Scottish Law Commission

promoting law reform

(DISCUSSION PAPER No.176)

Discussion Paper on Tenement law: compulsory owners' associations

discussion paper

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April 2024

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The Commission would be grateful if comments on this Discussion Paper were submitted by 1 August 2024.

Please ensure that, prior to submitting your comments, you read notes 1-2 on page ii. Respondents who wish to address only some of the questions and proposals in the Discussion Paper may do so. All non-electronic correspondence should be addressed to:

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Abbreviations

1987 Act

Insolvency Act 1987

2003 Act

Title Conditions (Scotland) Act 2003

2004 Act

Tenements (Scotland) Act 2004

2007 Act

Bankruptcy and Diligence etc. (Scotland) Act 2007

2011 Act

Property Factors (Scotland) Act 2011

A1P1

Article 1 of the First Protocol to the European Convention on Human Rights

Bell's Principles

G J Bell, Principles of the Law of Scotland (10th edn, 1899)

Bell, *Commentaries I*

G J Bell, *Commentaries on the Law of Scotland* (7th edn, 1870) vol 1

Discussion Paper on the Law of the Tenement

Scottish Law Commission, *Law of the Tenement* (Scot Law Com DP No 91, 1990) available at https://www.scotlawcom.gov.uk/files/8713/1711/2559/dp91.pdf

DMS

Development Management Scheme set out in Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009/729 Schedule 1

DMS Order

Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009/729

Final Recommendations Report

Working Group on the Maintenance of Tenement Scheme Property, *Final Recommendations Report* (2019) available at https://www.befs.org.uk/wp-content/uploads/2019/06/Working-Group-on-Maintenance-of-Tenement-Scheme-Property-Final-Recommendations-Report.pdf

Gretton and Steven, *Property, Trusts and Succession*

G L Gretton and A J Steven, *Property, Trusts and Succession* (4th edn, 2021)

Interim Recommendations Report

Working Group on the Maintenance of Tenement Scheme Property, *Interim Recommendations Report (2019)* available at https://www.befs.org.uk/wp-content/uploads/2019/01/SPWG-Interim-Recommendations.pdf

Housing to 2040

Scottish Government, *Housing to 2040* (2021) available at https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2021/03/housing-2040-2/documents/housing-2040/housing-2040/govscot%3Adocument/housing-2040.pdf

Macgregor, *Agency*

L J MacGregor, *The Law of Agency in Scotland* (2013)

MacPhail, *Sheriff Court Practice*

I D MacPhail, *Sheriff Court Practice* (4th edn, 2022)

OA

Owners' Association

OAS

Owners' Association Scheme

OCR 1993

Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993

Report on Real Burdens

Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 181, 2000) available at https://www.scotlawcom.gov.uk/files/8712/7989/7470/rep181.pdf

Report on the Law of the Tenement

Scottish Law Commission, *Report on the Law of the Tenement* (Scot Law Com No 162, 1998) available at https://www.scotlawcom.gov.uk/files/4512/7989/7476/rep162.pdf

Spanish Law on Horizontal Property (Ley de Propiedad Horizontal)

Law on Horizontal Property (Ley de Propiedad Horizontal) of 21 July 1960, Official State Gazette (BOE) no. 176 of 23 July 1960, amended by the Law amending the Law on Horizontal Property (Ley de modificacio´n de la Ley de Propiedad Horizontal) of 6 April 1999, Official State Gazette (BOE) no. 84 of 8 April 1999 and most recently by the Law on restoration, regeneration and urban renovation (Ley de rehabilitacio´n, regeneracio´n y renovacio´n urbanas) no. 8 of 26 June 2013, Official State Gazette (BOE) no. 153 of 27 June 2013

TMS

Tenement Management Scheme set out in the Tenements (Scotland) Act 2004 Schedule 1

TMS A

Scottish Law Commission, *Report on the Law of the Tenement* (Scot Law Com No 162,1998) Schedule 1, Management Scheme A

TMS B

Scottish Law Commission, *Report on the Law of the Tenement* (Scot Law Com No 162,1998) Schedule 2, Management Scheme B

UNCRC

United Nations Convention on the Rights of the Child

Van der Merwe, "Apartment Ownership"

C G Van der Merwe, 'Apartment Ownership' in K Zweigert (ed.), *International Encyclopedia of Comparative Law* (1992) Volume VI: Property and Trusts

Working Group

Working Group on the Maintenance of Tenement Scheme Property

Glossary

A1P1. This refers to Article 1 of the First Protocol to the European Convention on Human Rights which sets out the right to peaceful enjoyment of possessions as discussed in paragraphs 3.7 to 3.12.

Body corporate. A *legal person* that continues to exist regardless of changes in its membership.

Common ownership. Where ownership of property is shared between two or more persons.

Common property. Property of which ownership is shared between two or more persons.

Declarator. A court order that declares the existence (or non-existence) of a legal right.

Deed. A formal, written document which has different legal effects depending on the type of deed. A disposition, for example, is a deed which is used to transfer property ownership.

Deed of conditions. A document imposing title conditions against a group of properties, such as a tenement or housing development or industrial estate.

Development Management Scheme (DMS). The management scheme set out in Schedule 1 of the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009. It sets out mandatory and default provisions for land to which the scheme is applied.

Edinburgh colony. A type of tenement property found in Edinburgh. Ten areas of colony houses were constructed from around the middle of the 19th century to the early 20th. They are made up of a small number of back-to-back terraces which originally had upper and lower flats. They are characteristically arranged so that the front door of each flat is on the opposite side of the building to the other front door, and with an outside stair leading to the upper flat. This allowed each flat to have its own front door and front garden.

Factor. See *property factor.*

Four-in-a-block. A type of tenement where four flats are arranged in a single, detached block, with two flats on the ground floor and two directly above. Often each flat will have a separate front door, although in some examples entry is via a common close or stair.

Heritable property. Immoveable property, i.e. land and rights in land. Strictly, the term "heritable property" also applies to other very limited types of property such as pensions.

Land Register. The register of title to land in Scotland. (The Land Register is gradually replacing the *Register of Sasines*, a register of deeds.)

Management scheme. The set of rules governing the management of *scheme property* in a tenement building. These rules are currently found in the *Tenement Management Scheme (TMS)*, the *Development Management Scheme (DMS)* or as the case may be the *title conditions* applicable in the building in question. A statutory definition of "management scheme" is set out in section 27 of the 2004 Act. This paper makes initial proposals for a new management scheme, the *Owners Association Scheme (OAS)*.

Legal person. An entity or body recognised in law as having independent legal personality akin to natural *persons*, such as a company. Also known as juristic persons.

Manager. A person elected by a decision of the *Owners' Association (OA)* to exercise the powers of the OA on a day-to-day basis. Alternatively, a person appointed to manage a development under rule 4 of the *DMS*.

Moveable property. All property which is not *heritable property*.

Owners' Association (OA). The legal person to be brought into existence for every tenement in Scotland, whose membership is to be made up of the owners of the relevant tenement and that is to be subject to certain mandatory duties as proposed in this Discussion Paper.

Owners' Association Scheme (OAS). The default *management scheme* which is to be applicable to owners' associations under the proposals in this Discussion Paper.

Person. In law a person is the subject of rights and obligations. So as well as (i) natural persons (in other words, human beings) there are (ii) *legal persons* (also called juristic persons) such as companies.

Pertinent. A right in respect of an area of land or of a building beyond the boundaries of a land owner's principal property. An example may be a share in ownership of a garden or parking space not physically connected to the owner's house or flat. A flat owner will usually also hold a share of ownership in the tenement close or stair. Since this is beyond the boundaries of the principal property (in other words, the flat), the share of ownership of the close is a pertinent of the flat.

Property factor. A person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used in whole or in part for residential purposes. Alternatively, a local authority or housing association undertaking this function.

Real burden. An obligation affecting land, normally of a positive or negative nature. Real burdens are said to "run with the land", meaning that the land continues to be affected by the obligation when the owner of the land changes.

Register of Sasines. The older register of land in Scotland, with the full name the General Register of Sasines. Established by the Registration Act 1617. Has been gradually replaced by the *Land Register*.

Scheme cost. Costs incurred in the maintenance and administration of *scheme property* or in implementing *scheme decisions* under a particular *management scheme*.

Scheme decision. A decision taken in relation to the maintenance or management of *scheme property* under the *TMS*. The content of scheme decisions is defined in TMS rule 1.4.

Scheme property. Generally refers to the parts of a tenement building which are managed and maintained under a particular *management scheme*. As the context requires this may more specifically refer to scheme property under the *TMS* (as defined in rule 1.2 and 1.3), the *DMS* (as defined in the DMS Order, article 20) or as set out in our proposals for the *OAS* as discussed in Chapter 6.

Service charge. Generally refers to the contribution of flat owners to association funds. This may include regular payments towards an annual budget, for example, or one-off payments to cover a specific cost. As the context requires this may more specifically refer to the service charge as defined in rule 1 of the *DMS*, or as set out in proposals for the *OAS* as discussed in Chapter 8.

Tenement. Defined in section 26(1) of the Tenements (Scotland) Act 2004, a building or part of a building which is divided horizontally into flats.

Title. A person's right of ownership over land or buildings is often referred to as their title to the land or buildings. The word title is also used to refer to the record of their ownership, which will usually be a *title sheet* in the *Land Register*, but in a small number of properties will instead be a *title deed* recorded in the *Register of Sasines*. In the context of litigation, a person's right to initiate proceedings or take part in a case someone else has initiated is known as their title.

Title condition. A condition in the *title* to a property which imposes positive or negative obligations on the owner of that property as to how it is used and maintained, or allows the owner of that property to make a limited use of a neighbouring property for example for access.

Title deed or deeds. A document or documents setting out who owns land or buildings and any *title conditions* affecting that ownership. For most properties in Scotland, information in the title deeds will now have been incorporated into the *title sheet* for the property on the *Land Register*.

Title sheet. The Land Register has a title sheet for each registered property which details the extent of the property (usually plotted on a map), the owner(s) of the property, any securities (sometimes referred to as mortgages or charges) held in the property and any *title conditions* to which the property is subject.

Tenement Management Scheme (TMS). The *management scheme* set out in Schedule 1 of the Tenement (Scotland) Act 2004. It sets out provisions for managing maintenance of *scheme property* in tenements where the *title conditions* are silent or inadequate, and applies in all tenements except those subject to the *Development Management Scheme (DMS)*.

Chapter 1 Introduction

Introduction

1.1 On 10 January 2022, we received a reference from the then Cabinet Secretary for Social Justice, Housing and Local Government (Shona Robison MSP) to carry out a project on creating compulsory owners' associations (OAs) in tenement properties in Scotland.[1]

1.2 The reference asked us:

> "To review the law of the tenement in Scotland, including the Tenements (Scotland) Act 2004, and make recommendations for reform to implement recommendation 2 (establishing compulsory owners' associations) of the Final Recommendations Report dated 4 June 2019 of the Working Group on Maintenance of Tenement Scheme Property.
>
> Your recommendations should include proposals on the establishment, formation and operation of compulsory owners' associations and the rights and responsibilities to be imposed on them, including, insofar as you consider appropriate and desirable, such rights and responsibilities in relation to recommendations 1 (building inspections) and 3 (establishment of building reserve funds) of the Report."

1.3 The reference letter clarifies that we are not expected to address the substantive content of recommendations 1 or 3 of the Working Group's report. The letter notes that the Scottish Government will be taking forward work on decarbonising heating and energy use in homes in line with their commitment to achieving net zero emissions, and asks us to keep in mind the feasibility of OAs being given power to carry out energy efficiency and heating improvements in tenement buildings as part of this work in future. Similarly, the letter asks us to keep in mind that the Scottish Government may wish to place rights and responsibilities in respect of fire safety matters pertaining to tenement buildings on OAs in future.

1.4 This project accordingly aims to implement the recommendation of the Working Group in relation to OAs. It does not seek to conduct a more comprehensive review of the law of the tenement, or of management structures which could be employed in connection with tenement property. The recommendation focuses on owners of tenement flats, and their rights and responsibilities in relation to maintenance of the tenement building. These arise regardless of whether the owner is a natural or legal person, and will apply whether the owner is resident in the flat or not. Residents of tenement flats who are not owners, such as tenants or family members who an owner allows to live with them, are therefore not the primary focus of this project.

[1] This is a reference under section 3(1)(e) of the Law Commissions Act 1965. A copy of the reference letter is available at: https://www.scotlawcom.gov.uk/index.php/download_file/view/2305/1687/.

Background to the Scottish Government's reference

1.5 In December 2017, the Scottish House Condition Survey findings revealed that 48% of dwellings in Scotland had critical disrepair, a figure which rose to 67% in pre-1919 housing stock.[2] Tenements make up around 37% of all housing stock in Scotland.[3] Addressing disrepair in these properties has been found to be particularly challenging due to legal, technical and cultural obstacles not present in the case of single dwellings.[4]

1.6 In March 2018, the Scottish Parliamentary Working Group on Maintenance of Tenement Scheme Property was convened to explore solutions to these difficulties.[5] The Working Group is composed of MSPs drawn from all parties represented in Holyrood, alongside key stakeholders including the Royal Institute of Chartered Surveyors (RICS), the Royal Incorporation of Architects in Scotland, the Tenement Action Group, the Scottish Association of Landlords, the Property Managers Association Scotland and representatives of various housing associations, amongst others. Built Environment Forum Scotland and RICS provide the secretariat.

1.7 The Working Group produced interim recommendations[6] in January 2019, in respect of which a public consultation ran until March 2019. The Group's Final Recommendations Report was published in June 2019.[7] The Report contained three interconnected recommendations:

1. Tenement buildings should be subject to a **building condition inspection** every five years with a report prepared in light of that inspection. The Working Group's vision of the report was that it would be "…a live document, updated on a regular basis by the owners' association (acting as a log book), and will be held on a national, online register, and publicly accessible without charge."[8]

2. An **owners' association** in the form of an entity with legal personality should be established for every tenement building. The OA should provide "…leadership, effective decision-making processes and the ability of groups to enter into contracts."[9]

3. A **building reserve fund**, to be administered by the owners' association, should be established for every tenement building. Each owner should be required to

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[2] Scottish Government, *Scottish House Condition Survey: 2016 Key Findings* (2017), 6.1 and Table 45 available a https://www.gov.scot/publications/scottish-house-condition-survey-2016-key-findings/. The most recent Scottish House Condition Survey in 2019 found 52% of dwellings to have critical disrepair, rising to 71% in pre-1919 housing stock: Scottish Government, *Scottish House Condition Survey: 2019 Key Findings* (2020), 6.1 and 6.1.2.1 available at https://www.gov.scot/publications/scottish-house-condition-survey-2019-key-findings/.

[3] Scottish Government, *Scottish House Condition Survey: 2019 Key Findings* (2020), Tables 1 and 2 available at https://www.gov.scot/publications/scottish-house-condition-survey-2019-key-findings/.

[4] For a detailed analysis see D Robertson, *Why Flats Fall Down* (2019).

[5] An extensive record of the work of the Group is set out at https://www.befs.org.uk/policy-topics/buildings-maintenance-2/.

[6] Working Group on the Maintenance of Tenement Scheme Property, *Interim Recommendations Report* (2019) available at https://www.befs.org.uk/wp-content/uploads/2019/01/SPWG-Interim-Recommendations.pdf.

[7] Working Group on the Maintenance of Tenement Scheme Property, *Final Recommendations Report* (2019) available at https://www.scotlawcom.gov.uk/index.php/download_file/view/2306/1687/.

[8] Final Recommendations Report p 4.

[9] Final Recommendations Report pp 6 and 8. (The pages of the Working Group's Final Report do not run sequentially at this point.)

contribute to the fund at a level set by statute in relation to repair risk as assessed under a statutory, points-based system.[10]

1.8 The Report noted that the recommendations would help to address disrepair, and also to facilitate building improvements to enhance the energy efficiency of the tenement stock in line with the Scottish Government's energy efficiency and climate change targets.[11]

1.9 The Working Group's recommendations were broadly accepted by the Scottish Government, subject to the need for further research and development in various areas,[12] some of which are set out in the Scottish Government's Tenement Condition Workplan for 2021.[13]

Housing and buildings policy beyond the project

1.10 The introduction of OAs in tenement buildings is one aspect of a significant programme of work being taken forward by the Scottish Government in relation to disrepair and energy inefficiency in Scotland's buildings, with a particular focus on Scotland's housing stock. A brief summary of the work being progressed elsewhere may be useful in situating our project within its broader context.

