

Response to Scottish Parliamentary Working Group Report on Tenement Maintenance

This response is provided by a working group of the Centre for Scots Law at the University of Aberdeen. The working group consists of Dr Douglas Bain, Mr Malcolm Combe, Dr Alisdair MacPherson, Mrs Donna McKenzie Skene, Prof Roddy Paisley and Dr Andrew Simpson.

The group agree with the sentiments expressed in the report concerning the issues around housing and in terms of obtaining agreement to carry out repairs as well as with respect to the current problems involving costs for maintenance repairs. However, we are of the view that a number of matters require further consideration. For the sake of simplicity, we have framed these as questions and concise comments, as outlined below.

We would also like to note more generally that it will be onerous to apply the proposals to tenements (of all varieties) across Scotland. The task in doing so will be considerable and complex.

1. Tenement inspection every five years
 - a. Who is supposed to pay?
 - b. What are the consequences for non-compliance?
 - c. What are the legal consequences of a defective inspection? To what extent should the surveyor be liable?
 - d. Where and how exactly will reports made available every five years be made available? Again, who is to pay for this?
2. Establishing compulsory owners' associations
 - a. This clearly goes hand in hand with the proposed establishment of sinking funds. Many of our core questions relate to the establishment of sinking funds in the first place. Were it to be argued successfully that the introduction of such funds would be inappropriate, one would then have to consider the merits of establishing compulsory owners' associations in isolation.
 - b. If compulsory owners' associations were to be established in isolation from a sinking fund, what exactly would they do? How would they be funded, and how would their activities be supported?
 - c. If compulsory owners' associations were to be established in isolation from a sinking fund, would they have quite a limited remit?
 - d. If the answer to the last question (c) is affirmative, would it not be more sensible to create machinery to allow owners' the choice of establishing such an association, rather than making its introduction compulsory? We can see there being merit in making it easier to establish owners' associations with corporate identity, but think that this should probably be voluntary (unless sinking funds are to be introduced – a point we discuss below).
 - e. Consideration also needs to be given to how the insolvency of owners' associations would be dealt with.
 - f. Arguably, the question of the merits of sinking funds has to be considered first, logically, and thereafter the question of how to hold sinking funds would need to be considered.

- g. We would need more information about the criteria for establishing whether or not a tenant was excluded from the requirement for having a compulsory owners' association (e.g. in a one up, one down flat). Some limitation here does seem sensible in the event that compulsory owners' associations are to be introduced.

3. Establishment of sinking funds

- a. What is the nature of the obligation to contribute to the sinking fund? We note that the sinking fund is described as a "commitment, not a debt" and that therefore it should rank after actual debts. We are not clear as to the meaning of this description of what must, presumably, be a legally enforceable obligation. If it is owed, logically, it must be a debt, albeit perhaps a postponed one. In terms of ranking, there is a considerable lack of clarity, particularly when we consider the possibility that a limited company may be a tenant and therefore will have shareholders with an entitlement after all debts have been paid. In general, there is a need to be more articulate about the rights and obligations that parties hold in relation to a sinking fund.
- b. Suppose there is a credit balance in the sinking fund, and a tenant with an interest in the sinking fund becomes insolvent. Where does that asset sit in terms of ranking of the tenant's assets on insolvency?
- c. Why should local authorities and RSLs be exempt from paying into sinking funds at the outset?
- d. There may be difficulties in relation to the interaction of the proposed scheme with that relating to the registration of factors.
- e. Further research is needed to plot the potential market effects of this scheme, both in terms of enabling people to enter the property market and in terms of the extent to which this may make banks more reluctant to provide secured loans. The difficulty in relation to the last point relates to the question of how banks will be able to establish that particular properties are "paid up" in terms of pre-existent obligations owed to sinking funds. The need for banks to check this will also increase monitoring costs; where will these be borne?
- f. How will the sinking funds interact with the system of charging orders imposed by local authorities?
- g. Has there been any consideration of potential ECHR Article One Protocol One issues around the introduction of a retrospective scheme?
- h. How is information relating to the health of a particular sinking fund to be made available to fellow owners and tenants, prospective purchasers and banks?
- i. We have general concerns about the imposition of sinking funds for tenements generally. However, certain types of tenement property – e.g. new builds – might benefit from this.