstances? (Paragraph 8.46)

Perhaps a member should have the power to call a meeting in other circumstances but those should be clearly defined.

42. In the OAS, to call a general meeting:

(a) Should the person calling it be required to send a notice to each member and the manager specifying the date, time, location and intended business of the meeting?

Yes.

(b) Should the notice require to be sent at least 14 days prior to the intended date of the meeting? (Paragraph 8.46)

Yes.

43. In the OAS:

(a) Should a quorum be required for a meeting of members?

No.

(b) If so, why, and what quorum would be appropriate? (Paragraph 8.49)

44. In the OAS, where a meeting of members is called:

(a) Should the manager have a responsibility to support virtual attendance?

Yes, but there should perhaps be a requirement on the part of members attending virtually to confirm their identity.

(b) Should members be required to elect a convenor from amongst their number to run the meeting?

As a default rule, the manager could be the convenor unless there is some good reason (e.g. a potential conflict of interest) for him or her not to be the convenor of a given meeting. In cases where the manager is not the convenor, we agree that the members should have the power to elect one of their number as a convenor.

(c) Should the manager have a responsibility to keep a record of decisions taken at the meeting, and to send that record to all members following the meeting? (Paragraph 8.54)

Yes.

45. In the OAS:

(a) Should there be a rule as to how votes can be cast at meetings?

There needs to be unanimous agreement as to how voting takes place, failing which the manager decides. Specific provision could be made for voting by proxy.

(b) If so, what should that rule be? (Paragraph 8.57)

46. In the OAS:

(a) Should it be possible for decisions to be taken by consultation?

Yes, although it may be worth considering whether there should be certain decisions which it is not competent to take by consultation.

(b) If decision making by consultation is possible, should it be possible for consultation to be undertaken by (i) any owner and (ii) the manager?

Yes.

(c) If decision making by consultation is possible, should the scheme set out rules on how that consultation must occur? If so, what rules would be appropriate?

Yes, but these rules should not be overly rigid. Ideally, rules on how consultation is to take place could be agreed upon among the parties, failing which there could be default rules.

(d) If decision making by consultation is possible, should consultation with one co-owner be sufficient to count a vote for a co-owned flat?

The Working Group had mixed views on this question. We think there is value in consistency with what we said earlier (i.e. that in a property co-owned by only two persons, a disagreement on a given issue should cost those co-owners their vote on that issue), but we note the position in the TMS. Arguably, if there are two co-owners (e.g. Mr and Mrs Smith), and, during a consultation process, Mr Smith says that his and Mrs Smith's views are X, then subject to Mrs Smith making any views to the contrary heard, we can take Mr Smith at his word and assume that Mrs Smith's views are also X.

(e) If decision making by consultation is possible, should the person who undertook the consultation be responsible for counting the votes and notifying all owners of the outcome as soon as practicable, or instructing the manager to do so? (Paragraph 8.62)

Yes.

47. In the OAS:

(a) Should it be provided that any procedural irregularity in the making of a scheme decision does not affect the validity of the decision?

Yes, but perhaps some irregularities (e.g. particularly egregious or turpitudinous ones) should lead to the decision being regarded as voidable. In some cases (e.g. those involving criminality), arguably the decision should be not simply voidable but void.

Also, even apart from any rights of challenge based on procedural irregularity, there may be some other bases for challenging a decision.

(b) Where an owner directly affected by procedural irregularity in the making of a decision is not aware that costs have been incurred (or objects immediately to the costs), should it be provided that that owner is not liable for the costs, with their share redistributed amongst the other owners? (Paragraph 8.64)

Perhaps this redistribution of costs should occur but arguably only in the case of serious irregularity. There could perhaps be a non-exhaustive list of such irregularities. There is a whole spectrum of irregularity ranging from the minor and innocuous to the turpitudinous and deceitful.

Another option, either instead of or in addition to the above, would be to have a default rule as to the redistribution of costs subject to a right of appeal on the part of the OA members who have been saddled with those additional costs.

It should also be noted that where an owner has been affected by a procedural irregularity, exempting them from liability for costs may not be a sufficient remedy. For owner-occupiers, a tenement building is not only an asset, but also a home. It may be appropriate for decisions made through procedural irregularity which affect the home environment (for example, by making aesthetic changes or altering the amenities available to occupiers) to be subject to compensation.

48. In the OAS, should an owner (or group of owners) with liability for 75% or more of the costs resulting from a decision have the power to annul that decision by sending notification to the other owners and the manager? (Paragraph 8.66)

Yes, such a power of annulment seems reasonable.

