

RESPONSE FORM

DISCUSSION PAPER ON TENEMENT LAW: COMPULSORY OWNERS' ASSOCIATIONS

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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Summary of the Questions

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)

Comments on Question 1

BEFS considers that there may be an immediate increase in building works and positive impact on professions such as surveyors and the wider maintenance professions/trades. Increased demand will, it is hoped, lead to increased skills training provision.

We acknowledge the likelihood for short term financial impacts to owners.

In the long term, it is hoped that the proposed reform will result in a positive impact for home owners as well maintained tenements/flats may well command better prices as both maintenance and well managed.

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)

Comments on Question 2

Warmer homes and safer buildings. Well maintained and good places benefit people and communities, and raise awareness/move towards culture change towards maintenance and repair.

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?
 - (ii) To comply with any registration requirement arising under the legislation?
 - (iii) To hold an annual general meeting of members within 12 months of the creation of the OA, and in every 15 months thereafter?
 - (iv) To approve an annual budget?

(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)

Comments on Question 3

BEFS is in agreement with all the mandatory duties outlined above.

BEFS notes and supports Under One Roof's view that:

'By making owners' associations compulsory, we will be bringing Scotland in line with most other countries around the world and giving owners the tools to address not only repair and maintenance issues, but the need to retrofit tenement buildings over the next two decades.'

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

(Paragraph 4.24)

Comments on Question 4

Yes, as part of the incentive for tenements to comply. The remedial manager should have the same powers as an appointed manager

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)

Comments on Question 5

Unsure – this could lead to individuals being perceived as or having actual undue control of an OA. BEFS also agrees with Under One Roof's wider comment that *'in addition to owners and factors, provisions should be made for qualified professionals to take on the role, such as letting agents, surveyors and solicitors. This will address issues in rural areas and other parts of Scotland where factors are less prevalent.'*

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

(Paragraph 4.34)

Comments on Question 6

Yes

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?
 - (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?
 - (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)

Comments on Question 7

Yes to a), b) and c). However BEFS would highlight the already stretched resource and capacity of local authority planning and housing teams and would caution against placing additional burdens. Dedicated resource and funding, in advance of implementation must be made available.

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)

Comments on Question 8

Yes.

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

Comments on Question 9

a) Yes

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

Comments on Question 10

Yes to a) and b)

c) Not answered

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)

Comments on Question 11

BEFS would here refer to Under One Roof's view and experience:

'We do not agree that the rules of the OAS should operate as background law. Although we recognise that there is potentially a high legal bar to clear, Under One Roof's direct experience with speaking with owners leads us to conclude that there should be a mandatory tenement code as part of the new legislation, as noted in 4.47 of the discussion paper:

"...stakeholders emphasised to us the difficulties that result from the individualistic approach to tenement maintenance provision which is permitted by the current law. Flat owners struggle to understand the rules applicable in their building, not least because property titles are seldom readily comprehensible to non-lawyers.

"The fact that the rules set out in legislation may not apply in a particular tenement is liable to confuse non-lawyers further still. It is difficult for charities and other third sector

stakeholders to produce general information and advice for tenement residents since many caveats must apply, making public education on tenement law a struggle.

“Where wide-ranging regulation of property is required, as for example in connection with climate-related retrofit of Scotland’s buildings, the individuality of tenement provision makes this more difficult to achieve.”

As the only organisation in Scotland dedicated to helping owners navigate their ways through the rights and responsibilities of tenement owners, Under One Roof is can confidently say that a standard code applied to all tenement buildings of Scotland would provide significant relief to the vast majority of future owners’ associations in terms of eliminating arcane language and the need to make significant personal contributions towards the employment of a solicitor.

For those that are disadvantaged, we believe compensation, when required, would be minor, and could be provided by owners who benefit from the changes, and should be explored (such as the interest generated by a body holding building funds). We are not doubting there would be a cost to going down this path, but the long-term cost benefit to sustainable housing, and the Government reaching its NetZero targets, would outweigh shorter terms losses.

The confusing and inadequate titles that currently exist are a significant reason why maintenance and repair do not go forward, and we would hope the Scottish Government would be forward thinking in their approach to address this, and soon-to-come retrofit efforts, by finding a solution that will satisfy the legal concerns expressed in the commission’s recommendation on this matter.’

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)

Comments on Question 12

Yes

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

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

(Paragraph 4.71)

Comments on Question 13

BEFS is in support of the standardising of conditions and recognises that the 20 – 30 year period captures all owners, regardless of the potential for a backlog of works or inaction by current owners. BEFS does however also note Under One Roof's view that '*20, or 23 years as suggested as the minimum amount of time, is too long a period. If a mandatory tenement code is not created, we believe that the Scottish Government should investigate legally sound methods to ensure the duration of this fixed period is a maximum of ten years*'

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

(Paragraph 5.11)

Comments on Question 14

- a) Yes
- b) Yes

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))?
- (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)

Comments on Question 15

- e) BEFS considers that five-yearly inspections should be included as part of any proposed legislation regarding mandatory owners' associations and support Under One Roof's suggestion that *'identification of the OA should be held alongside the inspection reports, and for those to be held on a national, online register, and accessible without charge.'*

Otherwise, option 2 (a) would seem the most straightforward and efficient route.

