



Working Group on Maintenance of Tenement Scheme Property

Interim Recommendations Report

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Foreword

Scotland has a housing crisis.

That's a phrase that politicians trot out regularly, myself included. When we say this, we are usually talking about Scotland needing more new homes, and that's true; but more recently the issue of our existing stock has come to the fore. The most-recent housing condition survey shows that 68% of all dwellings have some degree of disrepair. Disrepair to critical elements stood at 50%, while 28% of dwellings had some instance of urgent disrepair, and 5% had some extensive disrepair. These figures have not moved in a year.

Nearly a fifth of all our housing is pre-1919 – that's 467,000 homes. 68% of those have disrepair to critical elements, and 36% have critical and urgent repair needs.

Many of these are tenements and they are at a condition cliff edge. A report to Glasgow councillors last year highlighted that repair bills to some blocks reached well into six figures – sums that are simply unaffordable to most people.

We need to develop a system which sees essential repairs being done. That's why MSPs of all parties formed the Working Group on Maintenance of Tenement Scheme Property, along with key stakeholders, to develop policies that we can suggest to government.

I also led a debate in the parliament on this issue last May. The Housing Minister, Kevin Stewart MSP, agreed that a review should be carried out of relevant existing legislation and of

how tenement housing in Scotland could potentially be better maintained and enhanced. He said the review should include consideration of the potential costs and impact of mandatory building health checks, new initiatives that would help facilitate owners to collectively undertake maintenance of tenement communal property, and what the best role for property factors is.

This report is the outcome of our group's work and I thank everyone involved for their contributions. I would also like to thank Ben Macpherson MSP for initially convening the group until his appointment as a Government Minister.

The recommendations here are draft proposals which can now be subject to the rigours of scrutiny. Some of our ideas will change as a result of that.

What we are all clear about is that action is needed, however difficult it is for MSPs and Government.

I look forward to sending our final conclusions to Mr Stewart in the near future.



Graham Simpson MSP
Convenor of the Tenement
Maintenance Working Group



Tenement Inspection

The Common Parts of all tenements should be inspected every five years and a report prepared that will be publicly available to existing or prospective owners and tenants, neighbours and policy makers. This will allow them to see what condition each building is in, how much expenditure is required to bring it up to standard if it is defective, and what needs to be done by way of ongoing maintenance.

Experience in other categories of building (such as institutional and church buildings) has shown that regular informed feedback on the condition of buildings results in overall standard of maintenance. Ultimately, maintenance is more cost effective as it prevents major repair.

It would also supplement the information provided in Home Reports with information vital to a purchaser and would provide a warning to prospective tenants who might otherwise find themselves in substandard buildings. This will feed back to owners and encourage more proactive maintenance.

Inspections should be undertaken by qualified building professionals; specifically, an architect or chartered building surveyor.

These inspecting professionals should:

- have appropriate training and experience;
- be regulated by a professional body with appropriate professional indemnity insurance (PII);
- abide by a code of professional conduct; and
- have access to redress/ombudsman.

For 'A' listed buildings, the professional should be accredited in accordance with a recognised conservation accreditation scheme.

The instructed professional should arrange a pre-site visit to advise on the inspection requirements – such as access to roofs and concealed parts – and to make other necessary arrangements.

The appointed professional should inspect in the tenement in accordance with the relevant British Standard Guide (BS 7913:2013). Maintenance should be managed, professional inspections undertaken, and reports prepared in accordance with BS7913:2013, Annex B, Conservation manuals, logbooks and four/five-yearly inspections. The roof (as defined in the Tenements (Scotland) Act 2004) has to be inspected physically or in clear sight. Drones, at present, are not appropriate.

The form and layout of the Inspection Report should be as set out in BS7913:2013, with further investigations and works prescribed under the following categories:

1. No reportable defects;
2. Desirable;
3. Necessary;
4. Urgent;
5. Immediate.

The draft survey reports need to be reviewed and agreed by the tenement community (as defined in the Tenements (Scotland) Act); then agreed by the professional. Following approval, all homeowners (as defined in the Property Factors (Scotland) Act 2011) will receive a copy of the report – either hard or electronic.

The report will cover the inspection; not costings for works – though these can be added on appointment by the tenement community. The professional should never recommend specific contractors to undertake recommended or advised works. The report will be a live document, updated on a regular basis by the homeowners (acting as a log book), and will be held centrally online, and accessible, for free, by the public. The report will sit separately from the home report, though it would be linked for reference purposes electronically. The production of an updated survey report should take place at minimum intervals of five years.