Housing to 2040

1.11 Published in March 2021, the *Housing to 2040* strategy document[14] outlines the Scottish Government's plans to take forward housing policy in the medium to long term. The central ambition underlying the strategy is that "…everyone ha[s] access to a warm, safe, affordable and energy-efficient home that meets their needs, in a community they feel part of and proud of."[15]

1.12 Two parts of this strategy document are of particular note in the context of our project: the proposed new housing standard[16] and the proposals on affordable warmth and zero emissions homes.[17]

New Housing Standard

1.13 *Housing to 2040* sets out a high level policy objective for the Scottish Government to "…take action so that all homes, no matter their tenure, are required to meet the same standards."[18] The document envisages that a new unitary housing standard will be put in place, and existing exceptions to relevant standards will be swept away, such that there will be "…no

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[10] Final Recommendations Report pp 7 and 8. (The pages of the Working Group's Final Report do not run sequentially at this point. The proposals for reserve funds therefore begin on page 8 and continue on page 7).
[11] Final Recommendations Report p 3.
[12] Scottish Government, *Tenement maintenance group: Scottish Government response* (2019, updated in 2021) available at https://www.gov.scot/publications/tenement-maintenance-report-scottish-government-response/.
[13] Scottish Government, *Tenement Condition Workplan 2021* available at https://www.gov.scot/publications/tenement-maintenance-report-scottish-government-response/.
[14] Scottish Government, *Housing to 2040* available at https://www.gov.scot/publications/housing-2040-2/.
[15] *Housing to 2040* p 8
[16] *Housing to 2040* Part 4A
[17] *Housing to 2040* Part 3.
[18] *Housing to 2040* p 52

margins of tolerance, no exemptions and no "acceptable levels" of sub-standard homes in urban, rural or island communities, deprived communities or in tenements."[19]

1.14 This new housing standard will be aligned to the new regulatory standard for energy efficiency and heating in all buildings,[20] to be introduced as part of the Heat in Buildings strategy discussed further below.[21] It is suggested that the new housing standard will "…move beyond traditional models of fitness for human habitation to a new model that meets expectations for housing as a human right and delivers homes that underpin health and wellbeing."[22]

1.15 Part 4A of *Housing to 2040* also discusses matters relating to repairs and maintenance. While recognising that these are a homeowner's responsibility, the document suggests that the Scottish Government wants to take action to support proactive approaches to repairs and maintenance. The first step in that will be research on the costs of maintenance and current incentives and disincentives to maintenance investment.[23] The particular challenges facing tenement properties in respect of repairs and maintenance are noted with recognition that the Scottish Government will "act on the recommendations of the Parliamentary Working Group on Tenement Maintenance, and will investigate ways to encourage behaviour change, which is most cost-effective for owners in the longer term."[24]

1.16 Government support in relation to repairs and maintenance is to be aligned with support being developed to deliver heat decarbonisation, with a "Help to Improve" policy approach being proposed.[25] *Housing to 2040* suggests that that support might be available to help pay for improvement work by the time the new housing standard is introduced.[26]

1.17 The new housing standard, when introduced, may have implications for OAs and, perhaps separately, for owners of tenement flats. As suggested in the letter from the Scottish Government setting out our reference for this project, OAs may be subject to duties in relation to compliance with the new housing standard in future.[27] In Chapter 4, we suggest that OAs should be subject to certain mandatory duties to ensure the effective functioning of the OA regime. The mandatory duties we discuss there are not connected to the new housing standard, or any existing building standard. However, if consultees support the use of the mandatory duty mechanism in legislation resulting from this project, the mechanism could also be used for the imposition of duties on the OA in connection with the new housing standard in future.[28] In Chapter 5, we note the potential future use by government of the mandatory duty mechanism in our consideration of categories of tenement to which the OA legislation may be disapplied.[29] Separately, we note that the new housing standard could potentially be tied in future to the duty on an owner of any part of a tenement to maintain that part so that it continues to provide support and shelter to other parts of the building. This duty, set out in section 8 of the Tenements (Scotland) Act 2004, is enforceable by owners of other parts of the tenement

[19] *Ibid.*
[20] *Ibid.*
[21] See 1.20.
[22] *Ibid.*
[23] *Housing to 2040* p 53.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] See 1.3 above.
[28] See discussion at 4.11-4.20.
[29] See 5.24-5.45.

building, and is not explicitly tied to any housing or building standard at present. We discuss the section 8 duty in Chapter 11.[30]

Affordable warmth, zero emissions homes and the Heat in Buildings Strategy

1.18 Part 3 of the *Housing to 2040* document outlines the Scottish Government's vision for its affordable warmth and net zero emissions homes policy. The overall aim here is "…for housing to contribute to tackling climate change by 2045 by delivering homes that are warm and affordable to heat and reducing the emissions caused by housing and housing construction."[31] The document discusses this aim in the context of both the regulation of new build homes[32] and the adaption of existing homes,[33] outlining some of the considerable preparatory work which needs to be done here.

1.19 The document notes plans for investment in support of existing homes, envisaging among other things the expansion of schemes funding works such as whole house retrofits for fuel poor households.[34] There is also discussion of continuing support via interest-free loans to householders for investment in heat and energy-efficiency technologies.[35]

1.20 This aspect of housing policy connects with a second area of Scottish Government policy focus concerning the energy efficiency of all buildings in Scotland. The Heat in Buildings Strategy[36] envisions the introduction of new mandatory legal standards for zero emissions heating and energy efficiency in all domestic and non-domestic buildings.[37] A public consultation on a Heat in Buildings Bill, designed to implement many of the recommendations in the strategy document, was opened in November 2023 and closed in March 2024.[38] The consultation suggests the introduction of an obligation on homeowners to ensure their home meets a minimum energy efficiency standard by 2033.[39] The consultation also suggests that all building owners will be required to have ended their use of polluting heating by 2045.[40] The consultation is accompanied by a report from a short-life working group tasked with considering the challenges of adhering to the intended new heat in buildings legislation in the tenement context.[41] The recommendations of the working group included a phased introduction of the new standards for tenements[42] and potential amendment of the Tenements

[30] See 11.5-11.15.
[31] *Housing to 2040* p 43
[32] *Housing to 2040* Part 3A
[33] *Housing to 2040* Part 3B
[34] *Housing to 2040* p 35-36.
[35] *Housing to 2040* p 36.
[36] Scottish Government, *Heat in Buildings Strategy: Achieving net zero Emissions in Scotland's Buildings* (2021) available at https://www.gov.scot/publications/heat-buildings-strategy-achieving-net-zero-emissions-scotlands-buildings/.
[37] *Heat in Buildings Strategy* p 89.
[38] Scottish Government, *Delivering Net Zero for Scotland's Buildings: A Consultation on proposals for a Heat in Buildings Bill* (2023) available at https://www.gov.scot/publications/delivering-net-zero-scotlands-buildings-consultation-proposals-heat-buildings-bill/documents/.
[39] *Consultation on proposals for a Heat in Buildings Bill* paras 2.20-2.40.
[40] *Consultation on proposals for a Heat in Buildings Bill* paras 2.10-2.19.
[41] Tenements Short Life Working Group – Energy Efficiency and Zero Emissions Heating, *Final Report* (2023) available at https://www.gov.scot/publications/tenements-short-life-working-group-energy-efficiency-zero-emissions-heating-final-report/documents/.
[42] Short Life Working Group report para 5.2

(Scotland) Act 2004 to categorise all work required to adhere to the new standards as maintenance rather than improvement to the building.[43]

1.21 As with the intended new housing standard, any new statutory duties imposed in connection with the heat in buildings work may have implications for OAs along the lines discussed in para 1.17 above.

Support for owners

1.22 It is recognised throughout the policy material on housing and heat in buildings that a significant challenge to improving the quality of the building stock is likely to be funding. Some building owners simply will not have the money required for works. Others may have assets (most obviously, the building itself may be worth more than any debts secured on it) but not liquid finance. We understand that financial initiatives for retrofit works, including for tenements, will be given further consideration by the Scottish Government as their work in these policy areas continues. Similarly, it is recognised in the policy documents that support in the form of public education and advice on how to comply with changes in standards will be important, including in tenements. In Chapter 3, we note that the availability of state support to assist owners in adapting to changes in the legal regulation of their property will be taken into account by the court in assessing the proportionality of any interference with the human rights of owners resulting from the reform.[44]

Methodology

1.23 Our work on the project has been informed by a detailed literature review of the topic from both a legal and policy perspective. This work has been complemented by a series of meetings involving principally non-legal stakeholders with expertise in tenement management and maintenance. We also undertook site visits to meet with owners of tenement properties and some existing owners' associations. We are extremely grateful to those who took the time to speak to us and to discuss examples of where the current law of the tenement is working well and where challenges lie. A list of the non-legal stakeholders with whom we have consulted can be found in Appendix A to this Discussion Paper.

1.24 We have been greatly assisted by an advisory group of legal experts who have provided invaluable input into the development of these initial proposals. It should be noted however that ultimately responsibility for the content of this Discussion Paper rests with us. The members of the advisory group are listed in Appendix A.

1.25 This Discussion Paper has also been informed by consideration of the law relating to multi-owner apartment or condominium buildings in other jurisdictions. Given differences in property law, building regulation and approaches to construction in the various jurisdictions considered, we have (perhaps unsurprisingly) not identified one particular scheme which would lend itself to wholesale transplant into Scots law. However, we cite useful comparative examples wherever helpful. We received great assistance with our research in this respect from the international experts on apartment law who participated in our comparative webinar

[43] Short Life Working Group report para 5.5. Under current law, maintenance work can generally be carried out where a simple majority of tenement flat owners vote in favour of undertaking it, whereas improvements generally require unanimous support: see 2.20. We consult later on whether improvements should be possible following the introduction of the OA regime on the basis of a special majority vote: see 8.29-8.34.
[44] See 3.16.

series in the autumn of 2022. Recordings of the webinars can be found on our Youtube channel, and we are extremely grateful to all those participated, whose names can be found in Appendix A.

1.26 Finally, our work on this Discussion Paper has been informed by a survey of the title conditions in approximately 250 tenement title deeds. The titles covered a range of tenements in terms of age, type of building and geographic location. We are very grateful to Registers of Scotland for their extensive assistance in sourcing and accessing this data, and to others who assisted us in developing our methodology for analysing the data, all as listed in Appendix A. A summary of our findings can be found in Appendix B, and we refer to the findings where relevant throughout the Paper.

Structure of this Discussion Paper

1.27 The Paper is composed of 14 Chapters. Following this introductory chapter, Chapter 2 sets out an overview of the current law on tenement maintenance and considers the operation of the Tenement Management Scheme (TMS) and the Development Management Scheme (DMS). It also provides an overview of the legislative framework for implementation of OAs on which we consult on this Paper, setting out where current law will remain undisturbed and where changes will be required. Chapter 3 sets out the human rights requirements with which the OA legislation must comply and outlines how our approach in the Paper has been informed by those considerations.

1.28 Chapter 4 considers in detail an appropriate legislative framework for the introduction of OAs. It suggests that the legislation should contain a combination of mandatory elements which cannot be overridden or disapplied by alternative provision in the tenement title conditions, and default elements which will operate as background law where the tenement titles are silent or incomplete. The mandatory elements will include the establishment of an OA for every tenement together with an enforcement regime intended to ensure the OA is functional at a basic level. The default elements will cover most of the rules by which the OA operates, including voting rights of owners and the division of liability for costs. This Chapter considers whether tenement title conditions – including existing tenement title conditions – should be subject to a new requirement to be written in a standardised form.

1.29 Chapter 5 considers the application of the legislation to individual tenements. It looks at whether a registration requirement is necessary to record the name and address of the OA and the title numbers of the flats which form the tenement. It also considers whether the legislation should not apply to certain categories of tenement, including small tenements, tenements in single ownership, tenements managed as part of a wider development and tenements subject to a DMS.

1.30 Chapter 6 looks at the OA itself. It considers which type of legal person should be used to constitute the OA, discusses the membership of the OA and deals with some administrative aspects.

1.31 Chapters 7-10 deal with the provisions of the default OA Scheme (OAS) regulating the operation of the OA where the tenement titles are silent or incomplete. Broadly speaking, owners of tenement flats will be free to vary the rules on which we consult in these chapters by agreeing with their fellow owners to new conditions in their titles. Chapter 7 considers which powers should be available to the OA by default, and consults on whether certain mandatory

restrictions to the extent of its powers should apply. Chapter 8 discusses how the membership of the OA can take decisions about what the OA does, including consideration of the appropriate voting thresholds for different activities and how votes can be conducted at meetings or by consultation. Chapter 9 sets out the role of the manager who will undertake the day-to-day work of the OA, asks whether there should be any restrictions on persons entitled to act as the manager and considers the manager's rights and duties. Chapter 10 looks at how liability for costs incurred by the OA should be allocated amongst members, and considers a new requirement for an annual budget and service charge.

1.32 Chapter 11 considers enforcement of tenement maintenance obligations. It looks first at maintenance obligations arising between owners under the Tenements (Scotland) Act 2004 (most notably the duty to maintain so as to provide support and shelter under section 8) and obligations which may arise under the management scheme applicable in the tenement. It consults on the introduction of new enforcement mechanisms for maintenance obligations and asks whether disputes between owners should continue to be heard by the sheriff court, or should instead fall within the jurisdiction of the Housing and Property Chamber of the First-Tier Tribunal. It also considers how third-party contractors should be able to enforce obligations against the OA.

1.33 Chapter 12 considers which insolvency process should be available to an OA. Chapter 13 considers the process by which an OA can be terminated and wound up.

1.34 Chapter 14 lists the consultation questions found in the earlier Chapters of the paper.

Impact Assessment

1.35 When our Report is published it will be accompanied by a BRIA (Business and Regulatory Impact Assessment). We require to assess the impact and, in particular, the economic impact of any reform proposals that we may eventually recommend in our Report. We would welcome the help of consultees in relation to the following questions:

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

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?**

Legislative Competence

1.36 We have identified two matters which might impact on the competence of the Scottish Parliament to pass legislation establishing and regulating OAs. First, the Scottish Parliament cannot pass legislation which is contrary to the rights set out in the European Convention on Human Rights.[45] We discuss this in detail in Chapter 3.

1.37 Second, competence to legislate in certain subject areas is reserved to the Westminster Parliament. It is beyond the competence of the Scottish Parliament to legislate on these "reserved matters".[46] The reserved matters are set out in Schedule 5 to the Scotland

[45] Scotland Act 1998 s 29(2)(d).
[46] Scotland Act 1998 s 29(2)(b).

Act 1998 (1998 Act). Section C1 of the Schedule lists "[t]he creation, operation, regulation, and dissolution of types of business association" as a reserved matter.[47] In our view, a critical question for legislation following from this project is whether the introduction of OAs is caught by this reservation. We set out an overview of the arguments in this respect below.

1.38 It has not been possible, when developing our proposals for consultation in this project, to suggest a scheme that falls unambiguously within the competence of the Scottish Parliament. The reference which initiated this project requires us to propose legislation implementing owners' associations in tenements, which is precisely the issue calling into question the competence of the Scottish Parliament to legislate. In other words, the legislative competence issue cannot be avoided if OAs are to exist. Accordingly, we have developed the proposals on which we consult in this Paper in line with the project reference. We anticipate that, should the Scottish Government wish to implement the recommendations contained in our final Report, they will liaise with the UK Government in respect of legislative competence matters in due course.

Is an OA a "business association"?

1.39 The term "business association" initially brings to mind profit-making enterprises such as companies. It may not seem immediately obvious that this term could apply to an OA. However, the definition of "business association" in the 1998 Act is very wide, covering any entity "established for the purpose of carrying on any kind of business, whether or not for profit". "Business" is defined to include "the provision of benefits to the members of an association". The Explanatory Notes to the 1998 Act give several examples of "business associations", including friendly societies and social landlords, which demonstrate the wide-ranging nature of the legislative definition.

1.40 Whether this definition would apply to an OA is not clear. An argument could be made that the "business" of the OA is the management and maintenance of the tenement, which provides benefits to the flat owners who are OA members. Although the OA would not be expected to have a profit-making motive, this is not sufficient to exclude it from the definition of "business associations": the definition is ultimately so wide that it may be more likely that the OA meets the definition than not. However, a counter-argument can be constructed. The "benefits" derived from membership of an OA might be viewed as quite different from those enjoyed by, for example, company shareholders. Owners' associations are not explicitly mentioned in the 1998 Act or the explanatory notes.

1.41 Where the correct interpretation of the legislation is unclear, the final determination lies with the court. The court may take into account how similar issues have been dealt with previously by the two Parliaments. We turn now to that issue.

Could it be argued that the introduction of OAs falls within the terms of the reservation?

1.42 If an OA is a business association, a straightforward reading of the legislation seems to suggest that the introduction of OAs is a reserved matter, and Westminster legislation would therefore be required to implement the recommendations of our project. The introduction of OAs is plainly the creation of a new type of association, and the relevant legislation will deal

[47] The words in quotes are the terms of the C1 reservation, albeit that two types of association are later excluded from its scope: public bodies and charities.

with the operation, regulation and dissolution of that association. In some respects, the answer to the question may simply end here.

1.43 Treatment of similar proposals in the past may also suggest that the reservation would apply to legislation creating OAs. The most obvious example stems from the introduction of the DMS in 2009. We discuss the DMS in detail in Chapter 2. For the moment, it suffices to identify its obvious parallels to the intended OA regime. The DMS is a mechanism for the ongoing management and maintenance of housing developments (usually newly built estates) by owners of homes within that development. Where the scheme is in use, any person buying a home in the development becomes a member of an owners' association with its own legal personality which has certain powers in respect of management of the development, in much the same way as is envisaged for OAs. The DMS was introduced following our recommendations in our Report on Real Burdens.[48] While many of the recommendations in that Report were implemented by way of legislation in the Scottish Parliament, Scottish Ministers took the view that the introduction of the DMS would require Westminster legislation, precisely because they considered the owners' association at the heart of the DMS to be a business association falling within the reservation.[49] As such, the DMS was eventually introduced by way of subordinate legislation at Westminster,[50] several years after the enactment of the bulk of the recommendations in our Report by way of primary legislation at Holyrood.[51]

1.44 Similarly, our Report on Unincorporated Associations[52] published in 2009 put forward recommendations which we considered to be outwith the legislative competence of the Scottish Parliament. An "unincorporated association" is a non-formalised group such as an amateur sports club or community gardening collective. We noted that the legislation recommended in our Report would apply to "non-charitable associations such as clubs whose activities amount to the carrying on of a business otherwise than for profit", which we therefore considered to be within the scope of the business association reservation.[53] This understanding of the reservation seems also to have been accepted as correct by UK Government, which consulted on the proposals and expressed an intention to proceed with legislation,[54] although it has not done so as yet.

What counter-arguments can be made?

1.45 Even if it is accepted that OAs are business associations, an argument can be made that the creation, regulation, operation and dissolution of those associations is not the key purpose of legislation which introduces them. Instead, the purpose of the legislation should arguably be understood as regulation of the ownership and management of tenement property in Scotland.

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[48] Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 181, 2000).
[49] Title Conditions (Scotland) Act 2003, *Explanatory Notes* Part 6 para 301 and Title Conditions (Scotland) Bill, *Policy Memorandum* para 8.
[50] Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009. See also *Explanatory Memorandum* para 3.3.
[51] Title Conditions (Scotland) Act 2003.
[52] Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217, 2009) available at https://www.scotlawcom.gov.uk/files/3312/7989/7412/rep217.pdf.
[53] Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217, 2009) para 1.16.
[54] Scotland Office, "Reforming the law on Scottish unincorporated associations and criminal liability of Scottish partnerships" (2012); Scottish Office, "Reforming the law on Scottish unincorporated associations and criminal liability of Scottish partnerships: the Government's response to consultation" (2012) 25.

1.46 Power to legislate in respect of property law is devolved to the Scottish Parliament. Where it might be argued that a piece of legislation has two purposes which touch on both reserved and devolved matters under the Scotland Act 1998, the provisions will generally be outwith competence "…unless the [reserved] purpose can be regarded as consequential and thus of no real significance when regard is had to what the provision overall seeks to achieve."[55] The argument here could be that, even though one effect of the legislation is the creation of a type of business association, that is ancillary to the primary purpose of regulating tenement ownership, which should hold the trump card in terms of legislative competence.

1.47 This argument may be strengthened by consideration of the intention behind the business association reservation. The reservation was designed to preserve a "level playing field" for business across the UK.[56] Parliamentary discussions show that MPs wanted to avoid "competing regimes of business regulation north and south of the border".[57] The creation of an entity which exists only in relation to tenement property located in Scotland would not seem easily to provide an opportunity to undercut businesses elsewhere in the UK. It would not impact on the common market for UK goods and services. Instead, the legislation would be an enabling mechanism for building maintenance and management in Scotland.