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?

- (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)

Comments on Question 16

a) Agree with i)

b) Broadly agree with definition of 3 or fewer for small tenement, whilst noting the possibility for disputes in tenements where there are only two flats.

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)

Comments on Question 17

BEFS supports option (a)(i)

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)

Broadly agree that that mandatory duties imposed on the OA be satisfied where they have been met for the development as a whole, however BEFS would consider here the need to ensure individual owners are empowered to maintain their property.

19. Should the OA legislation be disapplied from tenements subject to a DMS?

(Paragraph 5.43)

Comments on Question 19

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)

Comments on Question 20

No

21. (a) Should the OA be a bespoke body corporate created in any new legislation?
(b) If not, what form should the OA take?

(Paragraph 6.17)

Comments on Question 21

Yes

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?
- (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)

Comments on Question 22

Yes to both a) and b)

23. (a) Should the members of the OA be the registered owners, unregistered holders and heritable creditors in possession of flats in the tenement?
(b) Do you have any comments on the position of non-owner occupiers of flats in the tenement?

(Paragraph 6.28)

Comments on Question 23

- a) BEFS is of the view that membership should be made up of all three groups

Further, we would support Under One Roof's comment that:

'Although we support the view that non-owners should not have decision-making powers that involve maintenance and repair for the reasons stated in the Discussion paper, we note that tenants, particularly in buildings with few owner-occupiers, will have a greater knowledge of the condition of the building, and can provide a positive input into OA AGM's which are drawing up plans and budget for maintenance and repair. We would like to see rules that require the OA to notify all non-owners of the building of an upcoming AGM, a mechanism for them to input into the meeting, and have minutes of the AGM be made available to them. We would also like to see suggested guidance provided to OAs on the involvement of non-owners in

developing house rules (ie storage of bikes, and other building rules not related to maintenance)'

24. (a) Should the “scheme property” to be managed by the OA be defined in the same way as “scheme property” in the TMS?
- (b) If not, what changes would you suggest?

(Paragraph 6.36)

Comments on Question 24

- b) Grey areas may require updating – such as cupolas and skylights. BEFS also suggests the addition of chimney stacks as these have historically been excluded as listed in 6.31.

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

Comments on Question 25

Yes to a) and b)

- c) Owners should provide notice that they are leaving but up to new owners to inform manager within 3 months of arriving.
- d) Yes, however, to comply with GDPR and privacy regulations this should be coordinated with factors who act as manager. Care should also be given to protect vulnerable individuals, enabling them to provide details of a proxy/another named

person if required. to ensure that if the owner is vulnerable in some matter that they can provide

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

(Paragraph 6.41)

Comments on Question 26

Yes but with a duty to inform the members of the OA.

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?

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

(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)

Comments on Question 27

Yes to a) and b)

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)

Comments on Question 28

Yes, unless property factors choose to take on both factoring and managing an OA for a tenement.

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?
- (c) If you answered “no” to (a) or (b) above, what alternative would you suggest?

(Paragraph 7.9)

Comments on Question 29

Yes to a) and b)

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)

Comments on Question 30

- a) Yes
- b) It should include the list of key powers listed in paragraph 7.10

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?
- (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)

Comments on Question 31

BEFS considers that using the current definition seems the most direct approach towards positive outcomes. However, in recognition of the wider policy landscape within which this sits we note Under One Roof's response to b), that this be expanded to *'allow for powers (but not obligation) to carry out any works to bring tenement up to current building standard, and to carry out work related to the installation of zero-carbon heating systems and other retrofit and energy efficiency measures. Although there is no duty at the moment to conduct this work, it is both likely this will be the case before OA legislation is passed, and necessary for the successful upkeep of the building and comfort of its residents that it be achievable without requiring all owners to agree (an often unsurpassable bar to clear). Although the Commission notes in its Paper there is no obligation to improve the energy efficiency of their building, the addition of insulation to be defined as maintenance shows there is precedent for energy efficiency measures to form part of the definition'*

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?
- (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?
- (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)

Comments on Question 32

BEFS is inclined to disagree with a), b) and c) in relation to demolition powers.

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)

Comments on Question 33

Not answered

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

(Paragraph 7.29)

Comments on Question 34

Not answered

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?

(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)

Comments on Question 35

Not answered

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

(Paragraph 7.38)

Comments on Question 36

BEFS would caution against adding further legal complexities.