Establishing compulsory owners' associations

The informal owners' associations that currently exist in many tenements do not have legal personality. They cannot enter into contracts of any kind as a body and owners can be held individually liable for the actions of the association. While owners' associations provide a useful role in bringing owners and tenants together, they are very limited in their ability to act on their owner-members' behalf. Owners' associations need to be made corporate bodies to do this.

The group initially considered the Development Management Scheme (DMS), which was recommended in the Scottish Law Commission Report on Real Burdens (Scot Law Com No 181, 2000) and introduced by the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 (SI 2009/729).

Owners' associations established under the DMS are corporate bodies and able to enter into contracts for work or employment in their own right. The DMS also has provision for the employment of a manager who sets annual maintenance budgets, runs the sinking fund, deals with the building generally, and ensures owners' full participation. However, application of the DMS requires a legal deed to be prepared and registered, which the group considered would unduly complicate matters (and involve costs in each case).

The group recommends that a revised version of the Tenement Management Scheme (TMS (B)) – as described in the Scottish Law



Commission Report on the Law of the Tenement (Scot Law Com No 162, 1998) – would provide a suitable model to establish an owners' association as a corporate body.

Consequently, the group proposes that a revised version of TMS (B) should become the default scheme in place of the current TMS (TMS (A)). Legislation could achieve this, without the need for conveyancing.

Consideration would need to be given to the inter-relationship with the titles as, unlike the current TMS, TMS (B) is designed as a comprehensive code rather than as a default scheme. Furthermore, the proposal is potentially complex as it involves an area of law – business associations – which is reserved to the UK Parliament (the DMS required secondary legislation from the UK Parliament). Requiring incorporated owners' associations may therefore also require UK legislation.

A less radical approach would be for the current TMS to be amended to allow the introduction of an owners' association by a majority decision of owners.

In addition, the group propose that, should TMS (B) not replace TMS (A) as the default code, the DMS should be made compulsory for all new tenements, but it would be permissible for developers to apply the same DMS to a larger development, such as tenements and houses.

Under the current law, a tenement can consist of as few as two flats (one up, one down) and it may be that there should be an exception to any new requirement for there to be an owners' association in such cases.

Establishment of Sinking Funds

A Sinking Fund is like a pension for the building. It is set up to ensure regular affordable payments contribute to a growing fund to deal with future major expenditure. It spreads the cost of major repairs over a number of generations of owners and ensures works can be carried out at the right time.

At present, if owners want to establish such funds, it is likely that they will need to pay to change their title deeds and require a 100% agreement of owners. It is not surprising, therefore, that there are few funds of the nature in Scotland.

The establishment of Sinking Funds goes hand in hand with the instituting of owners' associations as corporate entities. To establish such funds, there would need to be appropriate and stringent mechanisms in place to ensure fund protection and ease of contribution and withdrawal.

The group recommends that:

- a) Sinking Funds should be introduced on a compulsory basis, even if at a minimal level or phased in by building age;
- b) Sinking Funds should be paid into a specially established holding fund; and
- c) The amount paid into each individual share of the Sinking Fund could be either:
 - i. a flat rate decided by Scottish Parliament; or
 - ii. proportional to the amount each flat/unit is due to pay as its share of common repairs and maintenance.

Through a specific holding fund – such as the model used by Safe Deposits Scotland and Credit Unions – monies could be held, monitored and controlled on owners' behalf.

The Sinking Fund would comprise of the same number of shares as there are individual units in a tenement.

The collective Sinking Fund would be managed by the same rules that apply to commissioning repairs and maintenance in the tenement or development. If decisions about common repairs are to be made by a majority of owners, then decisions about the use of the Sinking Fund would also be made by the majority. The same rules of appeal should apply to making decisions about common repairs and would apply to the use of the Sinking Fund.

The funds will need to be monitored for protection. For this approach, the group makes the following, additional recommendations:

Local Authorities should be given powers to require individual tenements to subscribe a higher amount into a Sinking Fund in the same way that they can currently impose Maintenance Plans under the Housing (Scotland) Act 2006. This could be in addition to, or instead of, requiring the production of a maintenance plan.

Local Authorities and Registered Social Landlords (RSLs) would not be required to pay into the Sinking Fund, but, when an RSL sells a flat or unit, it should be required to "pay up" its share in full.