1.48 The possible trespass into reserved matters may therefore be permitted by a court, since the purpose of introducing OAs is primarily the devolved matter of property law, and the legislation may not be considered to contradict the intention underlying the business association reservation.

Devolved competence - summary

1.49 Clearly arguments can be made either way on this question. We also recognise that it is difficult to take any final view on the likely competence of the Scottish Parliament to enact legislation the detail of which is not yet known. We will continue to liaise with the Scottish Government on this matter as the project progresses.

Acknowledgements

1.50 We have set a full list of all those who have helped with the project to date in Appendix A to this paper. We would like to record our gratitude for all their valuable contributions to our work.

[55] Per Lord Hope's discussion in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61*,* 2013 SC (UKSC) 153 *at* [43] discussed in *Christian Institute v Lord Advocate* [2016] UKSC 51*,* 2017 SC (UKSC) 29 at [31] and [32].
[56] 1998 Act, *Explanatory Notes*, Sch 5 section C1; Parliamentary Debates, House of Commons, Official Report, 30 March 1998, Vol 309 col 943.
[57] Parliamentary Debates, House of Commons, Official Report, 30 March 1998 Vol 309 col 996.

Chapter 2 Current Law

Introduction

2.1 This Chapter provides a summary of the current law in relation to management of tenement maintenance. It concludes with an overview of the proposed regime for the introduction of OAs on which we consult in the remainder of this Paper, with a brief explanation of how that regime will work within the existing legislation.

2.2 Our summary of the current law is not intended to be a comprehensive account.[1] The aim is to provide an overview which will, we hope, be useful for consultees who are not entirely familiar with the existing legal framework, and will provide context for our provisional proposals for reform. The summary covers key provisions in the Tenements (Scotland) Act 2004, and explains the Tenement Management Scheme (TMS) and the Development Management Scheme (DMS). We do not ask any consultation questions in this Chapter.

Tenements (Scotland) Act 2004

2.3 The law applying to tenements is principally set out in the Tenements (Scotland) Act 2004. This Act was designed to provide a comprehensive set of rules for tenements, restating earlier common law rules in a more accessible form and filling gaps in the common law.[2] The Act followed from a project we undertook on the law of the tenement in the late 1990s, and our Report on the Law of the Tenement explains many of the rules which form part of the legislation.[3]

2.4 The Act applies to all tenements in Scotland. "Tenement" is defined to mean a building (or part of a building) comprised of two or more related flats which are designed to be in separate ownership and are divided from each other horizontally.[4] This definition covers the classic Victorian sandstone tenement buildings found in the streets of Edinburgh and much of the West of Scotland, but also covers any other building made up of flats, including high-rise blocks, modern apartment buildings, post-war "four-in-a-block" housing,[5] Edinburgh colonies[6] and larger houses or buildings which have been converted into flats. The word "flat" as used

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[1] More detailed treatments can be found in R Rennie, *Land Tenure in Scotland* ch 14 and W M Gordon and S Wortley, *Scottish Land Law (3rd edn)* Volume 1, paras 15-46 to 15-169. For a treatment of the 2004 Act with section-by-section annotations, see R Rennie, *Land Tenure and Tenements Legislation (3rd edn)* 269-313.

[2] For a summary of the intentions underlying the 2004 Act, see Scottish Law Commission, Report on the Law of the Tenement (Scot Law Com No 162, 1998) para 2.4-2.30.

[3] The Report can be found on our website at https://www.scotlawcom.gov.uk/index.php/download_file/421/870/ .

[4] 2004 Act s 26. Properties divided from one another vertically, such as semi-detached houses or terraces, are not tenements.

[5] A type of tenement where four flats are arranged in a single, detached block, with two flats on the ground floor and two directly above. Often each flat will have a separate front door, although in some examples entry is via a common close or stair.

[6] Ten areas of colony houses were constructed in Edinburgh from around the middle of the 19th century to the early 20th. They are made up of a small number of back-to-back terraces which originally had upper and lower flats. They are characteristically arranged so that the front door of each flat is on the opposite side of the building to the other front door, and with an outside stair leading to the upper flat. This allowed each flat to have its own front door and front garden.

in the Act includes non-residential as well as residential properties,[7] so in a tenement with shop units or a pub at the ground floor level and residential units above, all the units will be considered flats.

Background law and mandatory provisions

2.5 In large part, the 2004 Act operates as default or background law. The rules which it provides will apply where the titles to the flats in the tenement do not make the position clear. The first three sections of the Act provide a good example of this. These sections set out default rules on who owns particular parts of the tenement building, such as the roof and walls. It will often be the case that the title to a flat will state explicitly whether ownership of the flat includes, for example, ownership of the roof, or perhaps shares ownership of the roof with the other flats in the building. In that case, the provisions in the first three sections of the 2004 Act are not needed. However, if the title does not provide an answer, the default rule about ownership of the roof in the 2004 Act will apply.[8]

2.6 Some parts of the 2004 Act will apply regardless of what the titles say, however. Most importantly, this includes various duties imposed on flat owners, enforceable by owners of other flats in the same tenement who will be affected if the duty is not complied with. For example, where one part of the tenement building provides support or shelter to another part, the owner has a duty to maintain that part so as to continue to provide support or shelter.[9] A different example concerns access for maintenance, where each flat owner is under a duty to allow access to or though their flat so that maintenance can be carried out to any part of the building so long as reasonable notice has been provided.[10] The property titles may impose more detailed or more onerous versions of these duties on flat owners, or may impose additional duties which are not found in the 2004 Act. Regardless of what the titles say, however, the minimum duties set out in the 2004 Act will always apply.

Main body of the Act and schedules

2.7 The main body of the 2004 Act is made up of 34 sections. These cover roughly the following issues:

- Default rules on the boundaries of individual flats and the tenement as a whole (sections 1-3);
- Mandatory rules on the application of the Tenement Management Scheme (TMS) discussed further below (sections 4 and 4A);
- Rights of flat owners to apply to court for resolution of tenement disputes (sections 5 and 6);
- Mandatory duties in relation to support and shelter (section 7-10);
- Mandatory rules as to the date or time at which repair costs are due to be paid, how liability for costs is attributed where an owner transfers ownership of their flat to someone new, and connected matters (sections 11-16);

[7] 2004 Act s 29(1).
[8] The default rule is that the roof forms part of the flat directly underneath it, and so will be owned by the owner of that flat: 2004 Act s 2(3).
[9] 2004 Act s 8.
[10] 2004 Act s 17.

- Mandatory duties to provide access for repairs, obtain insurance, and allow service pipes to be installed (sections 17-19);
- Mandatory and default rules on demolition and abandonment of the tenement (sections 20-23);
- Miscellaneous provisions including definitions used and interpretation of the 2004 Act (sections 24-34).

2.8 For the most part, the provisional proposals for reform discussed later in this Paper will not result in changes to these sections of the Act. This is because most of the rules contained in these sections do not relate to how maintenance of a tenement is managed, meaning that the introduction of OAs does not require the rules to change. There are some exceptions – for example, in Chapter 11 we consider some changes to the process for resolution of tenement disputes – and we identify these where they arise. It is also likely that our reform proposals would require several new sections to be inserted into the main body of the Act, principally to deal with creation of OAs and the mandatory duties we suggest should be placed on OAs. These matters are discussed primarily in Chapters 4-6.

2.9 In common with many pieces of legislation, the 2004 Act also includes several schedules, which can loosely be understood as appendices which set out in more detail how particular provisions in the main body of the Act are intended to work. Of most importance to this project is the first schedule, which sets out the Tenement Management Scheme (TMS). We explain the rules of the TMS in more detail below. It is likely that our provisional proposals for reform would require replacement of the TMS with an alternative, default management scheme which we refer to as the Owners' Association Scheme (OAS). The rules of the OAS are principally discussed in Chapters 7-10.

Tenement maintenance – which management scheme applies?

2.10 Under current law, the scheme for managing maintenance of a tenement building could, in principle, be set out entirely within the titles of the flats in the building. Particularly in tenements constructed more recently, it is common for the titles to contain an extensive maintenance scheme. However, it may be that the scheme in the titles does not cover every eventuality. Particularly in older tenement buildings, the scheme is likely to contain significant gaps, or there may be no scheme at all. The purpose of the TMS is to provide a set of fallback rules which are used to fill any gaps in the titles. If the titles contain no maintenance provisions at all, every rule of the TMS will apply in an unmodified form, although in practice this would be unusual.

2.11 In some tenements, an alternative management scheme known as the Development Management Scheme (DMS) will be used.[11] The DMS is usually adopted in large residential estates which might contain a mixture of tenements and single family homes alongside other types of property. Where a DMS is in place, the tenement will generally be managed alongside all the other properties in the development. If a tenement is subject to a DMS, the TMS does

[11] Found in Schedule 1 of the Title Conditions (Scotland) Act (Development Management Scheme) Order 2009 ("the DMS Order").

not apply to it.[12] Maintenance is instead managed under the rules of the DMS, as modified in the titles to the properties in the development.

2.12 We consider both management schemes in more detail below. As noted above, it is likely that the provisional proposals for reform on which we consult in this Paper would require replacement of the TMS with the OAS. Our provisional proposals would have no effect on the operation of the DMS.

The Tenement Management Scheme

2.13 The TMS was developed as part of our Report on the Law of the Tenement, in which it was referred to as "Management Scheme A".[13] It acts as a default or fallback scheme for managing tenements in Scotland. It will apply where the title deeds are either silent, ambiguous or fail to make complete provision in respect of a rule specified in the scheme.[14] The scheme is made up of nine rules, eight of which form substantive practices for tenement management and maintenance. Where it applies, the TMS and decisions taken under it are binding on flat owners.[15]

Scheme property

2.14 The TMS only applies to parts of the tenement building where certain mutual rights and obligations arise.[16] These parts are known as "scheme property". If part of the tenement building is not scheme property then it will not be managed under the rules set out in in the TMS.

2.15 Scheme property is any part of the tenement building:[17]

(a) which is common property[18] of two or more owners;

(b) which is not common property, but for which the flat titles impose responsibility for maintenance upon two or more owners;

(c) which is not (a) or (b) but which is;

(i) the ground on which the tenement is built;

(ii) its foundations;

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[12] 2004 Act s 4(2).
[13] Report on the Law of the Tenement ch 5. The Report also set out a separate Management Scheme B, which eventually became the DMS: see 2.37 below.
[14] 2004 Act s 4.
[15] TMS rule 8.
[16] In our Report on the Law of the Tenement we termed these "strategic parts", although this was not carried to the final statute. See Report on the Law of the Tenement para 5.6.
[17] TMS rule 1.2.
[18] "Common property" describes property where ownership is shared between two or more people. For example, where a married couple buy a house together, the house will be their common property. For a different example in the context of tenements, if the flat titles provide that every flat owner has a share of the ownership of the roof of the building, the roof will be common property. We describe the owners of common property as common owners, or co-owners.

(iii) its external walls;

(iv) its roof (including rafters and supporting structures);[19]

(v) part of a mutual gable wall which separates it from a neighbouring building;

(vi) any load bearing wall, beam, or column.

Part (c) of the definition ensures that strategically important parts of the building will always be subject to the TMS even where they are in the sole ownership of one of the flats.

2.16 Expressly excluded from scheme property are elements of the building which serve only one flat, including extensions, doors, windows, skylights, vents, openings, and chimneys.[20]

2.17 It should be emphasised that the definition of scheme property has no effect on who owns any part of the building. The titles will specify who owns which parts of the building, supplemented by the default rules in sections 1-3 of the 2004 Act if necessary. To say that something is scheme property means nothing more than that its maintenance will be managed subject to the rules of TMS, if the management scheme in the titles is inadequate.

Scheme decisions

2.18 The TMS sets out what decisions in relation to scheme property will fall within the remit of the scheme. Decisions of that type can be taken by owners only under the decision making rules set out in the property titles, or if the titles are inadequate, the decision making rules set out in the TMS. Decisions falling into this category are referred to as "scheme decisions".[21]

2.19 Rule 3.1 of the TMS states that scheme decisions can be taken on any of the following matters:

(a) to carry out maintenance to scheme property;

(b) to arrange inspection of scheme property to determine whether or to what extent maintenance is necessary;

(c) to appoint or dismiss a person to manage the tenement;

(d) to delegate specific powers to a manager;

(e) to arrange a common policy of insurance and liability for its premium;

(f) to install a commonly controlled entry system;

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[19] Inclusion of the roof is significant since one of the greatest inequalities under common law was invoked by top floor proprietors who, without title deeds to the contrary, would have full liability of the most expensive part to maintain: D B Reid, "The Tenements (Scotland) Act 2004" in R Rennie (ed) *The Promised Land: Property Law Reform* (2008) para 6-44.
[20] TMS rule 1.3.
[21] TMS rule 1.4.

(g) to determine that certain owners are not required to pay certain costs;

(h) to retrospectively authorise maintenance that has already been carried out;

(i) to modify or revoke prior scheme decisions.

2.20 The TMS defines maintenance to include repair, replacement, the installation of insulation, cleaning, painting and other routine works, gardening, day-to-day running, and reinstatement of parts of the building.[22] Specifically excluded is demolition of the tenement, alteration, and improvement which is not "reasonably incidental" to maintenance.[23] Decisions to carry out works of this kind, if not provided for in the management scheme in the property titles, must follow the general rules of property law. Accordingly, only the owner of a part of a building can decide to carry out improvements to it, or where the property is commonly owned, all the owners must agree to the work.[24]

2.21 When a decision is made to carry out maintenance to scheme property, the owners may make scheme decisions for its effective implementation. They may vote to appoint a person to organise it, such as a manager or factor, arrange for it to be carried out themselves, require owners to deposit a sum of money, and take other steps necessary to ensure the maintenance is carried out in good time and to a satisfactory standard.[25]

Decision making processes

2.22 Rule 2 of the TMS sets out how scheme decisions can be made. It applies where no alternative provision in relation to decision making is set out in the flat titles,[26] or can be used to fill gaps where the provision in the flat titles is incomplete.[27] The basic rule is that a scheme decision is taken where a simple majority of the votes allocated to flat owners is in favour of it.[28] A simple majority means anything more than 50% of the allocated votes.[29]

2.23 Every flat is allocated one vote, with the owner, or someone nominated by them, permitted to exercise this right.[30] Votes are allocated based on the number of flats in the

[22] TMS rule 1.5.
[23] *Ibid.*
[24] The Relevant Adjustments to Common Parts (Disabled Persons) (Scotland) Regulations 2020 (SSI 2020/52) allow for disability-related adaptations to be made to commonly owned parts of a building on the basis of majority consent or with authorisation of the sheriff.
[25] TMS rules 3.2, 3.3 and 3.4.
[26] In *Garvie v Wallace* 2013 GWD 38-734 (Sh Ct), the flat titles required maintenance decisions to be taken at a meeting, meaning that the process of decision making by consultation provided for in rule 2 of the TMS was not available to owners: see para [200]. In *Boatland Properties v Abdul* 2014 SCLR 792 (Sh Ct), a broadly-drafted title condition allowing repairs to be instructed where a majority of owners considered it necessary or desirable had the result that, so long as majority consensus was evidenced, the more detailed procedures set out in rule 2 of the TMS as to how that consensus should be reached did not apply: see paras [61]-[73].
[27] 2004 Act s 4(4).
[28] TMS rule 2.5.
[29] 2004 Act *Explanatory Notes* para 147. In *Humphreys v Crabbe* [2016] CSIH 82, 2017 SCLR 699 at [28], it was suggested that where deadlock resulted from precisely 50% of the allocated votes being in favour, the appropriate response would be an application to court to resolve the dispute under the 2004 Act s 6. However, it seems clear that the court does not have power to authorise a scheme decision where a majority has not been achieved: see the discussion at 8.21.
[30] TMS rule 2.2.

tenement at the time the vote occurs, not the number in its historical design.[31] The number of votes allocated in a tenement may therefore vary over time if flats are sub-divided or merged.

2.24 When a flat is co-owned, any owner may exercise the right allocated to that flat.[32] If co-owners disagree on how the vote should be cast, no vote will be counted unless the owner(s) of more than a half share of the flat reach agreement. If a vote is cast by consultation, the owner organising the vote need not ensure unanimity within that flat. Rather, a dissenting co-owner must make their dissent known to the organiser of the vote, the effect of which will be to nullify that flat's vote.[33]

2.25 An owner will not be allocated a vote where a scheme decision relates to maintenance of property for which the owner has no liability.[34] Similarly, an owner's vote is not to be counted where they vote in favour of a proposal exempting themselves from particular scheme costs.[35]

2.26 Scheme decisions can be made at a formal meeting or by a consultation. Any owner who wishes to call a meeting must give at least 48 hours' notice to other owners providing the date, time, purpose, and place of the meeting.[36] Where an owner seeks to have a decision taken by way of consultation, they must consult all owners with a vote and count the votes that are cast.[37] This requirement to consult is foregone when it is impracticable for good reason, such as when an owner is absent.[38] Where there are co-owners of a flat, the requirement to consult is satisfied when any co-owner is consulted.[39] There is an unavoidable practical danger with consultation such that an individual who appears to be the owner, such as a tenant or partner of the owner, may cast a vote which is later revealed to be invalid. The requirement of majority rather than unanimity voting lessens the impact of this risk.[40]

2.27 When a decision has been reached, it must be notified to the relevant owners. Where the vote was taken at a meeting, a person will be nominated to notify owners who were not present.[41] Where the decision was taken by other means, such as via consultation, the person who proposed the decision must notify the other owners.[42] Where a flat is co-owned, notification must be given to both or all of the co-owners separately.[43]

Annulling and challenging scheme decisions

2.28 Where an owner, or group of owners, did not vote in favour of a decision to carry out maintenance to scheme property, and they are liable for at least 75% of the cost of the work, they may annul the decision.[44] This is done by providing notice of the annulment to the other affected owners.[45] Notice must be given within 21 days of either the meeting at which the

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[31] *P.S. Properties (2) Ltd v Callaway Homes Ltd* [2007] CSOH 162. We note the reasons for this approach at 8.18.
[32] TMS rule 2.4.
[33] See further discussion at 8.36.
[34] TMS rule 2.3.
[35] TMS rule 3.1(g).
[36] TMS rule 2.6.
[37] TMS rule 2.7.
[38] Ibid.
[39] TMS rule 2.8.
[40] Report on the Law of the Tenement para 5.16.
[41] TMS rule 2.9(a).
[42] TMS rule 2.9(b).
[43] TMS rule 2.9 read with 2004 Act s 28(4).
[44] TMS rule 2.10.
[45] *Ibid.*

decision was made or of the date when the owner (or owners) were notified of the decision.[46] Since the scheme does not link an owner's share of voting power to their share of liability for costs, this right of veto operates as an important minority protection measure.[47]

2.29 Scheme decisions can also be challenged in court. Section 5 of the 2004 Act provides a right for any owner who was not in favour of a scheme decision[48] to make a summary application to the sheriff for annulment. Such an application must be made within 28 days of either the meeting at which the decision was taken or of notice being given to the owner in question.