49. In the mandatory provisions of the OA legislation:

(a) Should the court have the power to annul a majority decision taken by members to exercise the powers of the OA?

Yes.

(b) Should the court have the power to order the exercise of the powers of the OA

Yes, but only in cases involving apathy. A court should not be able to overrule a decision in which everyone has participated. In that regard, it might be important to distinguish a vote to abstain, which might reflect genuine indecision and ambivalence, from a complete refusal to participate. To adopt an electoral metaphor, a vote to abstain may be viewed as akin to spoiling one's ballot paper; refusal to participate is akin to omitting to vote. One may also wish to distinguish abstention in the first sense (i.e. as an expression of genuine ambivalence) from abstention in the sense of 'game playing', as where one owner refuses to participate in an effort to stymie the overall decision-making process. While we offer no concrete proposals here, these are some of

the issues which could be borne in mind. Broadly speaking, the legislation should target abstention as 'game playing'.

(b) Should the court have power to make an order only where the decision being challenged is not in the best interests of all members or where it would be unfairly prejudicial to one or more members?

Yes.

(c) What factors, if any, should the court be required to take into account in deciding whether to grant a relevant order? (Paragraph 8.76)

The factors that a court ought to take not account in deciding whether to grant a relevant order should be left open-ended.

50. In the OAS, should a decision taken by members be binding on owners and their successors as owners? (Paragraph 8.78)

Yes, a decision taken by members should be binding on owners and their successors as owners, provided that they have been consulted.

For example, if there has been a recent vote by the OA in favour of some unusual expense (e.g. one involving solar panels), the conveyancing process should bring that unusual expense to an incoming owner's attention.

51. In the OAS:

(a) Should provision be made for members to carry out emergency work to scheme property?

Yes.

One member of the Working Group expressed concern that the sheriff court may have misconstrued the Tenements (Scotland) Act 2004 in holding that the duty to maintain the parts of the tenement that provide support and shelter could only be used to provide patch repairs.[1] Arguably, repairs necessary for support and shelter or emergency repairs can be permanent/extensive if this appears to be in the interests of all owners as a whole.

(b) If so, should emergency work be defined as under the TMS? (Paragraph 8.80)

Yes, but again there could be clarification of how emergency work is to be interpreted (see above).

[1] See https://underoneroof.scot/enforcing-repairs-yourself/.

52. In the OAS:

(a) Should the manager require to be a registered property factor?

The manager should be required to be a registered property factor only if they are not an owner: i.e. only if they are acting in the course of their business.

(b) Should eligibility to act as manager be subject to any other qualifications? (Paragraph 9.19)

No, except that there should be requirements that a manager is, for example, not an undischarged bankrupt or convicted of fraud or other crimes of dishonesty. These rules for disqualification should probably have a significant degree of consistency with those we identified for remedial managers in our answer to Question 10(c) above.

53 (a) Where a member of an OA acts as the manager of that OA, should they be considered to be "acting in the course of their business" within the meaning of section 2(1) of the Property Factors (Scotland) Act 2011 solely because they are in receipt of a moderate benefit for that work?

No, a member of the OA acting as its manager should not be considered to be acting in the course of their business.

(b) Do you have any comments on how "moderate benefit" might be defined in this context? (Paragraph 9.24)

We take the view that there is no need to define this term.

54. In the OAS:

(a) Should the manager and a member acting on behalf of the OA be required to sign a certificate confirming the manager's appointment?

Yes, that would be reasonable and useful for certainty.

(b) Should the certificate require to be signed within one month of the manager's appointment? (Paragraph 9.28)

Yes, although the question arises: what are the consequences of a failure to sign within one month?

55. (a) In the OAS, should the manager:

(i) Be designated an agent of the OA?

Yes.

(ii) Have capacity to exercise any of the powers available to the OA?

Yes.

(iii) Have a duty to manage the tenement for the benefit of members?

Yes, but see our earlier point(s) regarding this notion of acting for the benefit of members (in our answer to question 29).

(b) If you answered no to any part of the question above, what are the reasons for your answer? (Paragraph 9.34)

N/A

56. In the OAS:

(a) Should the general duty of the manager be supplemented by a non-exhaustive list of specific duties?

Yes

(b) If a non-exhaustive list is provided, which duties should it include? (Paragraph 9.39)

The list given in paragraph 9.36 seems reasonable.

57. In the OAS, should duties on the manager of the OA be owed to the OA itself and to members? (Paragraph 9.41)

Yes.

58. (a) Does the OA legislation require any provision to deal with circumstances in which the manager purports to act beyond their authority?