Individual owners remain responsible for paying their share of common repair costs regardless of the level of saving in "their" share of the Sinking Fund. A failure to pay into the Sinking Fund would not absolve the individual of any responsibility for repair costs, they would simply have to find other ways to fund the repair.

Owners should be required to establish a Sinking Fund and start paying into it by a specified commencement date.

Enforcement of payment of shares into the Sinking Fund should be tied into the house sales process. In the same way that a charge against a property is paid off when a property is sold, any underpayment in the Sinking Fund share attributable to an individual flat/unit would be paid when a property is sold.

Any owner who does not pay into the fund should be required to pay a penalty or surcharge, the amount of which should relate to a multiple of the interest that would be have been earned had payment been duly made.

The Sinking Fund is a commitment not a debt, it should therefore rank after actual debts. This may mean that underpayment in a Sinking Fund share is carried forward to a subsequent sale.

It is important that Sinking Funds are securely managed to protect owners' funds – drawing a parallel with the management of Pension Funds i.e. managers should have the ability to invest funds in order to grow them in line with increasing repair and maintenance costs.



Part of the growth in funds could be used to provide services to owners such as arbitration and mediation. There is also the potential for future payments due to the fund to be used to secure loans to owners to enable them to carry out repairs which the Sinking Fund is currently unable to cover. This could be a useful incentive to owners to establish and contribute to funds.

To ensure transparency, it must be possible for co-owners, the registered property factor and local authorities to be able to see the fund details. The details must also be made available to potential purchasers.

Tenements are the most common house type in all occupation



Tenements account for **584,000**

properties in Scotland equating to **24%** of Scotland's total housing stock

Pre-1919 tenements account for

7% of Scotland's total housing stock – the fourth most common property [of all types and ages]



29% of tenements were built pre-1919 equating to [7% of all housing stock in Scotland]



68% of all pre-1919 dwellings have Critical Disrepair [Scottish Average: 50%]

36% of all pre-1919 dwellings have Critical and Urgent disrepair [Scottish Average: 24%]



5%



of all pre-1919 dwellings have Critical, Urgent & Extensive disrepair [Scottish Average: 2%]

Paying for common repairs or maintenance causes most disputes in tenements*



Amendments to the TMS and other legislation

The group has also considered amendments to the TMS and other legislation.

These suggested amendments cover energy efficiency; duty to maintain; shares by rateable value and feu duty; debt recovery; and majority decision making.

Further details on the legislative amends, and how the above recommendations were reached, can be found at: www.befs.org.uk/policy-topics/buildings-maintenance-2/

All statistics are taken from the Scottish House Condition Survey 2017

*Guidance on the Tenements (Scotland) Act 2004 and the Title Conditions (Scotland) Act 2003 for Housing Professionals

Key Dates

November 2017: Graham Simpson MSP hosted a parliamentary reception regarding RICS tenement health check policy proposal.

January 2018: the Scottish Parliament debated Ben Macpherson MSP's motion on Maintenance of Tenement Communal Property, which included the proposal for a cross party working group on the subject.

March 2018: Inaugural meeting of the Scottish Parliamentary Working Group on Tenement Maintenance, with Convenor and Vice-Convenors appointed.

May 2018: the issue of tenement maintenance was progressed in a Scottish Parliament debate on a motion on the inadequacy of existing legislation in dealing with the condition of Scotland's tenement housing stock and a vote in favour of a review of the relevant legislation.

August 2018: Scottish Federation of Housing Associations organised a visit to the offices of Dunedin Canmore for members of the working group. This included a short tour of tenements undergoing repairs in Edinburgh and learning about the challenges housing associations face in handling maintenance in tenements where they are not the majority owner.

January 2019: Interim report of the Scottish Parliamentary Working Group on Tenement Maintenance published.

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Organisations

BEFS, Secretariat
RICS, Secretariat
Scottish Federation of Housing Associations
Glasgow and West of Scotland Forum of Housing Associations
Property Managers Association Scotland
Tenement Action Group
RIAS
Scottish Association of Landlords
Citizens Advice Scotland
City of Edinburgh Council
Existing Homes Alliance



Confidence through professional standards

RICS promotes and enforces the highest professional qualifications and standards in the valuation, development and management of land, real estate, construction and infrastructure. Our name promises the consistent delivery of standards – bringing confidence to markets and effecting positive change in the built and natural environments.

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