2.30 The sheriff can annul the decision where satisfied that it is not in the best interests of the owners as a group, or that it is unfairly prejudicial to one or more owners.[49] In making this decision in the context of a scheme decision on maintenance, the sheriff is to have regard to the age of the property, the condition of the property, the likely cost of implementing the scheme decision and the reasonableness of that cost.[50]

Liability for scheme costs

2.31 The TMS makes provision for the liability of owners to pay for the costs involved in implementing scheme decisions.[51] These default rules can become important particularly where the property titles make inconsistent provision on allocation of liability, for example where the share of costs allocated to each flat in the titles do not add up to 100%.[52] Allocation of liability in the property titles cannot be altered by a scheme decision.[53]

2.32 The general rule in the TMS is that all flats bear an equal share of the liability for scheme costs.[54] This rule does not apply to the allocation of maintenance costs in two instances. First, if the part of the tenement being maintained is common property, then each co-owner's share of ownership will also determine their share of liability.[55] Second, if the part of the tenement being maintained is not common property, the relative sizes of the flats may alter the usual rule of equal shares of liability. If the floor area of the largest flat is more than one and half times that of the smallest flat, liability is instead shared in proportion to floor area.[56]

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[46] TMS rule 2.11.
[47] We discuss this further at 8.9 and 8.65.
[48] Someone who was not an owner at the time the decision was made but has subsequently become an owner also has a right of challenge. TMS rule 2.10
[49] 2004 Act s 5(5).
[50] 2004 Act s 5(6).
[51] TMS rule 4.
[52] R Rennie, *Land Tenure and Tenements Legislation* (3rd edn, 2009) 276.
[53] *DH v SI* 2021 SLT (Sh Ct) 231.
[54] TMS rule 4
[55] TMS rule 4.2(a). For example, if one co-owner has a one-third share of ownership, and the other a two-thirds share of ownership, the costs will be divided in the same way. The more usual case is that ownership is shared equally, meaning that costs will also be shared equally. Where the roof over the close is common property only of the flats taking access through the close by virtue of the default rule in section 3(1)(a) of the 2004 Act, the cost of repairs to that section of roof is nevertheless shared by all the flats in the tenement either equally, or in proportion to floor size where that rule is relevant in the tenement in question: TMS rule 4.3.
[56] TMS rule 4.2(b)(i).

Redistribution of scheme costs

2.33 Rule 5 of the TMS provides for the redistribution of a share of scheme costs. Liability for one owner's share of costs will be divided equally amongst the other paying owners under two circumstances: first, where a scheme decision is made to the effect that the owner in question should be exempted from paying their share;[57] and, second, where the share cannot be recovered for another reason, such as the bankruptcy[58] or disappearance[59] of the liable owner. The latter is deemed to have occurred when the owner cannot be identified or found after reasonable inquiry. It is not enough to suggest that the owner cannot be contacted and so must not pay.[60] Where a share is redistributed for reasons other than a scheme decision, the owner in default becomes personally liable to the other owners for the amount paid on their behalf.[61]

2.34 Owners may request payment of the "missing share" of scheme costs from the local authority,[62] which may in turn seek to recover the cost from the defaulting owner. However, there is no obligation on the local authority to pay missing shares, and in practice local authorities may not have the resources to do so.

Emergency work

2.35 Under the TMS, any flat owner can instruct or carry out emergency work.[63] Emergency work is defined as work to scheme property which is necessary to prevent damage to any part of the tenement, or in the interests of health and safety, and which requires to be carried out before a scheme decision can be made.[64] Liability for the costs of emergency work is apportioned in the same way as other scheme costs relating to maintenance.[65]

Notices

2.36 Rule 9 provides that any notice required under the TMS may be made in writing, to the owner or to the owner's agent.[66] Three forms of delivery are provided: by post, by delivery (presumably given by hand),[67] or by electronic means.[68] Where the owner cannot be identified or found after reasonable inquiry, notice shall be deemed to be provided where it has been posted or delivered to the flat in question and addressed to the owner (or equivalent).[69] Any notice will be deemed to be provided on the day that it is posted or delivered, or on the day of the electronic transmission.[70]

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[57] TMS rule 5(a).
[58] Although the terms of the provision specify only "sequestration".
[59] TMS rule 5(b).
[60] 2004 Act *Explanatory Notes* para 167.
[61] TMS rule 5.
[62] See 2004 Act s 4A and also Housing (Scotland) Act 2006 s 50. In relation to 2004 Act s 4A see commentary in G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018) para 15-11.
[63] TMS rule 7.1.
[64] TMS rule 7.3.
[65] TMS rule 7.2.
[66] TMS rule 9.1.
[67] R Rennie, *Land Tenure and Tenements Legislation* (3rd edn, 2009) 306.
[68] TMS rule 9.2.
[69] TMS rule 9.3.
[70] TMS rule 9.4.

The Development Management Scheme

2.37 The DMS is a model scheme for the management of land.[71] The model was initially developed as part of our Report on the Law of the Tenement, where it was designed for use in tenements and referred to as "Management Scheme B".[72] In our subsequent Report on Real Burdens, we adapted the scheme for use in other developments with shared facilities, with the adapted scheme termed the Development Management Scheme.[73] In current practice, we understand that the DMS, when used, is likely to apply to housing developments which contain a range of property types, some of which may be tenements. In our survey of tenement title conditions, we found only four flats subject to a DMS, and in each case it appeared the DMS covered a range of properties.[74] In principle, however, a DMS could be applied to a single tenement alone.

2.38 Use of the DMS is entirely voluntary, in the sense that it will apply only where the landowner choses to use it.[75] This can be done by registering a "deed of application" against the land and buildings in question.[76] The landowner has freedom to modify most rules of the model scheme in the deed of application.[77] Where unmodified, the default rules described below will apply.

Developments, units and scheme property

2.39 Before considering the substantive rules, it is useful to consider some of the key terms used in the DMS. "Development" is the term used to the describe the wider area of land to which the DMS is to apply. As well as the properties within the development, this will include, for example, any landscaped or playground areas, roads, parking areas and garages. The deed of application will identify the extent of the development in question. The term "units" is used to describe houses, flats and other properties in development. These properties will be identified, generally by their postal address, within the deed of application.

2.40 As with the TMS, the DMS is a scheme for managing the maintenance of certain areas of property within a development, generally those which are commonly owned or have some shared, strategic significance. As with the TMS, the relevant areas are referred to as "scheme property". The "scheme property" to be managed in any specific development must be identified in the deed of application. However, where the development includes one or more tenements, scheme property is taken to include those strategically important parts of the tenement which will necessarily form part of the scheme property in the TMS (the roof, external

[71] DMS Order art 3. Land in the context includes the buildings which are on that land.
[72] Report on the Law of the Tenement ch 6. "Management Scheme A" was the term used in that Report to refer to the scheme ultimately enacted as the TMS.
[73] Report on Real Burdens ch 8.
[74] Appendix B para 19.
[75] The scheme is applied to any particular development by the owner granting and registering of a "deed of application" (2003 Act s 71(1)). Conversely the DMS can be disapplied to any development of part of a development by a deed of disapplication (2003 Act s 73(1)). While it is possible to apply the DMS to an existing development where the properties are in individual ownership, this would require the agreement of all owners. It is more usual that the scheme is established by an individual developer prior to them selling on individual units.
[76] Title Conditions (Scotland) Act 2003 s 71(1).
[77] The provisions on owners' associations found in Part 2 of the scheme cannot be modified: DMS Order art 6.

walls, foundations and so on).[78] A full list of those parts is given in section (c) of para 2.15 above.

Owners' association and manager

2.41 Critical to the operation of the DMS are both the owners' association and the manager. The owners' association is established as soon as the DMS comes into effect.[79] It is a legal person, able to take action such as entering contracts or raising legal proceedings in its own name.[80] All unit owners become members of the association automatically.[81]

2.42 The day-to-day management of the development lies with the manager, who acts as an agent for the owners' association.[82] The members of the association retain overall power to appoint or dismiss the manager and also to direct the manager to carry out specific tasks.[83]

2.43 The members of the association are required to meet once per year at a minimum.[84] Other meetings can be called by the manager in certain circumstances, including where a minimum number of members wish a meeting to be held.[85] Detailed provision is made as to how meetings should run, including specification of a quorum,[86] and procedures for voting[87] and record keeping.[88] Most decisions at a meeting can be taken by a simple majority of the votes cast. However, certain decisions, including to carry out improvements to scheme property, require a special majority of all the votes allocated.[89]

2.44 The manager of the development may be the owner of one of the units, but it is more likely that a professional property factor (either a firm or an individual) will be appointed to the role. The first manager is appointed in the deed of application.[90] A manager must then be appointed at the first annual general meeting of members.[91] Where the manager's term of appointment expires or if the manager position otherwise becomes vacant, a manager must be appointed at any subsequent general meeting.[92]

2.45 A detailed list of the manager's duties is set out in the model scheme. These include carrying out inspections and maintenance of scheme property.[93] "Maintenance" under the DMS is stated to include "repairs or replacement, cleaning, painting and other routine works, gardening and the day to day running of property; but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance". The manager is also required to carry out administrative tasks in relation to meetings of members, including

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[78] DMS Order art 20.
[79] DMS rule 2.1.
[80] DMS Order art 4.
[81] DMS rule 2.3.
[82] DMS rule 4.4.
[83] DMS rule 4. In particular rules 4.1, 4.2, and 4.7.
[84] DMS rule 9.
[85] DMS rule 9.3.
[86] DMS rule 10.
[87] DMS rule 11.
[88] DMS rule 12.
[89] DMS rule 13.
[90] DMS rule 7.1.
[91] DMS rule 7.2(a). Appointment is on the terms and conditions decided by the association. It is perfectly possible for the first manager simply to be reappointed.
[92] DMS rule 7.2(b).
[93] DMS rule 8(a) and (b).

organising and attending meetings, keeping a record of decisions made and implementing those decisions.[94]

2.46 Administration of the finances of the owners' association also falls to the manager. They must fix the financial year for the association,[95] prepare accounts for the previous financial year[96] and propose the budget for the financial year to come.[97] The draft budget is required to set out the annual service charge to be paid by the unit owners, an estimate of any funds the association is like to receive, the amount that needs to be spent in the financial year, and, if the association has a reserve fund, the amount that should be put into that.[98] This forward looking budget requires to be approved at a general meeting of members.[99] Maintenance of property is of course not an entirely predictable business and to reflect this the manager has discretion to charge an additional service charge of up to 25% of the amount approved in the annual budget.[100] If funds beyond this amount are required, the manager must prepare a supplementary budget for approval by members.[101] Where the association has surplus funds, and it seems likely they will be held for some time, the manager has to ensure the funds are held in an interest bearing account or are invested in the way that has been decided by the members at a general meeting.[102] The manager must also ensure that any reserve fund is kept separate from other association funds.[103]

2.47 The manager is responsible for collecting the service charge from unit owners.[104] The manager is also required to enforce obligations owed by any person to the owners' association and to enforce the rules of the particular DMS against any individual unit owner.[105]

2.48 As under the TMS, any member can instruct or carry out emergency work to scheme property.[106] The association is required to reimburse the member who pays for that work.[107]

Local authority powers

2.49 For completeness, we note that local authorities also have certain powers to support or compel maintenance to be undertaken in tenements. Although these lie beyond the scope

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[94] DMS rules 8(e), 9 and 12.3.
[95] DMS rule 8(c).
[96] DMS rule 8(d).
[97] DMS rule 18.1.
[98] DMS rule 18.2.
[99] DMS rule 18.3. This rule allows the OA to approve the draft budget subject to specified variations or to reject the budget and have the manager prepare a revised draft budget. Specific rules are set out on bringing the budget back to the OA for approval and for the payment of service charges in the interim. See rules 18.3 to 18.5.
[100] DMS rule 20.1 and 20.2.
[101] DMS rule 20.3.
[102] DMS rule 21.2.
[103] DMS rule 21.3.
[104] The general rule is that the service charge will be the same for each unit owner (DMS rule 19.1) but the OA can vary this for particular owners (DMS rule 19.2).
[105] DMS rule 8(f). Both of these enforcement powers are subject to the qualification that the manager do so only where it is reasonable. Unit owners will only have a right to enforce the terms of a particular DMS scheme against each other if that is specified in the deed of application (or a variation to that deed) establishing the DMS. Where that right is included, members can only enforce if the failure to comply with the rule results in, or will result in, material detriment to the value or enjoyment of the member's ownership of the unit. DMS Order art 10.
[106] DMS rule 14.1. Emergency work is defined as "work which requires to be carried out to scheme property- (a) to prevent damage to any part of that or any other property; or (b) in the interests of health and safety, in circumstances in which it is not practicable to consult the manager before carrying out the work." (DMS rule 14.3). This is broadly the same definition as under the TMS. (TMS rule 7.3).
[107] DMS rule 14.2.

of the project, and would not be altered by anything in our provisional proposals, we think it may be useful for consultees if we briefly mention some of these powers here.

2.50 First, all buildings in Scotland are subject to minimum standards set out in legislation and generally enforceable by local authorities. Residential properties are subject to the tolerable standard,[108] which requires, among other criteria, that houses are structurally stable, watertight and satisfactorily insulated and do not pose health and safety risks by, for example, necessitating effective drainage systems for foul water. Non-domestic buildings are subject to a range of standards covering matters including structural integrity, fire safety and environmental matters.[109] In Chapter 1, we noted ongoing government work in connection with potential new standards in relation to housing, and to the energy efficiency of all buildings. If these standards are introduced, new enforcement regimes may also be introduced.

2.51 Local authorities have a range of powers in relation to enforcement of these standards, summarised in a digestible format by the Scottish Parliament Information Centre (SPICe) in their briefing on "Flats: management, maintenance and repairs".[110] Most importantly for the purposes of the current project, local authorities can impose a work notice under sections 30-32 of the Housing (Scotland) Act 2006 requiring an owner or owners to bring a property into a reasonable state of repair in line with the tolerable standard or where there is a risk to health and safety.[111]

2.52 The local authority also has powers to pay missing shares of the cost of common repair works in tenements, under section 50 of the 2006 Act in the unusual case where owners have set up a maintenance account for the tenement, or under section 4A of the 2004 Act as mentioned above. It should be noted that although local authorities are empowered to make provision to this effect, they are not obliged to do so. A report prepared for the Scottish Government in 2016[112] suggests most authorities do not offer a missing shares scheme. Where a local authority covers a missing share, it may register a charge against property owned by the defaulting owner which obliges the owner to repay the amount owed in instalments to the local authority over thirty years.[113]

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[108] Housing (Scotland) Act 1987 s 86(1) as amended by Housing (Scotland) Act 2006 s 11. Where the owner wishes to lease the property to a residential tenant, a higher standard known as the repairing standard will apply: Housing (Scotland) Act 2006 ss 12-13. Alternatively, if the owner is a local authority or housing association using the property as social housing, the even more stringent Scottish Housing Quality Standard will apply as required by the Scottish Social Housing Charter, introduced under the Housing (Scotland) Act 2010 s 31.

[109] Building (Scotland) Regulations 2004 ss 9-12 and Schs 5-6. The Scottish Government publish technical handbooks on how to meet these requirements, with the latest handbook for use from 1st April 2024 available at https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2023/12/building-standards-technical-handbook-april-2024-non-domestic/documents/building-standards-technical-handbook-april-2024-domestic/building-standards-technical-handbook-april-2024-domestic/govscot%3Adocument/2024%2B04%2BNon-domestic%2BTechnical%2BHandbook%2B-%2BComplete.pdf.

[110] SPICe, *Flats: Management, Maintenance and Repairs* (SB 21-59) (2021) pp 45-49 available at https://bprcdn.parliament.scot/published/2021/9/9/e001b7a4-97b4-11e7-b57f-000d3a23af40/SB%2021-59.pdf.

[111] The City of Edinburgh Council has powers to serve notices requiring tenement repairs to be carried out by owners, failing which the council can carry the repairs out and recover the costs incurred: City of Edinburgh District Council Order Confirmation Act 1991 Part VI.

[112] SPICe, *Flats: Management, Maintenance and Repairs* (SB 21-59) (2021) p 51.

[113] Housing (Scotland) Act 2006 s 172.

Owners' associations – our proposed scheme

2.53 In the remainder of this Paper, we set out our provisional proposals for implementation of the Working Group recommendation that tenements in Scotland should have owners' associations.

2.54 Chapters 4 to 6 of the Paper focus on the OAs themselves. These chapters suggest the introduction of new, mandatory provisions into the main body of the 2004 Act. The new sections would create an OA for every tenement, and provide that a person would be a member of the OA when they owned a flat in the tenement. The new sections would impose certain mandatory duties on the OA to ensure it functions at a minimum level, including a duty to appoint a manager. The new sections would also cover some basic matters concerning the operation of the OA, including whether it should have to provide a public record of its name, address and membership, how it could sign documents and so on. Chapters 12 and 13 of the Paper consider the insolvency of the OA, and how it can be terminated and its assets wound up. Provisions on these matters, if necessary, are likely to be mandatory and form part of the main body of the 2004 Act also.

2.55 Chapters 7 to 10 of the Paper focus on the Owners' Association Scheme (OAS). The OAS would replace the TMS as the fallback rules for management of tenement maintenance in circumstances where the property titles are silent or incomplete. In broad terms, under the default rules which we propose, the OA would have the power to take the sort of actions currently dealt with as scheme decisions under the TMS. The OA could exercise these powers where members decide it should do so. Members would make decisions following a similar process to that under the TMS, with the addition of a new, mandatory requirement for a general meeting of members to be held once a year.