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)

Comments on Question 37

BEFS agrees with the SLC that there should not be a strict link between allocation of voter's rights and allocation of liability of costs with the OAS. Working with the processes established under TMS would be a solution.

38. In the OAS:

- (a) Should each flat be allocated one vote?
- (b) Is any special rule needed for situations where the number of flats in the building changes, and if so, what?

(Paragraph 8.19)

Comments on Question 38

- a) Yes

This includes allocation of a vote to all subsequent owners (even if flat numbers increase/decrease)

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?
- (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?
- (c) Should decisions which require a special majority be taken by 75% of votes allocated? If not, what alternative threshold do you suggest?
- (d) Which decisions should require a special majority?
- (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?
- (f) Should unanimity be required for a decision to demolish the tenement?

(Paragraph 8.34)

Comments on Question 39

- a) Yes majority of allocated votes (not votes cast)
- b) Yes
- c) Yes
- d) and e) Unsure. BEFS considers best whatever is most legally suitable and pragmatic to support legislation being enacted.

f) yes

BEFS particularly supports paragraph 8.28 that a tied vote should be for action, not inaction.

40. In the OAS:

- (a) Should the owner or any person nominated by the owner be able to cast a vote?
- (b) Where the owner wishes to nominate a person to act on their behalf, should that nomination require to be in writing?
- (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)

Comments on Question 40

- a) Yes
- b) Yes
- c) Not answered

41. In the OAS:

- (a) Should the manager have a duty to call the annual general meeting?
- (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?
- (c) Should the manager have the power to call a general meeting at any time?
- (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?
- (e) Should any member have the power to call a meeting in other circumstances, and if so, which circumstances?

(Paragraph 8.46)

Comments on Question 41

- a) Yes
- b) Yes
- c) As needed and if reasonable terms of notice given
- d) Yes

e) Not answered

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

(Paragraph 8.46)

Comments on Question 42

Yes to a) and b).

43. In the OAS:

- (a) Should a quorum be required for a meeting of members?
- (b) If so, why, and what quorum would be appropriate?

(Paragraph 8.49)

Comments on Question 43

No – not meetings would be required to be a quorum, the decision making process should be clearly set out so meetings (outwith AGM) can be attended as owners feel is necessary and are able.

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

- (a) Should the manager have a responsibility to support virtual attendance?
- (b) Should members be required to elect a convenor from amongst their number to run the meeting?

- (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)

Comments on Question 44

- a) Yes
- b) Not answered
- c) Yes

45. In the OAS:

- (a) Should there be a rule as to how votes can be cast at meetings?
- (b) If so, what should that rule be?

(Paragraph 8.57)

Comments on Question 45

- a) No specific rule. Votes should be able to be made remotely. There should be agreement by members of the OA on whether to vote via open or closed ballot.

46. In the OAS:

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

(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)

Comments on Question 46

Not answered

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?

(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)

Comments on Question 47

a) Yes

b) Yes

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)

Comments on Question 48

Yes – although clarity on matters relating to repairs/maintenance which were necessary for the safety etc of inhabitants would be welcome.

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?

(b) Should the court have the power to order the exercise of the powers of the OA where the required majority has not been achieved?

(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?

(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)

Comments on Question 49

Not answered

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

(Paragraph 8.78)

Comments on Question 50

Yes a decision should be binding.

51. In the OAS:

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

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

(Paragraph 8.80)

Comments on Question 51

Yes to a) and b)

52. In the OAS:

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

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

(Paragraph 9.19)

Comments on Question 52

- a) If the manager is not being paid and is an owner they should not be required to be a property factor. If the owner is the manager, and professionally manages buildings, and are being paid for their role, then they should be a registered property factor. However the role of managers should not be restricted to owners or factors; other professions, such as letting agents, surveyors and solicitors could be considered.
- b) Yes, if not covered by professional qualifications, however how this would be managed with an owner-manager is unclear.

- 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?
- (b) Do you have any comments on how “moderate benefit” might be defined in this context?

(Paragraph 9.24)

Comments on Question 53

Not answered

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?
 - (b) Should the certificate require to be signed within one month of the manager’s appointment?

(Paragraph 9.28)

Comments on Question 54

Yes to a) and b)

55. (a) In the OAS, should the manager:
- (i) Be designated an agent of the OA?
 - (ii) Have capacity to exercise any of the powers available to the OA?
 - (iii) Have a duty to manage the tenement for the benefit of members?
- (b) If you answered no to any part of the question above, what are the reasons for your answer?

(Paragraph 9.34)

Comments on Question 55

Yes to all of a)

56. In the OAS:
- (a) Should the general duty of the manager be supplemented by a non-exhaustive list of specific duties?
 - (b) If a non-exhaustive list is provided, which duties should it include?