Yes. We are not entirely in agreement with the conclusion in para 9.48. It would be useful for the legislation to largely be a one-stop shop for interested parties to know the relevant rules – particularly in light of the widespread application of legislation and the fact that many non-experts may seek to refer to it.

(b) If so, what provision is required? (Paragraph 9.49)

Where an agent acts beyond their authority, a contract with a third party is binding but with the agent/manager rather than the OA. Alternatively, if the OA is to be bound, there needs to be a clear mechanism for managers to be held liable to the OA/owners of tenement properties.

59. In the OAS:

(a) Should the rules on liability for costs replicate the rules on liability for costs in the TMS?

Yes, for the sake of consistency.

(b) If not, how should liability for costs be allocated? (Paragraph 10.15)

60. In the OAS:

(a) Should members have the power to exempt an owner, in whole or in part, from liability for a share of costs which would otherwise be due?

Yes.

(b) If so, should the vote of any owner who stands to benefit not be counted in making the decision? (Paragraph 10.17)

Yes.

61. In the OAS:

(a) Should liability for exempt or missing shares of costs be redistributed equally amongst other owners liable for the same costs, subject to a right of relief where the share is missing (but not where the share is exempt)?

Yes, but maybe subject to qualification. If rules for distribution are not equal in the first place, the position here should follow the normal rules. See also our earlier answers on related matters (e.g. for Questions 37 and 38).

(b) If not, what alternative rule should apply? (Paragraph 10.21)

See answer to (a).

62. Are any changes to sections 11-15 of the Tenements (Scotland) Act 2004 required by the introduction of the OA regime? (Paragraph 10.24)

No.

63. In the OAS:

(a) Should the budgeting system be based on the system used in the DMS?

Yes.

(b) If not, what alternative system would you propose? (Paragraph 10.39)

64. If the DMS budgeting system is adopted for the OAS:

(a) Should the draft budget be required to include details of the works intended to be carried out, the estimated cost of each work and how the estimate was arrived at, and the timeline for completion of works?

Yes.

(b) Should any surplus service charge payments be returned to owners or remain available to the OA for work the following year?

Funds should be retained, but perhaps subject to percentage limits. For instance, if there is a surplus of ten per cent or under, it could be rolled over into the following year. There could also be a utility account with a right to withdraw money over a certain threshold.

(c) Are any other changes required to adapt the DMS system for the OAS? (Paragraph 10.39)

No.

65. In the OAS:

(a) Should there be provisions on treatment of funds equivalent to those in the DMS?

Yes.

As mentioned earlier, it will be important to ensure that banks are well-informed about owners' associations before these are introduced.

(b) If not, what changes or additions to the DMS provisions would you suggest? (Paragraph 10.43)

66. (a) Should section 8 of the 2004 Act be amended to include a duty on owners to maintain any part of the tenement which they own so as to prevent damage to any part of the tenement, or in the interests of health and safety?

Yes, but it will be important to clarify what is meant by 'health and safety' for these purposes.

(b) If not, why not? (Paragraph 11.12)

67. (a) Should legislation include a non-exhaustive list of works covered by the duty on owners under section 8 of the 2004 Act? Why or why not?

There was a slight difference of opinion on this issue within the working group. Some members took the view that there should be a list; others took the view that there should not even be an indicative list because of the practical difficulties in framing one. What the group agreed on was that if there is to be a list, it should be a non-exhaustive, indicative one.

(b) If legislation were to include such a non-exhaustive list, what works should be included in the list? (Paragraph 11.15)

One example of works that could be included in a non-exhaustive list was roof maintenance, although there would remain issues as to what precisely needed to be maintained and in what respect (e.g. replacement of slates).

68. (a) In the OA legislation, should each owner continue to have an individual right of enforcement in relation to obligations owed to them by other owners under the 2004 Act or under the management scheme applicable to the tenement?

Yes.

(b) In the OAS, should the manager have the right to enforce any obligation owed to one owner by another under the 2004 Act or under the management scheme applicable to the tenement?

Yes, although it would be worthwhile to clarify the precise form that this power would take (e.g. would it include liquidated damages?).

(c) In the OAS, should the manager have a duty to enforce any obligation owed to one owner by another under the 2004 Act or under the management scheme applicable to the tenement where reasonable to do so? (Paragraph 11.27)

The Working Group doubts whether there should be such a duty.

69. In the OA scheme, should each owner have an individual right of enforcement in relation to the obligations owed by the manager to the OA? (Paragraph 11.31)

Yes.