2.56 Members would also be under a mandatory duty to appoint a manager to exercise the powers of the OA on a day-to-day basis. The manager could be one of the flat owners or a professional factor, and would operate as an agent of the OA. The OAS would set out the default rights and responsibilities of the manager, which could be modified by owners in the flat titles if they wish. Members would continue to be liable for the costs incurred in relation to maintenance, with the default rules on liability in the OAS similar to those in the TMS. However, an important difference is that the process of planning for and paying maintenance costs will in future have to be arranged through an annual budget process and payment of a service charge. The duty to approve an annual budget will be mandatory, as will an owner's liability for costs (as at present). The default rules on how the budget process should operate as set out in the OAS could be modified by members in their flat titles if they wish.

2.57 Finally, Chapter 11 of the DP looks at enforcement of tenement maintenance obligations. This Chapter considers the existing, mandatory duties imposed on owners in the main body of the 2004 Act (particularly the section 8 duty to maintain property so as to provide support and shelter) and also looks at obligations which will arise under the management scheme applicable in the tenement. It considers whether the manager of the OA should have enforcement powers in relation to these obligations, and consults on whether tenement disputes should in future be heard by the Housing and Property Chamber of the First-Tier Tribunal rather than in the sheriff court.

2.58 In short, our provisional proposals would be likely to result in: (i) new sections being inserted into the main body of the 2004 Act; and (ii) the replacement of the TMS with the OAS in the first schedule to the 2004 Act. The proposals would not result in any changes to the DMS, or to the powers currently available to local authorities in connection with tenement maintenance.

2.59 In the next Chapter, we consider the human rights framework applicable to any legislation introducing the OA regime, and explain how this has influenced the development of our proposals.

Chapter 3 Human rights implications

Introduction

3.1 This Chapter considers the human rights framework with which legislation introducing OAs must comply. It provides an overview of relevant legislation, explains how the human rights of flat owners and others may be engaged by the introduction of OAs and sets out how our provisional proposals for reform have been influenced by consideration of the human rights issues.

3.2 Human rights are held by individuals not against other individuals, but against the state, represented by the government and other public authorities. The UK is signatory to a number of international human rights instruments.[1] However, to date, only the rights contained in the European Convention on Human Rights (ECHR) have been directly incorporated into domestic law, meaning that a person can raise proceedings for a breach of these human against a public authority in the Scottish courts. Rights contained in the United Nations Convention on the Rights of the Child (UNCRC) will also form part of domestic law when the UNCRC Incorporation (Scotland) Act 2024 comes fully into force, which is due to occur in July 2024. Accordingly, we focus on these two instruments in our discussion here.

3.3 The Chapter is not intended to provide a comprehensive account of human rights law in Scotland,[2] but we hope it may be of assistance to consultees who are less familiar with the operation of human rights in this area. We do not ask any consultation questions in this Chapter.

European Convention on Human Rights

ECHR rights in domestic law

3.4 The European Convention on Human Rights (ECHR) provides citizens of the states which have signed the Convention with a series of civil and political rights. These rights have been incorporated into Scottish domestic law by the Human Rights Act 1998 and the Scotland Act 1998. The Human Rights Act 1998 requires legislation passed by the UK Parliament to be given effect to in a way that is compatible with Convention rights.[3] If it is not possible to apply the legislation in a Convention-compliant manner, courts in any part of the UK may make a "declaration of incompatibility" in relation to the legislation in question.[4] A fast-track procedure can then be followed by the UK Parliament to amend the legislation as necessary to bring it

[1] A timeline of key instruments in Great Britain can be found on the website of the Equality and Human Rights Commission at https://www.equalityhumanrights.com/human-rights/what-are-human-rights/history-human-rights-britain.
[2] For a book-length treatment, see R Reed and J Murdoch, *Human Rights Law in Scotland* (4th ed, 2017).
[3] Human Rights Act 1998 s 3.
[4] Human Rights Act 1998 s 4.

into compliance.[5] In addition, any act by a public authority which is not compatible with Convention rights will be unlawful.[6]

3.5 Legislation passed by the Scottish Parliament is subject to more stringent controls under the Scotland Act 1998. First, the UK government may prohibit any Bill passed by the Scottish Parliament being presented for Royal Assent[7] if the Bill is incompatible with the UK's international obligations, including those in the ECHR.[8] Second, legislation enacted by the Scottish Parliament which cannot be given effect to in a Convention-compliant manner is considered to be beyond the competence of the Parliament and therefore "not law".[9]

3.6 Convention rights can also be enforced directly by individuals against the UK or Scottish public authorities by raising proceedings in the domestic courts.[10] Where a person has exhausted their rights of appeal domestically, they may be permitted a further appeal to the European Court of Human Rights in Strasbourg.[11]

Article 1 of the First Protocol to the ECHR

3.7 For the purposes of this project on tenement law, the most important human right under consideration is set out in Article 1 of the First Protocol to the ECHR (A1P1). A1P1 provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Where a person owns a flat, that is a possession. Legislation introducing OAs will change the rights and responsibilities which result from owning a flat. That is an interference with a flat owner's peaceful enjoyment of their possession.

3.8 Action by the state which interferes with or engages a human right will not necessarily breach that human right. In human rights terms, A1P1 is described as a relative right, rather than an absolute right.[12] This means that the state can take action which engages that right, provided that the action meets the requirements set out in the relevant article of the ECHR.

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[5] Human Rights Act 1998 s 10 and Sch 2.
[6] Human Rights Act 1998 s 6. "Act" here is defined to include "omission". Scottish public authorities are subject to an equivalent duty under the Scotland Act 1998 s 57.
[7] Royal Assent is the final stage in the process of creating new legislation in the UK, and occurs after a Bill has been passed by the UK Parliament or any of the devolved legislatures, including the Scottish Parliament. Without Royal Assent, legislation cannot be brought into force. A short guide to the legislative process is available on the Scottish Parliament website at https://www.parliament.scot/bills-and-laws/about-bills/how-a-bill-becomes-an-act.
[8] Scotland Act 1998 s 35.
[9] Scotland Act 1998 s 29.
[10] Human Rights Act 1998 s 7.
[11] European Convention on Human Rights art 35(1).
[12] Few human rights are absolute, but one example is the right to freedom from torture and inhuman and degrading treatment set out in article 3 of the ECHR. This means that there are no circumstances in which the use of torture by the state can be justified.

3.9 Over time, the European Court of Human Rights and the UK courts have developed a framework for determining whether action by the state which engages the right to peaceful enjoyment of possessions meets the requirements set out in A1P1. Where the requirements have been met, there will be no breach of A1P1. Where the requirements have not been met, there will be a breach of A1P1, meaning that (for example) the Holyrood legislation which caused the breach is "not law", or that an individual who has suffered loss as a result of the breach may be entitled to damages.

3.10 The court will start by determining whether the state action complained of has interfered with the peaceful enjoyment of the applicant's possessions. An interference can fall within one of "three rules": a deprivation of the possession in question;[13] a control of the use of that possession; or a more general interference with the peaceful enjoyment of possessions.[14]

3.11 The court will then determine whether the interference is justified in terms of the requirements of A1P1 by asking three further questions. First, is the action by the state lawful?[15] Here, the court will be looking to see that the action taken by the state has a clear basis in legislation or another source of law, rather than being an arbitrary misuse of power by a Parliament, government or other public authority. Second, does the action by the state pursue a legitimate aim in the public interest?[16] In addressing this question, the court will acknowledge the legitimacy of a democratically elected Parliament determining what is in the public interest and legislating to that effect. The court will accept the state's assessment of what is in the public interest unless it is "manifestly without reasonable foundation."[17]

3.12 Finally, is the interference proportionate in that it strikes a fair balance between the needs of the state and the rights of the applicant without imposing an individual and excessive burden on them?[18] The UK courts will consider four factors when reviewing the proportionality of state action:[19]

i. Whether there is a legitimate aim which could justify a restriction of the relevant protected right;

ii. Whether the measure adopted is rationally connected to that aim;

iii. Whether the aim could have been achieved by a less intrusive measure;

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[13] A deprivation might occur *de jure* ("at law"), meaning that legal title to the possession is transferred away from the former owner to someone else, or *de facto* ("in fact"), meaning that the owner still has legal title, but action by the state has removed the rights that would usually be associated with ownership to such an extent that the legal title has become meaningless: *Sporrong and Lönnroth* v *Sweden* (1983) 5 EHRR 35 at para 63.
[14] *Sporrong and Lönnroth* v *Sweden* (1983) 5 EHRR 35 at para 61.
[15] *James* v *UK* 1986 8 EHRR 123 at [64]-[66]; Reed and Murdoch, *Human Rights in Scotland* para 8.24-8.26.
[16] *James* v *UK* 1986 8 EHRR 123 at [46]-[49]; Reed and Murdoch, *Human Rights in Scotland* para 8.27-8.28.
[17] *James* v *UK* 1986 8 EHRR 123 at [46].
[18] *James* v *UK*, 1986 8 EHRR 123 at [50]; Reed and Murdoch, *Human Rights in Scotland* para 8.29-8.31.
[19] *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3, [2015] AC 1016 at [45]; *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 at [90]; *Scottish Association of Landlords and others v Lord Advocate and Scottish Ministers* [2023] CSOH 76, 2023 SLT 1179 at [16] and [50].

iv. Whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.

When considering the aim of the legislation during the proportionality review, the court may apply a stricter standard of scrutiny than it did earlier in the A1P1 assessment, but the views of the legislature are still likely to carry significant weight in the balancing exercise.

A1P1 and the OA legislation

3.13 It seems uncontroversial to suggest that legislation introducing OAs will engage the rights of flat owners under A1P1 by controlling the use of their possessions.[20] This control of use will be lawful, on the assumption that relevant legislation will be enacted by the UK or Scottish Parliaments following the usual legislative process, and that any action by a public authority (such as a local authority or a court) applying that legislation will follow the requirements set out in that legislation. The control of use will almost certainly be considered to pursue a legitimate aim in the public interest, in the sense that the clear policy ambitions animating the proposed introduction of OAs[21] would seem to exclude any argument that the reform is "manifestly without reasonable foundation".

3.14 The central issue in terms of the A1P1 compliance of the OA regime is therefore likely to be proportionality. Notwithstanding the potentially stricter scrutiny applied to the public interest test during the proportionality review, it seems likely that the aim of the OA regime would be considered legitimate. An assessment of the public interest being served by changes in the tenement maintenance regime invites consideration of other human rights which may be impacted where buildings are poorly maintained.[22] The policy discussions surrounding the recommendation that OAs should be introduced emphasise the connection between improved building maintenance and the reduction in greenhouse gas emissions.[23] One aim of the OA regime is to support the achievement of "net zero", in line with the rights of all persons in Scotland, and particularly children,[24] to the highest attainable standard of physical and mental health.[25] Such considerations are obviously weighty. The fact that any legislation will have been subject to extensive debate during its development, not least including the consultation process carried out through this Paper, is likely to support the argument that it has a legitimate aim.[26] There also seems little doubt that the introduction of OAs is rationally connected to the aim of improving building maintenance, and more broadly of reducing climate emissions.

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[20] For consideration and rejection of the argument that legislation introducing OAs may be considered a deprivation of possessions, see F McCarthy, "Making Scottish apartment law sustainable" in M Habdas et al (eds) *Rethinking Expropriation Law IV: Takings for Climate Justice and Resilience* 267-290 at 283-287.
[21] See the discussion at 1.5-1.20.
[22] In cases brought under the Human Rights Act 1998, where there is a sufficiently close connection between a Convention right and an international treaty obligation, the court must have regard to that obligation in interpreting the Convention right: *R (on the application of JS) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 at [137]. See also *Moohan, Petitioner* [2014] UKSC 67, [2015] AC 901 at [63]-[64] and [78].
[23] See particularly the discussion at 1.18-1.20.
[24] *United Nations Convention on the Rights of the Child* art 24.
[25] *International Covenant on Economic, Social and Cultural Rights* art 12. The European Court of Human Rights is currently considering whether a failure by states to take action to reduce greenhouse gas emissions is a breach of rights under the ECHR, including a contended positive obligation on states under A1P1 to take action in this respect: *Duarte Agostinho and others v Portugal and others* App No 39371/20.
[26] *R (on the application of Countryside Alliance)* v *Attorney General* [2007] UKHL 52, [2008] 1 AC 719 at [40].

3.15 The final two questions in the proportionality review may turn on a more granular consideration of the detail of any legislation eventually introduced, and the effect of the application of that legislation in individual cases. Here, it is useful to consider the types of factors that the court has found relevant in assessing the fair balance of legislation in other cases.

3.16 The court will take into account the extent to which the impact of any interference with a Convention right has been mitigated by measures put in place by the state to facilitate a change in legal position. In this respect, the long period of time over which the proposed changes to tenement law have been developed and publicly debated are likely to weigh in favour of a fair balance, since owners have arguably been put "on notice" that a change is likely to occur.[27] The court will also consider the extent of any support made available to owners by government in respect of the introduction of OAs, for example in terms of education and training, professional advice or funding.[28] Additionally, it may be argued that flat owners will, in some respects, benefit from the introduction of the OA regime which is intended to make maintenance of the building which they own, and perhaps live in, easier and more efficient. Any benefits received through the interference with a Convention right will also be relevant to the fair balance question.[29]

Other relevant rights under the ECHR

3.17 The relevance of other Convention rights to the project is more limited, but some rights may play a role. In particular, the right to respect for the home will require to be taken into account where any debt enforcement mechanism allowing for forced sale of a flat is introduced. We consider this further in Chapter 11.[30]

United Nations Convention on the Rights of the Child

UNCRC Incorporation (Scotland) Act 2024

3.18 It is anticipated that rights arising under the UNCRC will also be directly incorporated into Scots law if and when the Scottish Parliament considers legislation introducing the OA regime in future. The majority of the provisions in the UNCRC Incorporation (Scotland) Act 2024 are due to come into force on 16th July 2024.[31] After that date, legislation enacted by the Scottish Parliament which is found by a court not to be compatible with UNCRC requirements may be subject to a strike-down declarator[32] (meaning that the words specified in the declarator cease to be law) or to an incompatibility declarator[33] (meaning that Scottish Ministers must report to the Parliament on the steps they intend to take in relation to the incompatibility within six months of the declarator).[34] Any act by a public authority which is not compatible with UNCRC rights will be unlawful.[35] It will also be possible for individuals to

[27] *Ian Edgar (Liverpool) Ltd* v. *United Kingdom* App no 37683/97 (ECtHR, 25 January) (admissibility).
[28] *Fredin v Sweden* (1991) EHRR 784.
[29] *Katikardis v Greece* (2001) 32 EHRR 6.
[30] See 11.49-11.55.
[31] UNCRC Incorporation (Scotland) Act 2024 s 47.
[32] UNCRC Incorporation (Scotland) Act 2024 s 25.
[33] UNCRC Incorporation (Scotland) Act 2024 s 26.
[34] UNCRC Incorporation (Scotland) Act 2024 s 28.
[35] UNCRC Incorporation (Scotland) Act 2024 s 6.

enforce UNCRC rights directly against Scottish public authorities by raising proceedings in the domestic courts.[36]

Relevant rights

3.19 Rights under the UNCRC are likely to have less immediate significance for the project than those under the ECHR, in the sense that children generally do not own flats or have responsibility for maintenance decisions or costs. However, as noted above, improved tenement maintenance may support the right of the child to the highest attainable standard of health,[37] either directly where the child lives in a tenement flat or indirectly through the reduction in climate emissions linked to improved building maintenance. Separately, the child's right to protection from arbitrary or unlawful interference with their home should be taken into account in consideration of debt enforcement measures involving forced sale of tenement flats, considered further in Chapter 11.[38]

Approach to reform

3.20 Consideration of the human rights issues outlined above has influenced the development of our provisional proposals for implementation of the OA regime. In particular, we have taken careful account of what will be required to ensure the proportionality of any new legislation as a whole, and also as that legislation applies in individual cases.

3.21 The proportionality assessment adopted in the domestic courts queries whether the aims of the legislation could have been achieved by a less intrusive measure. In our provisional proposals, we have aimed to minimise the interference with the rights of owners to the greatest extent possible whilst ensuring the OA regime is nevertheless effective. That concern underlies our suggestion that mandatory duties imposed by the legislation should be limited.[39] It has influenced our provisional recommendation that the majority of the scheme should operate as "default" or background law, as with the current TMS.[40] It has also led us to seek consistency with the current position of owners even within that background law, unless there is a clear justification for a change, an issue which crops up repeatedly in our consideration of possible OAS rules in Chapters 7 to 10.

3.22 Separately, we have taken account of the need for a fair balance to be struck in individual cases. In this respect, we have sought to ensure that, as under current law, the impact of decisions or actions by the OA on an individual flat owner can be considered by the court, which is directed to take into account the best interests of all the owners in a tenement together with any unfair prejudice to one or more of the owners.[41] We have also considered how the process of enforcing those rights might be streamlined, including through consultation on whether a change of forum may be appropriate,[42] and whether alternative dispute resolution processes may play a role.[43]

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[36] UNCRC Incorporation (Scotland) Act 2024 s 7.
[37] UNCRC art 24.
[38] See 11.49-11.55.
[39] See 4.3-4.20.
[40] See 4.44.4-53.
[41] See 8.67-8.76.
[42] See 11.32-11.40.
[43] See 11.41-11.45.

3.23 We give further consideration to more specific issues in connection with human rights where they arise throughout the Paper.

Chapter 4 Legislative framework: mandatory and default aspects

Introduction

4.1 The Working Group recommended the introduction of owners' associations (OAs) for tenements in Scotland. In this Chapter, we consider the framework of legislation required to implement this recommendation. Our provisional view, on which we consult below, is that implementation will require legislation with two facets. First, the legislation will have to include certain mandatory elements. We use the term "mandatory" here to mean elements which cannot be disapplied or modified through provision in the tenement titles or other means.[1] The mandatory elements of the legislation will create a new legal entity for every tenement[2] through which maintenance of the common parts of the building must be coordinated,[3] and impose certain duties to ensure the effective operation of that entity. We consult below on the suggestion that these elements of the legislation should be enforceable not only by members of the OA, but by other parties including the local authority. Second, the legislation must also include a non-mandatory set of rules governing the operation of the OA, covering issues such as voting rights and liability for costs. These rules will generally operate as background law, regulating the operation of the OA where alternative provision has not been made in the tenement titles.[4] We refer to these non-mandatory rules as "the OA Scheme" or "OAS".

4.2 In this Chapter, we first consider the mandatory aspects of the legislation, including which mandatory duties should be imposed on the OA and how they might be enforced. We then consider why we think the remaining provisions of the legislation must be non-mandatory, and explore how the default rules which make up the OA Scheme should interact with existing and future provision in tenement titles. Finally, we ask whether the drafting of tenement title conditions related to maintenance (including existing conditions) should be standardised to make it easier for flat owners to understand the rules applicable in their tenement. We seek the views of consultees throughout.