(Paragraph 9.39)

Comments on Question 56

a) Yes

and in b) the provision around insurance as suggested in 9.37 is extremely important and essential to the wider process and benefits of this larger legislative piece

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

(Paragraph 9.41)

Comments on Question 57

Yes.

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

(b) If so, what provision is required?

(Paragraph 9.49)

Comments on Question 58

a) Yes but unsure of how to achieve this, note Under One Roof's suggestion that:

b) *'Owners should have provision to take manager to FTT with redress, including a provision for compensation, as the manager might have very good motives for exceeding authority, which might be reasonable in some eyes but not others.'*

59. In the OAS:

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

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

(Paragraph 10.15)

Comments on Question 59

a) Yes

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?

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

(Paragraph 10.17)

Comments on Question 60

a) Yes

b) 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)?

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

(Paragraph 10.21)

Comments on Question 61

a) No

BEFS would here refer to Under One Roof's response:

'Owners as members of the OA will of course be liable for all its debts, however if the scheme sets out that debt is owed to the OA as a whole, rather than the owners directly, the manager will only need to recover from other owners the amount that is needed to maintain the OA's solvency – which may not be all the debt. The OA will have a duty to recover the debt, but if this is by a charging order, it may take some time. At present, the recovered debt would be repaid to the owners who covered the debt even if they have moved / sold property. This can be administratively difficult and if an owner can't be traced, then it's unclear how their share of the recovered debt can be used.

Under One Roof suggests an alternative that in return for not being obliged to cover the whole debt, only what is needed to keep the OA solvent, the owners who sell would give up the right to any of the debts recovered in future.'

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)

Comments on Question 62

No

63. In the OAS:

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

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

(Paragraph 10.39)

Comments on Question 63

- a) Yes, with any minor amendments as deemed necessary

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?
- (b) Should any surplus service charge payments be returned to owners or remain available to the OA for work the following year?
- (c) Are any other changes required to adapt the DMS system for the OAS?

(Paragraph 10.39)

Comments on Question 64

- a) Yes
- b) Not answered
- c) Not answered

65. In the OAS:

- (a) Should there be provisions on treatment of funds equivalent to those in the DMS?
- (b) If not, what changes or additions to the DMS provisions would you suggest?

(Paragraph 10.43)

Comments on Question 65

- a) Yes – also that mandatory Building Funds be part of this legislation, with funds held by a scheme similar to Safe Deposits Scotland.

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?

(b) If not, why not?

(Paragraph 11.12)

Comments on Question 66

a) Yes

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?

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

(Paragraph 11.15)

Comments on Question 67

a) Yes, a non exhaustive list may be useful - but the differences in materials and building types could cause confusion or result in unintended consequences such as the implication of support for interventions which are not appropriate for a specific building type/material/age/construction. Any list should be informed by a range of building professionals with experience in all forms of modern and traditional construction.

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?

(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?

(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)

Comments on Question 68

a) Yes – each owner should also have an individual right to enforcement in relations to obligations owed to them.

b) Yes

c) Yes

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)

Comments on Question 69

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)

Comments on Question 70

Not answered.

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?

(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?

(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)

Comments on Question 71

a) Yes

b) Yes

Alternative dispute resolution processes will (continue) to be key to resolving disputes among owners.

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)

Comments on Question 72

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?

(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)

Comments on Question 73

- a) Yes
- b) Yes, there should be an exclusion for family homes

74. (a) Where proceedings against an OA by a third party have proved ineffective:
- (b) Should the third party have a direct right of recourse against the members?
- (c) Should the right of the third party be limited to each member's individual share of money owed?
- (d) 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)

Comments on Question 74

b)there should be some right of recourse however as is noted by the SLC contractors are already skilled at putting clauses in place (like proof that the funds are held before starting work) to best assure that payment can be made.

c) Yes

d) Yes

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

(Paragraph 12.16)

Comments on Question 75

Not answered

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)

Comments on Question 76

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?

(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?

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

(Paragraph 13.9)

Comments on Question 77

a) Yes

b) Yes

c) Not answered

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

(Paragraph 13.13)

Comments on Question 78

Not answered

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

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

(Paragraph 13.16)

Comments on Question 79

Not answered

General Comments

BEFS considers that the proposed legislation must be comprehensive and accessible, not requiring expert knowledge or reference to other legislation except in rare circumstances.

BEFS would also like to would like to take this opportunity to highlight all three recommendations made the Tenement Maintenance Working Group, for reforming tenement law:

1. a requirement for tenements to be subject to a building condition inspection every five years;
2. the establishment of compulsory owners' associations; and
3. establishment of building reserve funds.

These recommendations are considered important, interlinked, and accompanying vehicles towards delivery.

BEFS would also like to take this opportunity to recognise the discussion paper as a significant milestone, and thanks the SLC for the vast amount of work undertaken in its preparation.

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Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.