70. Should enforcement action in relation to obligations arising under the 2004 Act or the management scheme applicable to the tenement be dealt with by summary application to the sheriff court or by application to the Housing and Property Chamber of the First tier Tribunal? Please give reasons for your answer. (Paragraph 11.40)

Enforcement action in relation to obligations arising under the 2004 Act or the management scheme applicable to tenements should be addressed via application to the Housing and Property Chamber of the First-Tier Tribunal, which will be relatively inexpensive, more efficient and generally more conducive to the resolution of disputes in the context of tenements. The fact that there may be power inequalities among owners, some of whom will be owner-occupiers and some of whom will be landlords, makes ease of access to justice particularly important in this context. At the same time, a tribunal will not, in the absence of unreasonable conduct, make an award of expenses.

71. (a) Should a court or tribunal dealing with an application to enforce an obligation arising under the 2004 Act or the management scheme in place in the tenement have power to refer the matter for mediation if appropriate in all the circumstances of the case?

Yes, a court or tribunal should have such a power (but not an obligation).

(b) Should a court or tribunal dealing with an application to enforce an obligation arising under the 2004 Act or the management scheme in place in the tenement have discretion to take into account any attempts by any party to the case to engage with an alternative dispute resolution process when determining any award of expenses?

Yes.

(c) Do you have any other comments about the use of alternative dispute resolution processes in the context of tenement maintenance disputes? (Paragraph 11.45)

One specific context in which resort to ADR should not be mandatory is in the context of the enforcement of a right to payment.

72. Should the manager be entitled to seek authority from the court for a budget for works required for compliance by owners with their duties under section 8 of the 2004 Act? (Paragraph 11.48)

Yes.

73. (a) Should the provisions on the diligence of land attachment be brought into force, subject to the restriction that it can be used only by an OA in relation to heritable property forming part of a tenement in connection with debts owed in relation to maintenance of that tenement?

Yes. We are also of the view that land attachment (or an equivalent) should be brought into effect more broadly, subject to possible exclusions regarding the family home and other dwellinghouses in some circumstances.

(b) Should the power to sell attached property be excluded where the property in question is used as a family home as defined in section 98 of the Bankruptcy and Diligence etc. (Scotland) Act 2007? (Paragraph 11.55)

Yes, we can see the merit in this. The argument in favour of allowing a family home to be sold in this situation is weaker than it is in relation to e.g. sequestration (where there are still some restrictions on sale – see Bankruptcy (Scotland) Act 2016, ss 112-113). Nevertheless, we agree that there is justification in allowing for registration of a notice of attachment even for a family home, which will give the OA a degree of priority in relation to proceeds, in the event of the debtor's bankruptcy or where there is a sale of the property by the debtor or a secured creditor.

It should also be noted that the matter of the family home in bankruptcy and diligence is currently being considered as part of the Stage 3 Review of debt solutions. The approach adopted in relation to tenements should align with the outcomes of that review, in order to avoid the creation of a more inconsistent, complicated and fragmented regime.

74. Where proceedings against an OA by a third party have proved ineffective:

(a) Should the third party have a direct right of recourse against the members?

Yes. In the absence of such a direct right, third parties might be deterred from contracting with an OA.

(b) Should the right of the third party be limited to each member's individual share of money owed?

Yes.

(c) Should a third party enforcing directly against members be entitled to levy a service charge as if the third party was the manager of the OA? (Paragraph 11.63)

On balance, we think that a third party should be able to do this.

75. Which insolvency process (or processes) should be available to an OA? (Paragraph 12.16)

In principle, we think that sequestration is the insolvency process that should be available to an OA on the basis that it is currently the process prescribed for corporate bodies other than companies/LLPs. We presume that it would also be possible for an OA to grant a trust deed for creditors, but it is worth considering whether that would be appropriate.

76. Should the OA legislation provide that the process of terminating an OA begins automatically when the regime is disapplied from a tenement or plot of land through registration of a relevant deed or notice in the Land Register? (Paragraph 13.4)

Yes.

77. In the OAS, following registration of a deed or notice disapplying the OA regime to a tenement or plot of land, should the manager have a duty to:

(a) Use any association funds to pay any debts of the association, then distribute any remaining funds to flat owners?

Yes.

(b) Prepare the final accounts of the association and send a copy to each flat owner no later than six months after the commencement of the winding up?

Yes.

(c) Take on any further responsibilities, and if so, what? (Paragraph 13.9)

78. In the OAS, what provision should be made for the distribution of funds to members during the winding up process? (Paragraph 13.13)

These provisions should mirror those in respect of liability.

79. (a) In the OA legislation, should an OA be deemed dissolved six months after registration of the deed commencing the termination process?

Yes.

(b) Should members be permitted to postpone dissolution for a specified period beyond that date should they so wish? (Paragraph 13.16)

Yes.