Mandatory aspects of the legislation

4.3 The key purpose of the OA legislation is to regulate the way in which maintenance of tenements is managed. The current law provides a framework within which flat owners may take and enforce decisions in relation to maintenance of common parts of the building. The extent to which the law compels owners to make use of this framework is limited. Owners have a duty to maintain their property so as to provide support and shelter to other parts of the

[1] Mandatory elements of the current law include the duty on flat owners to maintain their property so as to provide support and shelter to other parts of the building under the Tenements (Scotland) Act 2004 s 8, and to insure their property under the 2004 Act s 18. For further discussion see 2.6-2.7.
[2] We consult on circumstances in which tenements may not be required to have an OA at 5.24-5.45.
[3] We consult on which parts of the building should be "scheme property" and therefore maintained by the OA at 6.29-6.36.
[4] This mirrors the non-mandatory nature of the TMS under current law.

building.[5] However, since this duty can be enforced only in the face of an intended or actual breach, it does not serve to foster a proactive approach to maintenance. In addition, this duty is generally enforceable only by other owners in the building,[6] meaning that breaches may be left unaddressed where those owners are indifferent or lack the wherewithal to take action.

4.4 The OA regime recommended by the Working Group aims to address these difficulties by compelling flat owners to take action in three main ways.[7] First, the regime requires every OA to appoint a manager tasked with responsibility for maintenance of the building. Second, the regime requires members to meet at least once per year, with this meeting providing an opportunity to plan future maintenance works.[8] Third, the regime requires a budget for future maintenance works to be prepared on a regular basis.[9] These requirements form the core of the mandatory provisions we think the OA legislation must contain.

Human rights issues

4.5 The mandatory aspects of the regime outlined above are novel in tenement law. Under current law, flat owners are free to choose how maintenance is managed. The 2004 Act does not require them to have a manager, attend an annual meeting with other owners or be bound by a budget.[10] Provision for organising maintenance by way of an owners' association in some form was relatively unusual within the title conditions we surveyed for this project.[11] Legislation imposing these measures will clearly engage the rights of flat owners under A1P1 by controlling the way in which they manage maintenance of their shared property. However, a strong argument can be made that this control of the use of possessions is justified.

4.6 As we discussed in Chapter 3,[12] the focus of any A1P1 challenge to legislation introducing the OA regime is likely to be the four-step proportionality assessment. Considering the first step in that assessment, there seems little doubt that the regime has a legitimate aim in seeking to improve the condition of the tenement stock. The declining state of tenements has been clearly evidenced over a period of years and has formed a focus of concern for stakeholders for some time.[13] The regime also aims to facilitate the potentially larger-scale renovation works required to improve the energy efficiency of tenements, which is essential if Scotland is to meet its "net zero" targets.[14] The second step in the proportionality assessment

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[5] Tenements (Scotland) Act 2004 ss 8-10; see discussion at 2.6.
[6] The local authority is empowered to take enforcement action in certain circumstances, but such action is rare: see 2.51-2.52.
[7] This understanding is drawn principally from the characteristics of the OA described in the Final Recommendations Report at p 6.
[8] The Working Group noted the value that informal owners' associations under current law can have in bringing owners together and considered that OAs should operate such as to "prevent absent or apathetic owners holding up repairs": Final Recommendations Report p 6.
[9] The Working Group suggested "an annual repair plan and budget": Final Recommendations Report p 6.
[10] Some flat titles may make provision for management along these lines, which the owner consents to be bound by when taking ownership, but the provisions are not imposed by legislation or the common law.
[11] See Appendix B para 31.
[12] See 3.7-3.16.
[13] Graham Simpson MSP referred to many tenements as being at a "condition cliff edge": Interim Recommendations Report p 2; Douglas Robertson claimed that "Scotland seems reluctant to address the serious disrepair problem re-emerging within its flatted housing stock." D Robertson, "Why Flats Fall Down" (2019); In its response to the Working Group's recommendations, Scottish Government agreed that "action is needed to improve the conditions of our tenements" Scottish Government, Response To Recommendations In The Final Report Of The Scottish Parliamentary Working Group On Tenement Maintenance (2019).
[14] Final Recommendations Report p 3.

asks whether the measure adopted is rationally connected to the purported aim, which seems inarguably the case as regards the introduction of the OA regime.

4.7 The third step in the proportionality assessment asks whether the aim of the legislation could be achieved by a less intrusive measure. An obvious comparison in this respect is the status quo, where mandatory obligations on owners are minimal, enforcement rights in relation to those obligations are held by a limited pool of people, and the condition of tenement stock is in decline. Some intervention is clearly necessary. Consideration of the position in comparator countries reveals an almost universal acceptance that a central organising body is essential to the proper maintenance of apartment buildings.[15] In our research, we have not identified an alternative, less intrusive model of maintenance which appears to be effective. The ubiquity of the owners' association model in other jurisdictions might also provide an argument that the introduction of such a model here should not be regarded as an overly intrusive control of flat owners' possessions.

4.8 Finally, the proportionality assessment asks whether, on a fair balance, the benefits of achieving the aim by the measure in question outweigh the disbenefits resulting from the restriction of the relevant protected right. The benefits of the introduction of the OA regime could be significant in two respects. First, improving the condition of the tenement stock including its energy efficiency will be beneficial to Scottish society as a whole, not least in terms of progress towards net zero. Such measures are important in preserving and promoting the rights to life and to private and family life of everyone in the country. Second, the regime will also provide benefits to the affected flat owners themselves by facilitating maintenance of the building in which they live. The disbenefits in practice are likely to be the resource implications of the regime for owners. The requirement to appoint a manager will impose an administrative burden on owners who choose to self-manage, or a financial burden on owners who employ a professional in this role.[16] It seems reasonable to suggest that this burden will not inevitably outweigh the benefits of the regime. Many flat owners already accommodate the expense of a professional factor or property manager, and it can be argued that it is only possible for owners to avoid both administrative and financial costs in this respect at present by neglecting maintenance of their building.

4.9 If the legislation will not necessarily fail the final step in the proportionality assessment (in other words, if it is possible to implement the legislation in a way which allows it to satisfy this test), this is sufficient to suggest the interference with owners' rights under A1P1 caused by the introduction of the legislation can be justified.

4.10 The focus in these paragraphs has been on the A1P1 compliance of the introduction of the OA regime as a whole. The legislation itself may meet the requirements of A1P1 where the court considers it possible for the legislation to be applied in a proportionate manner, yet breach the rights of an individual owner under A1P1 because the legislation has not, in fact, been applied in a proportionate manner in that particular case. Later in the Discussion Paper,

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[15] See generally van der Merwe, "Apartment Ownership" paras 47-48. Influential examples from other jurisdictions include the French *syndicat* (now regulated by Loi No 65-557 of 10 July 1965) and the strata owners' corporation in New South Wales, Australia (currently regulated by the Strata Schemes Management Act 2015). Under commonhold tenure, an apartment (or development) ownership regime introduced in England and Wales by the Commonhold and Leasehold Reform Act 2002, ownership of a flat includes membership of the commonhold association for the relevant apartment building or development.

[16] We consult on whether there should be restrictions on persons who may act as an OA manager at 9.19.

we suggest measures to ensure the proportionality of the application of the legislation to individuals, including conferring a right on an owner to challenge a decision of an OA where it causes the owner undue hardship. This would mean, for example, an owner could challenge the appointment by the OA of an expensive professional manager where an alternative charging more moderate fees would suffice for the needs of the tenement in question.

Which mandatory duties should be imposed?

4.11 In line with the recommendations of the Working Group, OAs will be brought into existence by way of legislation, without the need for any action to be taken on the part of flat owners. The risk of this approach is that the OA may exist "on paper" whilst being non-functional in reality. To address this risk, we consider that the OA must be subject to mandatory duties which ensure its operation. The legislation cannot allow for such duties to be disapplied by way of provision in the tenement titles, since this would effectively enable owners to contract out of the regime entirely.[17] It must also be possible for such duties to be enforced by persons other than owners of flats in the tenement or the manager of the OA, and below we consider how a remedial management scheme may operate in this respect. Without third party enforcement powers, the collective indifference or lack of capacity of flat owners will again result in a non-functioning OA. Legislation which allowed for this outcome would not fully implement the recommendation of the Working Group.

4.12 In considering which mandatory duties would be appropriate, we have focused on the minimum actions required to ensure the basic operation of the OA. A minimalist approach of this kind maintains the freedom of flat owners to the greatest extent possible within the limits of the Working Group's recommendation. With this policy aim in mind, we provisionally propose the imposition of four duties.

Duty to appoint a manager

4.13 First, the OA should have a duty to appoint a manager. The manager will be the person tasked with the day-to-day operation of the OA as discussed in detail in Chapter 9. Without a manager, it will be challenging or impossible for the OA to function. For tenements currently in existence, the duty to appoint a manager will arise when the OA is created through the entry into force of the relevant legislation. For tenements constructed following the introduction of the legislation, the duty to appoint a manager will arise when the OA is created following approval of the building completion certificate, as discussed in Chapter 6.[18] Where a manager resigns, dies or is dismissed, a new manager will be required.

4.14 In the interests of certainty, legislation should set a time limit within which a manager must be appointed when the role is vacant. We suggest six months as an appropriate period, taking into account the responsibility of the manager to arrange a members' meeting at least once every 12 months, as discussed below.

[17] We consult on whether it should be possible for the scheme to be disapplied from tenements in certain circumstances at 5.34, 5.36, 5.40, 5.43, and 5.45.
[18] See 6.18-6.21.

Duty to comply with registration requirement

4.15 Secondly, the OA should have a duty to comply with any relevant registration requirement. We consult on the detail of a potential registration requirement in Chapter 5. In brief, although an OA does not require registration of any deed to exist, we suggest a public record of the OA's name, address and the title numbers of the flats it represents may be necessary from an administrative perspective.[19] If consultees support the inclusion of a registration requirement in the legislation, our provisional view is that it would be appropriate for compliance with that requirement to be a mandatory duty. Administrative registration, if required, will be important for the overall functioning of the OA. Allowing for third party enforcement action would be appropriate to address circumstances in which the members and any manager of the OA have failed or refused to register.

Duty to hold annual general meeting

4.16 Thirdly, the OA should have a duty to hold an annual general meeting of members. The absence of any mechanism within the existing law to encourage (or compel) owners to coordinate with one another on maintenance of the building positions Scotland as an outlier internationally.[20] It has been highlighted as a significant disadvantage of our legislation in written commentary on tenement law.[21] The requirement to hold an annual meeting is the key mechanism within the new regime supporting owners to act as a collective. It should be noted that the OA may be able to make decisions without an annual meeting. In Chapter 8, we consult on the extent to which decision making by way of consultation with members as and when the need arises should be possible.[22] If consultees support the continuation of the power of flat owners to make decisions in this way, a manager could be appointed and a budget put in place without the need for a meeting. In this sense, the annual meeting may not be considered essential to the functioning of the OA. However, the intention to foster a sense of collective responsibility for the tenement appears to be a key element of the Working Group's recommendation, and the annual meeting may be seen as integral to the functioning of the OA in that respect. Accordingly, our provisional view is that a mandatory duty to meet is appropriate.

4.17 In the interests of certainty, it may again be useful to clarify the time limits for the holding of such meetings. The DMS requires a first annual meeting to be held within 12 months of the creation of the DMS owners' association.[23] After that, no more than 15 months are allowed to elapse between meetings.[24] These rules followed equivalent provision for annual general meetings of shareholders in company law.[25] Subject to the views of consultees, we suggest similar provision would be appropriate for meetings of members of the OA.

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[19] See 5.2-5.23.
[20] See generally van der Merwe, "Apartment Ownership*"* paras 333 and 360.
[21] D Weatherall, F McCarthy and S Bright, "Property law as a barrier to energy upgrades in multi-owned properties: insights from a study of England and Scotland" (2018) 11(7) *Energy Efficiency* 1641-1655 at 1650.
[22] See 8.58-8.62. Consultation is a procedure for making decisions outwith formal meetings. It may take the form of going door-to-door to collect votes or using email correspondence, for example.
[23] DMS rule 9.1.
[24] DMS rule 9.2.
[25] Companies Act 2006 s 336.

Duty to approve an annual budget

4.18 Finally, the OA should have a duty to approve an annual budget dealing with projected maintenance works in the coming year. We give more detailed consideration to the content of the budget in Chapter 10.[26] As with the annual meeting, it may be possible for the OA to make decisions in respect of maintenance and secure payments from members by way of consultation only as and when the need arises. However, the introduction of a budgeting system is key to the systematic approach to maintenance the OA regime is intended to foster. For that reason, we again think a mandatory duty in this respect is justified. In Chapter 11, we suggest that the manager should have power to seek court approval for a budget covering essential work if such approval cannot be obtained from members.[27] If consultees support this approach, the manager could ensure the compliance of the OA with the duty to approve an annual budget even in the face of a recalcitrant membership.

Additional mandatory duties?

4.19 For the sake of completeness, we note the two recommendations of the Working Group which fall outwith the scope of the current project, namely to require five-yearly tenement maintenance inspection reports to be carried out and to require the establishment of a reserve fund for every tenement. The Scottish Government is committed to taking forward these recommendations separately from the current project.[28] Accordingly, we do not seek to address these recommendations here. We note, however, that the imposition of additional mandatory duties on the OA, enforceable as discussed below, may provide an appropriate mechanism for the implementation of these recommendations by government in due course.

4.20 We would be grateful for the views of consultees on the mandatory duties we provisionally propose above. We ask:

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?

[26] See 10.25-10.39.
[27] See 11.47-11.48. As discussed further in these paragraphs, “essential work” here would mean any work required to comply with owners’ duties to maintain the property under the 2004 Act s 8.
[28] See 1.5 - 1.9.

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

Enforcement of mandatory duties: remedial management

4.21 In the normal course of events, it is to be hoped that enforcement of the mandatory duties on the OA will not be necessary. The default rules set out in the remainder of this Discussion Paper confer on the OA, its members and the manager the powers to comply with these duties.[29] In most cases, the manager has a responsibility to members to take the relevant action,[30] and if the manager fails to do so, members may hold them to account or replace them.[31] In the unlikely event that a manager is prevented from taking action necessary to comply with the mandatory duties by members directing otherwise, we suggest that the manager should have the right to obtain the authorisation for necessary action from the court.[32]

4.22 The situation may arise, however, where a manager fails to meet their responsibilities, or where no manager is in post, and members of the OA are apathetic or absent. Where the OA fails to meet its duties in these circumstances, our provisional view is that the appropriate remedy would be the appointment of a remedial manager. The remedial manager's function would be to bring the OA back into compliance with its mandatory duties, with the remedial management process concluding through the appointment by the OA of a (non-remedial) manager. This suggestion adapts the recommendation of the Working Group that compulsory factoring should be the fallback position where an owners' association cannot be established or fails.[33] A remedial management remedy seems to us to capture the spirit of the Working Group's recommendation, whilst recognising that, in the regime proposed, the OA will exist by virtue of legislation even where it fails to function.

4.23 The appointment of a professional to manage a person's affairs when they have demonstrated a lack of capacity to do so is not unfamiliar in Scots law. A guardian may be appointed to make decisions in respect of the property, financial affairs or personal welfare of an adult who lacks capacity by virtue of Part 6 of the Adults with Incapacity (Scotland) Act 2000. A trustee in sequestration may be appointed to manage the estate of an insolvent human being in the interests of their creditors under Parts 1 and 2 of the Bankruptcy (Scotland) Act 2016, or a liquidator to manage the affairs of an insolvent company under Part 4 of the Insolvency Act 1986. In the context of crofts which share common grazings, a grazings constable may be appointed to manage and maintain the grazings where the crofters fail to appoint a committee to do so.[34] The rationales and objectives of these processes are, of course, quite distinct from one another, and from the aims that would underlie a remedial management process in the OA context. However, we have found the procedures by which professionals come to be appointed in such circumstances to be of some assistance when considering how a remedial manager might come to be put in place for an OA.

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[29] See generally Chapters 7-9.
[30] See 9.29-9.33.
[31] See 11.28-11.31. We also suggest that any member should have the power to organise a general meeting if the manager fails to do so: see 8.42.
[32] See 11.24-11.27.
[33] Final Recommendations Report p 8.
[34] Crofters (Scotland) Act 1993 s 47(3). We are grateful to Malcolm Combe for bringing this provision to our attention.

4.24 We seek views. We ask:

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

Who may act as a remedial manager?

4.25 First, it may be reasonable to suggest that the owner of any flat in the tenement should be entitled to seek appointment as the remedial manager. In Chapter 9, we consult on the proposal that it should be competent for a flat owner to be appointed as the (non-remedial) manager of the OA in the ordinary course of appointment, so that flat owners in tenements which wish to "self-factor" as at present may continue to do so.[35] In some tenements, there may be one engaged owner who is willing to act as the manager, but cannot rouse sufficient interest from neighbouring owners for a majority vote appointing them to the position. In such circumstances, the engaged owner may instead wish to seek appointment as a remedial manager by the court. A possible concern with this approach may be that remedial management becomes necessary only in difficult or dysfunctional tenements where a professional manager may be better qualified to act. However, it seems uncontroversial to suggest that some flat owners will hold the relevant skills to deal with difficult tenements, in addition to which we anticipate that the manager will have the power to engage professional assistance where necessary.[36] In principle we do not think there is a strong reason to prevent a flat owner taking on this role.

4.26 Other than in circumstances where the owner of a flat in the tenement seeks appointment, we think it would be sensible to provide that a person can be appointed as a remedial manager where they are entered on the Scottish Property Factor Register.[37] As discussed in more detail in Chapter 9,[38] a person can be entered on the Register only where they are a "fit and proper person"[39] as defined by the Property Factors (Scotland) Act 2011, and once registered, must comply with the Property Factors' Code of Conduct.[40] Requiring a remedial manager to be entered on this register should ensure that only a professional with the expertise necessary to bring the OA back into alignment with its mandatory duties can take on the role. This echoes the requirement for a trustee in sequestration[41] or a liquidator[42] to be a qualified insolvency practitioner.

4.27 We would be grateful for the views of consultees. We ask:

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?

