



Law Society  
of Scotland

# Consultation response

## Scottish Parliamentary Working Group on Tenement Maintenance: Interim Recommendations

February 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Property and Land Law Reform sub-committee welcome the opportunity to consider and respond to the Scottish Parliamentary Working Group on Tenement Maintenance: Interim Recommendations<sup>1</sup>. We have the following comments to put forward for consideration.

## General comments

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We recognise the difficulties around the standards of tenement properties and the reasoning behind the proposed schemes. At this stage, recommendations are fairly high-level and the detail of how the schemes will operate are therefore unclear. We look forward to considering the proposals further in due course.

We question whether the implementation of the suggested schemes – tenement inspection, establishing compulsory owners' associations and the establishment of sinking funds – for all tenements is proportionate. There are likely to be significant costs required to set-up and maintain the schemes. It is important to note that there are a very wide range of types of building included within the term "tenement" in terms of the Tenements (Scotland) Act 2004. There are a wide range of circumstances which may arise in relation to tenement maintenance and it is therefore important that any implemented schemes can accommodate the varying needs – for example, some tenements may require little or no maintenance for a number of years while others may require regular, fairly significant, work; some may have been well-maintained to date, and others not.

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<sup>1</sup> <https://www.befs.org.uk/policy-topics/buildings-maintenance-2/>

## Tenement Inspection

The proposed regular inspection of tenement's common parts would provide a useful discipline and early warning for tenements which are at risk of requiring material expenditure due to chronic lack of maintenance. This may also assist prospective purchasers to make an informed choice in relation to any purchase.

The proposed scheme for inspection is likely to require significant expenditure on a regular basis, particularly if the inspection is to include a detailed assessment of roofs and concealed parts. In addition, the proposed scheme may require significant work to keep the report up-to-date over time. The costs and work required may be disproportionate for (i) certain types of property; and/or (ii) certain ages of property; and/or (iii) properties where there is a history of regular maintenance. We suggest that further details about the types of tenement to which the scheme should apply should be provided.

In the event that an overly cautious approach is taken by those inspecting the property to the costings of the work required, there is a potential to impact upon the value of tenement properties. We do note the provision of costings would be on the appointment by the tenement community only.

In addition, we suggest that consideration needs to be given to the monitoring and enforcing of compliance with the proposed scheme. For example, those undertaking the inspection will expect to be paid for the service, however, it is likely that not all owners will pay for the inspection in advance and/or some owners may refuse to pay after the inspection has taken place. If difficulties arise with payment, there is the potential that inspections will not take place, or not take place timeously, or that the complying owners will bear a greater cost.

If Local Authorities are to be given a pro-active role in monitoring and enforcing compliance, they will require sufficient resources to undertake these duties.

## Establishing compulsory owners' associations

We agree that if a revised version of the Tenement Management Scheme (TMS(B)) was to be applied, this would be complex and the interaction with existing titles would need to be catered for. For example, any revised version should be able to be capable of applying to a mixed tenement including residential and retail/commercial units and be able to work alongside titles where detailed provisions for a residents' association, decision making, and/or provisions for the allocation of costs of maintenance are already in place and may have been reflected in the price of properties in that tenement.

In the experience of our members, the increased use of Development Management Schemes (DMS) has been a relatively recent phenomenon and has generally been applied to new build developments. If a

TMS(B) is to be applied, the interaction between the responsibility of the tenement owner's association, and liability for statutory notices should be considered. If the existence of an owner's association resulted in non-defaulting owners being directly liable for a defaulting owner's share of liability under a statutory notice, then this could unfairly prejudice non-defaulting owners. Local authorities who issue a statutory notice often only pursue each owner for their share and do not seek to impose joint and several liability.

We agree that if a TMS(B) was to be applied, further consideration should be given to the extent of any exceptions from that scheme.

### **Establishment of Sinking Funds**

There is the potential that such a system may assist owners where significant maintenance is required to a tenement building and under current arrangements, all owners may not be willing to agree to work being carried out. We note, however, that arrangements for setting up, monitoring and protecting sinking funds require careful consideration as the costs involved may be significant and could be disproportionate to the benefits.

If an owners' association is set up under TMS(B) and a significant sinking fund is established, the obligations on that owners' association should expressly include the need to take into account the interests of future owners in order to maintain the fund.

In the event that sinking funds are to be invested, for example so that growth in value helps fund future repairs or the increase in costs of future repairs, then this would increase the cost of managing the fund. These costs may be disproportionate for sinking funds that have not built up a significant value. Given the nature of investments and the associated risks, there is a risk of the value of investment falling and insufficient funds being available for maintenance.

The transition into such a scheme will need careful consideration. Homeowners may have budgeted for outgoings in relation to their property which is unlikely to have included payment towards a sinking fund.

We would welcome sight of detailed proposals in relation to enforcement. In particular, the proposal for a penalty, or surcharge, when that exceeds any actual loss to the owners' association or to individual owners, should be considered further. If enforcement is linked to the sale of a unit, then the operation of this proposal in the context of negative equity or a sale under a standard security should be considered further. For example, if an underpayment to the sinking fund would be a debt of the next purchaser, then this may effectively further lock owners into a negative equity position.



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