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[35] See 9.12-9.19.
[36] See 9.17.
[37] The Register is available at https://www.propertyfactorregister.gov.scot/PropertyFactorRegister/.
[38] See 9.9-9.11.
[39] 2011 Act s 4(4)-(5).
[40] 2011 Act s 14(5). The Code of Conduct can be found here: https://www.gov.scot/publications/property-factors-scotland-act-2011-code-conduct-property-factors-2/.
[41] Bankruptcy (Scotland) Act 2016 s 51, and see also Insolvency Act 1986 Pt 13 in relation to insolvency practitioner qualifications.
[42] Insolvency Act 1986 s 230, and see also pt 13 in relation to insolvency practitioner qualifications.

How should a remedial manager be appointed?

4.28 The intention is that a remedial manager should be appointed when an OA has failed to meet its mandatory duties. Determining whether this is the case may involve legal as well as factual questions, for example there may be a dispute as to whether a (non-remedial) manager has been validly appointed. Accordingly, we think it may be appropriate to require a court order for appointment of a remedial manager. This mirrors the position in relation to sequestration triggered by a creditor, where the court must assess, among other things, whether the debtor meets the test of apparent insolvency in the meaning of the relevant legislation before a trustee in sequestration can be appointed.[43] It also mirrors the position in relation to appointment of a guardian, when the court is asked to determine, among other things, whether the vulnerable adult lacks capacity to the extent of the statutory test.[44]

4.29 In Chapter 11, we consult on whether disputes arising under the OA legislation should fall within the jurisdiction of the Sheriff Court, or the Housing and Property Chamber of the First-tier Tribunal.[45] Applications for appointment of a remedial manager should fall within the jurisdiction of the same court or tribunal as other disputes under the regime. For simplicity's sake, we continue to refer to the "court" as the appropriate forum in the discussion below.

4.30 We suggest that it should be possible for an application for the appointment of a remedial manager to be made by any person having an interest in the operation of the OA. Members of the OA would, of course, have an interest. Residents in the building who are not members of the OA, such as tenants, would also have an interest. Neighbours who are affected by poor maintenance, or who wish to coordinate with the OA on broader maintenance works, would also fall into this category.

4.31 The local authority for the area in which the tenement is situated would also have an obvious interest from the perspective of ensuring compliance with relevant building standards. Taking this a step further, however, we tentatively suggest that the local authority should act as an applicant of last resort in relation to remedial management. By this we mean that the local authority should be under a duty to apply to the relevant court for the appointment of a remedial manager in certain circumstances. Those circumstances would be where the local authority becomes aware of a failure by an OA to meet its mandatory duties, it seems likely that the court would grant the application,[46] and no other party has made (or is likely to make) an application for the appointment of a remedial manager. This mirrors the duty of local authorities to make an application for a guardianship order where one is required and it seems unlikely that an application will be made by any other party.[47]

4.32 We are conscious that requiring the local authority to act as an applicant of last resort would place a burden on local authority housing departments. We understand from early consultation for this project that housing departments are already under significant pressure and are likely to struggle to meet new responsibilities without additional resources. However, without such a backstop duty we are concerned that compliance with the OA legislation may effectively become voluntary. We also hope that the involvement of the local authority might,

[43] Bankruptcy (Scotland) Act 2016 s 13. For the meaning of "apparent insolvency" see s 16.
[44] Adults with Incapacity (Scotland) Act 2000 s 58(1).
[45] See 11.32-11.40.
[46] See 4.33.
[47] Adults with Incapacity (Scotland) Act 2000 s 57(2).

at least in some cases, help to resolve the issues which are preventing the OA complying with its duties without the need for recourse to the court. Questions in relation to local authority funding are beyond the scope of this project, but would doubtless have to be considered by the Scottish Government before the local authority could be given this role.

4.33 Any person with an interest should make an application to the appropriate court for a remedial management order in line with the relevant procedure, as discussed above. We would suggest that the court is empowered to make the order where: (i) the OA has failed to adhere to its mandatory duties as set out in legislation; and (ii) it is reasonable in all the circumstances of the case. The inclusion of the second limb of the test is designed to give the court discretion to consider any developments since the application for remedial management was made which may suggest the order is no longer necessary, for example if OA members were in the process of appointing a manager voluntarily. A court would be empowered to continue a case if appropriate to allow further time for voluntary compliance by the OA with its duties, before making a final determination as to whether a remedial management order is required.

4.34 We would be grateful for the views of consultees. We ask:

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

4.35 We also ask the following supplementary questions:

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?

4.36 We suggest that the person making the application for the appointment of the remedial manager should specify the name of the proposed remedial manager and confirm that person's willingness to act. This is similar to the processes in relation to the appointment of a guardian,[48] trustee in sequestration[49] or (interim) liquidator.[50] We recognise that identifying and taking forward discussions with a registered factor may be a challenge for an individual owner or other interested party entitled to make a remedial management application. However, we

[48] See Adults with Incapacity (Scotland) Act 2000 ss 57, 58(4)-(5) and 59.
[49] Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 (SSI 206/313) Sch 1, Form 6.1-A.
[50] Act of Sederunt (Rules of the Court of Session 1994) (SI 1994/1443) Sch 2, r 74.21(1)(e).

hope that the Government may put in place some support in this respect if legislation along these lines is ultimately enacted.

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

Remedial manager of last resort

4.37 It must be clear that no one can be forced to act as a remedial manager, just as no one can be forced to act as a trustee in sequestration or a guardian for an adult with incapacity. We note that, in those contexts, public bodies will step into the role if needs be: the Accountant in Bankruptcy must act as a trustee in sequestration in certain circumstances[51] and a local authority's chief social worker can be appointed as an adult's welfare guardian in the absence of another suitable appointee.[52] It would seem sensible to make similar provision for a remedial manager of last resort within the OA legislation.

4.38 The local authority once again seems the only body in a position to take on this role. Our comments in relation to impact on local authority functions and funding in paragraph 4.32 above apply here too, albeit that the cost of management services carried out by the local authority in this capacity should ultimately be recoverable from the OA members.

4.39 The question arises here of whether a local authority acting as a remedial manager of last resort should be regulated under the Property Factors (Scotland) Act 2011, which includes the requirement to comply with the Property Factors' Code of Conduct.[53] A local authority will generally be registered as a factor in terms of this Act, since it is common for a local authority to take on the factor's role in tenements containing a mixture of social and privately-owned flats, and registration is a prerequisite to acting as a factor in these circumstances. By default, the local authority acting as a remedial manager would therefore usually be required to adhere to the Code of Conduct. However, a reasonable argument can be made here that when a local authority is compelled to act as a remedial manager, the higher standards required of it when acting voluntarily as a factor or manager should be suspended. As a remedial manager of last resort, the local authority would owe the duties to owners which are owed by all managers under the OA legislation, as discussed below and in Chapter 9.[54] The absence of regulation under the 2011 Act in these circumstances would accordingly not leave owners unprotected. However, from a pragmatic perspective, exempting local authorities from the application of the 2011 Act when compelled to act as a remedial manager may ease the overall burden and cost of being allocated this role.

4.40 We seek views. We ask:

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[51] For example, where a sheriff does not appoint a particular person to be trustee in sequestration they must appoint the Accountant in Bankruptcy (Bankruptcy (Scotland) Act 2016 s 51(3) and (7)).
[52] Adults with Incapacity (Scotland) Act 2000 s 59(1). See also section 57 as regards the local authority's duty to apply for a guardianship order.
[53] The Code of Conduct was most recently revised in 2021 and can be accessed at https://www.gov.scot/publications/property-factors-scotland-act-2011-code-conduct-property-factors-2/.
[54] See 9.35-9.38.

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?

Function and powers of the remedial manager

4.41 The function of the remedial manager is to support the OA to meet its mandatory duties. They may exercise any of the powers normally attributed to managers under the OAS in the course of fulfilling this function. As mentioned above, we suggest this should include the right to seek authority from the court for a maintenance budget in circumstances where approval cannot be obtained from owners.[55] It might normally be anticipated that the remedial manager will call an annual meeting to deal in particular with (i) a budget prepared by the remedial manager, and (ii) appointment of a new (non-remedial) manager. The latter of these will bring the role of the remedial manager to an end. We would note that nothing should prevent the remedial manager from being appointed as the new (non-remedial) manager should that OA vote in favour of that appointment.

4.42 As with any manager of the OA, the remedial manager will owe duties, including fiduciary duties to the members of the OA, as discussed further in Chapter 9.

4.43 We ask:

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?

Non-mandatory aspects of the legislation: the OA Scheme

Mandatory vs default

4.44 Above, we considered the elements of the OA legislation which will create the OA and aim to ensure it functions at a basic level. We suggested these elements of the legislation should be mandatory. The OA legislation will also need to provide a set of rules on the operation of the OA, covering matters such as voting rights, liability for costs and enforcement

[55] See 11.24 to 11.27.

measures available to members. We refer to these rules as the OA Scheme or OAS.[56] Our provisional view is that these rules can operate only as a default or background law. They will apply to a particular OA only where provision has not already been made in the tenement titles to deal with the relevant issue. Although we recognise that this approach to regulation of tenement maintenance creates some challenges, our provisional view, explained further below, is that the practical and legal obstacles to a mandatory tenement law are insurmountable.

4.45 Tenements in Scotland have never been subject to a legislative code prescribing how maintenance should be addressed. In our Report on the Law of the Tenement, we summarised the historical development of law in this area, noting that tenements existed for quite some time before any system of law was developed to regulate them.[57] Since the 18th century, Scots law has recognised a conveyancing device known as a real burden, a type of title condition which allows for positive and negative obligations to be included in the title to a property and which bind any person who becomes the owner of that property.[58] As tenements were constructed over the following centuries, burdens or other conditions would be inserted into the titles of flats specifying the rights and obligations of owners towards one another in terms of maintenance. Which conditions were included was a matter for the builder or developer and their advisers, meaning that the rules in one tenement could be quite different from the rules in the tenement next door. In practice, it seems that developers would tend to apply similar rules to each tenement they constructed. However, given the wide range of parties involved in construction of tenements over the centuries and the evolving views of advisers over time and in different geographical areas, the heterogeneity of provision in the tenement stock as a whole cannot be overstated. This view tends to be supported by our survey of tenement title conditions, in which some provision for maintenance was found in all but 6 of the 235 titles analysed.[59]

4.46 Prior to the reforms to tenement law at the beginning of this century, the common law had to be relied on to fill any gaps in the maintenance rules set out in tenement title conditions. The common law itself left many questions unanswered, however,[60] ultimately leading to the introduction of the Tenement Management Scheme in 2004. Like the common law, the TMS generally applies only to fill gaps where the titles are silent or incomplete.[61] Although comprehensive data does not exist, our survey of title deeds corresponds with anecdotal evidence from practitioners to the effect that the older a tenement is, the more likely it is that provision in the titles will be lacking.[62] Gaps in provision may also be more common in tenements resulting from conversion of buildings originally constructed for other purposes. Tenements built more recently, perhaps especially in last 30 years, are likely to include burdens in the titles significantly more detailed than the default provision in the TMS.

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[56] We anticipate that the OAS will replace the TMS as the default set of maintenance rules applicable in most or all tenements as discussed at 2.55, 2.56 and 2.58. We consult on whether the OA legislation should be disapplied from certain categories of tenement at 5.24-5.45, and note that the TMS would have to remain in place for tenements in respect of which the OA legislation is disapplied at 5.30.
[57] Report on the Law of the Tenement para 2.1.
[58] Report on Real Burdens para 1.4-1.5.
[59] Appendix B para 23.
[60] For discussion, see Report on the Law of the Tenement para 2.4-2.30.
[61] Tenement (Scotland) Act 2004 s 4.
[62] See, for example, findings in relation to the existence of maintenance provision: Appendix B para 23.

4.47 In early consultation for this project, 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.

4.48 Some stakeholders also suggested that there was greater standardisation in the equivalents to tenement law found in other jurisdictions. As we noted in our Report on the Law of the Tenement, however, it is almost invariably the case that legislative codes in other countries operate as background law, with owners in apartment buildings free to adopt different rules for their building outside certain core provisions.[63] The fact that modification seems to happen relatively rarely in some places may have more to do with historical housebuilding practices and the expectations of developers and owners than with the law itself.

4.49 The concerns expressed by stakeholders in this respect are important. However, there are two significant obstacles to the imposition of a mandatory legislative scheme in relation to tenement maintenance. Both obstacles were recognised in our Report on the Law of the Tenement.[64]

4.50 The first significant obstacle is legal. Legislation which overrides existing title provisions in their entirety is unlikely to be a proportionate interference with the rights of flat owners under A1P1. The concerns expressed by stakeholders suggest that the aim of a mandatory tenement code might best be understood as improving the accessibility and comprehensibility of the maintenance rules applicable in a particular tenement. Whether a mandatory code is the least intrusive mechanism by which such accessibility could be achieved is debatable. Public education on how to interpret property titles and/or the provision of free or low-cost legal advice to those otherwise unable to access it may be alternatives. More problematically, for the imposition of a mandatory code to be proportionate, the advantages of the mandatory code would need to outweigh the disbenefits to owners resulting from alteration of their existing rights. The disbenefits to be taken into account here fall into two categories. First, the rules set out in the code might place an owner in a worse position than previously, for example if they increase the owner's share of costs for maintenance works. Second, every flat owner loses the freedom which currently exists to vary the rules through agreement with their neighbours or, where applicable, application to the court.[65] In principle, it might be possible to address these disadvantages through provision of compensation, though in practice, it seems highly unlikely that government would wish to proceed with such a scheme. In any event, it may be difficult to quantity the compensation that

[63] Report on the Law of the Tenement para 2.4.
[64] Report on the Law of the Tenement para 3.3-3.4 and 3.8-3.11.
[65] The Lands Tribunal has the power to vary or discharge burdens on application by an owner of property affected by the burden in certain circumstances: Title Conditions (Scotland) Act 2003 s 90. For discussion, see Report on Real Burdens ch 6.

could meaningfully offset the loss of a freedom enjoyed by owners of other types of housing in Scotland, and which might be considered a fairly central aspect of what ownership in our legal system actually means.

4.51 The second significant obstacle to a mandatory tenement code is practical. Bearing in mind the diversity of the tenement stock, it would be almost impossible to develop a set of rules that could apply effectively in all cases. Considering this issue in our Report on the Law of the Tenement, we said:

> "No set of general rules could provide solutions which apply with equal appropriateness to every single case. Nor can general rules safely supply the level of detail which efficient tenement management often requires." [66]

Our survey of tenement title conditions, discussed in Appendix B, has served only to reinforce these conclusions.

4.52 Against that background, the imposition of a mandatory tenement code seems unfeasible. Accordingly, we suggest that the rules of the OAS should operate as background law, applicable only to the extent that provision in the tenement titles is absent or incomplete. Bearing in mind the important concerns expressed by stakeholders in relation to the challenges posed by this individualistic approach, below we explore an alternative route to improving the comprehensibility of tenement maintenance rules through increased standardisation of maintenance rules in tenement titles. First, we seek the views of consultees on the point of principle.

4.53 We ask:

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?

Disapplying the OAS: a standardised deed?

4.54 If consultees accept our preliminary view above, the rules of the OAS will operate as background law. Like the TMS under current law, the OAS will generally supplement, rather than replace, provisions in the flat titles.[67] Some rules, including those dealing with voting rights and liability for costs, will be disapplied frequently by existing tenement title conditions. Other rules, including those on the powers of the manager and the imposition of the service charge, are less likely to be covered in existing titles, but owners could choose to insert new conditions on those matters into their titles through registration of a deed of conditions. In Chapter 7, we consult on the suggestion that the OA should have power to register a deed of conditions affecting all flats in a tenement,[68] and in Chapter 8 we ask whether registration of such a deed should require a unanimous vote in favour by all flat owners or whether a majority vote would suffice.[69]

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[66] Report on the Law of the Tenement para 3.8.
[67] Tenement (Scotland) Act 2004 s 4. See also Report on the Law of the Tenement para 5.1.
[68] See 7.25-7.26.
[69] See 8.32-8.34.

4.55 We noted above the difficulties of a legal regime in which the default maintenance rules in legislation must be read together with provisions in the tenement titles to understand the position in any particular tenement. The current legal regime is individualistic not only in the sense that owners have freedom to choose which rules apply, but also in the sense that the drafters of the deeds incorporating those conditions into the property titles have freedom to choose how those conditions are drafted. If standardisation of the rules themselves is not feasible, requiring instead a more standardised approach to the drafting of relevant deeds may make it easier for the rules applicable in any particular tenement to be understood.

4.56 Under current law, conditions are generally inserted into a title either in the deed transferring ownership of the property (known as a disposition) or in a separate document known as a deed of conditions.[70] Such deeds need not take any particular form,[71] and in practice, a huge variety of approaches to drafting such deeds can be found. A person trying to understand whether the deed disapplies a default rule of the TMS – or, in future, of the OAS – will find no explicit statement that the deed has that effect, and such deeds can be lengthy and written in complex terms.

4.57 Our tentative suggestion is that, in future, where a deed is intended to disapply or modify the application of one or more rules of the OAS, the deed should be required to reproduce the OAS in full but with relevant rules amended in line with the intentions of the drafter. A deed which did not do so would not be valid in so far as it purported to modify the application of the OAS.

4.58 To explain further, we anticipate that the OAS will be drafted in a similar way to the TMS and the DMS. In other words, it will be made up of a series of sections on different topics (for example, "manager's powers" or "liability for costs") with numbered rules in each section. A deed purporting to modify the OAS would require to reproduce each of these sections in full, incorporating amendments where desired, so that (for example) an additional manager's power may be added to the end of the list in the relevant place, or the rule that certain costs should be split equally may be amended in the deed to provide that costs should be split based on the relative floor sizes of flats.

4.59 Adopting this approach would mean that the interaction between the background law and the title conditions would need to be spelled out in the deed itself, rather than left to each individual reader to judge for themselves. It would also have the advantage that the rules in every tenement where such a deed was registered would follow the same basic structure, allowing for greater familiarity with that structure amongst the general public and making it more straightforward for information and advice to be given to tenement owners and residents on how to understand the rules in their building.

4.60 Our suggestion here draws some inspiration from the approach we suggested drafters may wish to adopt in relation to the DMS. As discussed in Chapter 2, the DMS is applied to a development through registration of a deed of application.[72] This deed may simply apply the

[70] See generally Gretton and Steven, *Property, Trusts and Succession* paras 14.15-14.19.
[71] Some minimum requirements as to the content of the constitutive deed are set out in the Title Conditions (Scotland) Act 2003 ss 4-5.
[72] Title Conditions (Scotland) Act 2003 s 71(1).

scheme set out in legislation, in full and unaltered, to the development in question.[73] However, when recommending the introduction of the DMS, we anticipated that developers would generally prefer to make certain modifications.[74] The legislation does not require a deed of application to take any particular form. However, we suggested that it may be useful for those purchasing units in the development if the deed of application included the amended version of the scheme in full.[75] In our review of title deeds, we came across four examples where a DMS had been used. In each case, the DMS rules as set out in legislation had been reproduced in unamended form in the titles. Amendments to these rules were set out in other sections of the deed. This approach, though entirely reasonable in the context of the DMS,[76] would not be valid in so far as it purported to modify the application of the OAS rules under our provisional proposal for standardisation.

4.61 Although we consider that standardisation may have benefits in this context, we are conscious that the trend in property law is away from statutory standard conveyancing forms, and for good reason. Ensuring that statutory forms remain up-to-date with developments in law and practice is challenging, and difficult questions arise as to the validity of deeds which deviate even in small ways from the statutory standard.[77] Legislative provision to the effect that minor deviations from the form would not affect the validity of relevant conditions cannot always resolve hard cases. Although we are alive to these concerns, our tentative view is that the need for greater standardisation in the drafting of tenement title conditions is sufficiently strong to overcome them.

4.62 We accept that this issue is difficult. We would be grateful for the views of consultees. We ask:

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?

Disapplying the OAS: standardising existing title conditions?

4.63 Our provisional proposal above concerned standardisation of new deeds modifying the application of the OAS after the OA legislation has come into force. However, the huge majority of tenement titles in Scotland already include conditions drafted on the basis of the current, individualistic approach. If the requirement to standardise drafting applies only to future conditions, the impact on the comprehensibility of tenement maintenance rules overall will therefore be quite limited. We think the introduction of the OA regime may provide an opportune moment to tackle the legacy of individualism in tenement title drafting, and make a

[73] As discussed at 2.38, the deed of application must include certain information to "fill in the blanks" in the statutory DMS template including the name of the owners' association: 2003 Act s 71(2).
[74] Report on Real Burdens para 8.85.
[75] Report on Real Burdens para 8.87.
[76] Indeed, Professors Reid and Gretton suggest this drafting approach in their discussion of the DMS in *Conveyancing 2009* at 133-134.
[77] We discuss this in the context of heritable securities in our Discussion Paper on Heritable Securities: Pre-default (Scot Law Com DP No. 168, 2019) para 6.20-6.38 available at https://www.scotlawcom.gov.uk/files/2115/6078/4827/Discussion_Paper_on_Heritable_Securities_-_Pre-default_DP_No_168.pdf.

bigger impact on the comprehensibility of tenement maintenance rules overall, by requiring standardisation of drafting in existing tenement titles.

4.64 A suggested approach could operate as follows. The OA legislation could provide for a deadline after which title conditions relating to tenement properties would cease to have effect in so far as they purported to modify the application of the OAS unless the conditions were in the standard form. Owners who wished to retain their existing title conditions would therefore have to register a deed of conditions in the requisite form prior to the deadline in order to do so. We refer to this here as a "preservative deed of conditions". If no preservative deed was registered, once the deadline had passed, the OAS would accordingly apply to the tenement in unmodified form.[78]

4.65 Requiring registration of a preservative deed to retain existing title conditions would obviously engage the rights of flat owners under A1P1. However, there are recent precedents for this in property law reform. Feudal superiors who wished to retain rights of pre-emption or redemption which would otherwise have been extinguished by the abolition of the feudal system were required to register a notice converting the feudal right into an alternative legal device known as a personal real burden prior to the abolition date.[79] Similarly, a notice could be registered to preserve a feudal title condition where the superior who benefitted from the condition also owned land adjacent to the property bound by the condition.[80] The use of these notice mechanisms may provide some support for an argument that a requirement to register a preservative deed in relation to tenement title conditions is a proportionate interference with owners' rights.

4.66 It must be recognised, however, that registration of a preservative deed of conditions would be a more complex undertaking that the notice procedures used in the feudal abolition context. A key difference is that a feudal superior could take steps unilaterally to register a notice in relevant circumstances. Under current law, registration of a new deed of conditions applying to all flats in a tenement would require every affected owner to sign. Under our provisional proposals, the OA would be empowered to execute a deed of conditions on behalf of all the flat owners in the building,[81] so long as a majority of owners voted in favour of this taking place.[82] If those proposals are supported by consultees, registration of a preservative deed would be more straightforward than under current law, but coordination amongst owners would be required nevertheless.

4.67 We think compliance with A1P1 is likely to require a mechanism by which an owner can protect their existing rights and maintain the status quo through *unilateral* action. Accordingly, we suggest that the OA should be under a duty to register a preservative deed of conditions where requested to do so by *any* owner. Under our provisional proposals, the manager will have the power to engage a solicitor to undertake this work.[83] The costs could be recovered from all owners by way of the annual budgeting process since the work is

[78] It would remain open to owners to vote in favour of the OA registering a deed of conditions in whatever terms they chose after the expiry of the deadline, but the special rules on registration of a preservative deed discussed below would no longer apply.
[79] Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 18A.
[80] Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 18.
[81] See 7.26 for consultation on the powers of the OA.
[82] See 8.32 for consultation on the majority required for the OA to exercise the power to register a deed of conditions.
[83] See 9.29-9.34 for consultation on the powers of the manager.

necessary to comply with a statutory duty. Compliance with the duty will be unproblematic where all owners are in support. Compliance with the duty will also be appropriate where one owner has made the request and others are apathetic: in A1P1 terms, we do not think it would be justifiable for an owner to lose their existing rights against their will as a result of the indifference of others.

4.68 Circumstances may, however, arise where one owner (or more) requests registration of a preservative deed of conditions, but another owner (or more) objects to registration. In line with our provisional proposals on disputes arising between owners under the OAS, this issue may be resolved in one of two ways. In Chapter 8, we suggest that where a majority decision is taken in favour of a particular action by the OA, any owner who did not vote in favour of that decision may challenge it in court. The court may annul the decision or make any other order in respect of it where the court determines that the decision is not in the best interests of all owners or is unfairly prejudicial to one or more owners.[84] We suggest that an owner who wishes to challenge a request to register a preservative deed of conditions should be entitled to do so as if challenging a majority decision. Alternatively, following a request by one owner for registration of a preservative deed of conditions, a majority of owners may object. If consultees support our proposal that the OA should be empowered to register a deed of conditions on the basis of a special majority vote, it would seem to follow that the OA should be empowered to refuse to register a deed of conditions on the basis of a special majority vote. In this circumstance, it would be open to the owner who sought registration of the preservative deed (and therefore presumably did not vote in line with the majority) to challenge the decision of the majority in the usual way.

4.69 Bearing in mind the potential complications which may arise, the deadline for registration of a preservative deed of conditions should be reasonably generous. An appropriate period may be 20 years, in line with the long negative prescription.[85] We would also suggest that the clock does not start to run on this period until two or three years following the introduction of the OA regime, so that flat owners have the opportunity to familiarise themselves with the operation of the OA before steps must be taken towards registration of a preservative deed. We note also that any change to a property's title conditions may result in a breach of the terms of any secured loan contract between the owner of the property and a bank or other financial institution. If consultees support our proposal on standardisation of existing tenement title conditions, we will recommend that government work with the Financial Conduct Authority and other relevant stakeholders to develop a protocol on circumstances in which consent is deemed to have been given, and a streamlined procedure for circumstances in which consent may be required.

4.70 We recognise that this proposal represents a shift from current conveyancing practice. We also recognise that it places an additional burden on tenement flat owners. However, we think it would represent an important step forward for the accessibility of tenement law in future. We would be grateful for the views of consultees.

[84] See 8.73-8.75.
[85] Prescription and Limitation (Scotland) Act 1973 ss 7-8.

4.71 We ask:

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?

Chapter 5 Applying the legislation: which tenements?

Introduction

5.1 In Chapter 4, we considered the framework of legislation introducing the OA regime. In this Chapter, we look at its application to specific tenements. We deal first with the challenges of identifying any individual tenement under current law, and consider whether any administrative formalities should be required in new legislation to make OAs easier to identify. Secondly, we consider whether there are categories of tenement (for example, those consisting of only two flats) where the legislative regime as a whole should be disapplied, meaning that tenements in the relevant category will not have an OA. The provisions under consideration in this Chapter would form a mandatory part of the framework of any legislation introducing OAs. We seek the views of consultees throughout.

Identifying the OA

5.2 The Working Group took the view that, rather than requiring flat owners to create an OA for their particular tenement, it would be preferable for OAs for all tenements to come to life automatically. In its interim recommendations, the Group noted that the DMS provided an existing legal mechanism by which flat owners could become members of a body corporate with legal personality, but observed that "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)".[1] It proposed instead that the TMS should be replaced by a revised version of TMS B[2] as the default management scheme.[3] This proposal was not explicitly reiterated in the Group's final recommendations, but it was noted that the Group "continues to believe that owners' associations are an essential element of tenement maintenance" and that "the details in the legislation need to be right" to deal with interaction between OAs and existing title deeds.[4] From these comments, we have understood the intention of the Group to be that OAs under the new regime should be brought to life by way of statute. When brought into force, legislation would create the OA for each tenement and provide that owners of flats in the buildings are its members. Early consultation with stakeholders represented on the Group has confirmed our understanding in this respect.

5.3 Creation of a legal person in this way is unusual. Legal persons are generally created by registration, which then provides a public record of the existence and identity of the person in question. The registration process will generally require specification of the entity's name and address, and list of its members.[5] As consultees may be aware, registration is not required

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[1] Interim Recommendations Report p 6.
[2] TMS B was an alternative model management scheme for tenements proposed in our Report on the Law of the Tenement, which incorporated an owners' association with legal personality. TMS B evolved into the DMS through recommendations in our Report on Real Burdens. See discussion at 2.37.
[3] Interim Recommendations Report p 7.
[4] Final Recommendations Report p 6.
[5] See for example Limited Liability Partnerships Act 2000 ss 2-4; Companies Act 2006 ss 7 and 112.

to create a natural person, but a public record of their existence and identity is nevertheless required by way of birth registration.[6] In the sections which follow, we consider how the existence and identity of an OA might be recorded, bearing in mind the intention of the Working Group that the cost and complexity of registration should be avoided.

Identification by inference using the Land Register

5.4 Once legislation introducing the OA regime is in force, it will be possible to infer the existence of an OA from the existence of a tenement. Our concern here is not precisely with the existence of a physical tenement building, but with the existence of a tenement in law. These things are connected but not the same. The extent of a tenement is a matter of legal interpretation,[7] rather than a question determined by an architect or building plan. In addition, the legal tenement may continue to exist even where the physical building has been destroyed.[8]

5.5 The existence of a legal tenement can be identified through entries on the Land Register.[9] However, identifying a tenement in this way is not a straightforward matter. No entry will be found in the Land Register for the tenement itself. Instead, what can be found are title sheets for each of the flats which make up a tenement building. Those title sheets must be understood subject to section 26(1) of the Tenements (Scotland) Act 2004, which defines a tenement as "a building…which comprises two [or more] related flats which are designed to be in separate ownership and are divided from each other horizontally." To determine whether flats are "related", section 26(2) provides that:

> "…regard shall be had, among other things, to—
>
> (a) the title to the tenement; and
>
> (b) any tenement burdens,
>
> treating the building…for that purpose as if it were a tenement."

Accordingly, identifying a tenement by way of the Land Register requires a person to consult relevant flat titles for a description of the extent of the tenement, or for other markers (such as shared responsibility for certain parts of a building) from which the extent of the tenement can be inferred. Having thus identified the tenement, it will follow from the application of the OA legislation that there is an OA connected to that tenement, and the members of the OA will be the owners of the relevant flats.[10]

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[6] Registration of Births, Deaths and Marriages (Scotland) Act 1965 ss 14-15.
[7] Tenements (Scotland) Act 2004 s 26.
[8] Tenements (Scotland) Act 2004 s 20. Where a tenement is demolished, the owner of a flat continues to own the airspace taken up by the flat prior to demolition.
[9] It may be the case that some tenement flat titles have yet to be transferred from the Register of Sasines to the Land Register, but this number is likely to be small, and will diminish over time. Accordingly, we focus here on the Land Register, although the principle that a tenement can be identified from a public register remains the same regardless of which property register is involved.
[10] Below, we consult on categories of tenement in respect of which the OA legislation may be disapplied, suggesting that it must be clear from the legislation or on the face of the Register that such disapplications have occurred: see 5.24 – 5.45.

5.6 Identifying a tenement by way of Land Register entries is a somewhat unwieldy process. However, it is important not to overstate the difficulty it causes in practice under the current legal regime. In practice, the legal tenement will usually align with the expectations a reasonable person might have based on the physical tenement. A Victorian tenement will, legally, almost invariably be comprised of the flats which take access through the close and the main door flats underneath them on the ground floor. A villa "four-in-a-block" will almost invariably be a tenement of its own. More difficult cases will arise, perhaps especially where the tenement is a non-conventional shape or where a building (or buildings) not originally designed to be flats have been converted. In these cases, as in the straightforward cases, the acquirer of a flat in the tenement will have the extent of the tenement explained to them by their solicitor when taking ownership. As a broad statement, it seems reasonable to suggest that owners of flats generally understand the extent of the tenement in which their flat is located, and will accordingly understand which flats are represented by the OA of which that owner is a member once relevant legislation comes into force.

5.7 With the introduction of the OA regime, the limits of this tenement identification process may become apparent, however. The process works at present in large part because the persons who most need to understand the extent of the tenement – namely flat owners – will necessarily be in receipt of legal advice at the point at which they become flat owners. With the introduction of the OA regime, the range of people who wish to identify the tenement will broaden. Persons who contract with the OA may wish to ascertain the identity and membership of the OA, and cannot be expected to seek legal advice on relevant title deeds in order to do so. The same is true of non-owners with an interest in the mandatory aspects of the legislation. This could potentially include bodies, such as local authorities, who may be tasked with monitoring the compliance of OAs with mandatory duties, including any new duties which may be imposed in future in relation to building condition inspections and reserve funds.[11]

5.8 Reliance on the Land Register as a mechanism for identification of the OA has one further problem. The OA needs a name and address. It is difficult to see how it can, for example, open a bank account or enter contracts without one. We have considered whether this problem could be addressed through legislation. The legislation could perhaps provide for every OA to be named according to the formula "The Tenement Owners' Association of [address of tenement building]", with the address to be drawn from the title sheets of relevant flats. The address of the tenement building could also be the postal address of the OA. But we foresee problems with this approach. For one, addresses follow various conventions in Scotland – buildings sometimes have a name as well as a street number, tenements will generally have more than one street number, tenements may also have addresses on two different streets. The attempt to produce simplicity through legislation may ultimately result in uncertainty or unwieldiness that could be avoided by having a human being involved in the naming process. Additionally, the address of a tenement ("10-12 High St") is not a regular postal address, and as any tenement resident knows, mail delivered under the close door or left in the lobby is unlikely to be read. A different solution is needed.

[11] The Working Group recommended that duties should be imposed on OAs to instruct regular condition inspection reports and to establish reserve funds: see para 1.7 of this Paper.

5.9 Drawing together the threads above, we think the OA regime is more likely to achieve the intended benefits if the identity and membership of the OA can be ascertained easily. Finding a way to make that possible while respecting the desire of the Working Group to avoid registration costs is not straightforward. Below, we suggest some options for identifying the OA on which we would be grateful to hear the views of consultees. First, we ask a question about the name and address of the OA.

Name and address of the OA

5.10 It is common for the name of a legal person to reflect the type of entity it is. We think it would be sensible for this approach to be taken for OAs. Following the examples of the DMS[12] and the English commonhold scheme,[13] we suggest the OA should be named "The Tenement Owners' Association of" followed by the address of the tenement building, so for example "The Tenement Owners' Association of 48-52 High St, Stirling".[14] In line with the equivalent provision in the DMS,[15] we suggest the appropriate postal address for the OA should be that of the manager. This seems appropriate given the manager will be the person with power to act on behalf of the OA on a day-to-day basis.

5.11 We would be grateful for views. We ask:

14. (a) Should the OA be named "The Tenement Owners' Association of" followed by the address of the tenement building? If not, what other name(s) would you suggest?

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

Identification option 1: ask the manager

5.12 We suggested above that new legislation should include an easier mechanism for identifying the OA than the current tenement identification process. This could be achieved, without any public registration requirement, by placing a mandatory duty on the manager to provide information on the identity and membership of the OA when asked. The first manager could be required to seek approval from members in respect of: (i) the name of the OA (which would, of course, have to adhere to legislative requirements); (ii) its address; and (iii) a list of the registered title numbers of the flats making up the tenement which the OA represents. This information could be compiled by the manager with assistance from members and with reference to Land Register titles and legal advice if necessary. The manager could be required to propose a draft to members for approval no later than the first annual general meeting following the manager's appointment.[16] Thereafter, the manager could be required to maintain a record of this information, which should require updates only in the unlikely event that someone later disputes the extent of the tenement as reflected in the manager's record, or

[12] DMS rule 2.2 and 2.4; see also Report on Real Burdens para 8.8.
[13] The Commonhold Regulations 2004 s 12.
[14] This is a fictional example.
[15] DMS rule 2.4.
[16] If approval cannot be obtained from members, the manager could seek approval from the court under section 6 of the 2004 Act.

where renovation changes the composition of the tenement. The manager could have a duty to provide the details contained in the record on request by any person.[17]

5.13 This option is straightforward and incurs minimal expense. It essentially mirrors the usual practice under current law, where for example a tradesperson engaged by a property factor will generally take the factor's word for the composition of the tenement. On the other hand, this option could not be said to provide exactly the same benefits as public registration: a person is an inherently less reliable source of information, since a register cannot fall behind on correspondence, or provide false information (assuming the register is appropriately regulated, as with the Land Register). Perhaps more significantly, a practical difficulty may arise in that a person who cannot identify the OA may also be unable to identify the manager. This difficulty may not emerge too frequently, since a person's interest in an OA will often stem from being contacted by the manager in the first place (for example, to provide a quote for work). In other cases, the manager will sometimes be identifiable from the Scottish Property Factor Register. Ultimately, however, there will be cases in which the manager cannot be identified, leaving the interested party to identify the tenement from the Land Register as under current law. It is difficult to predict how frequently this problem will be encountered.

Identification option 2(a): an immediate registration requirement

5.14 If consultees are of the view that, notwithstanding the position of the Working Group, a public record of the name and address of the OA is essential, the Land Register is the obvious place in which to record this information. The manager could be placed under a duty to obtain approval from members of the details to be recorded as under option 1 above, then to enter that information on the Land Register against the titles of relevant flats. A new form of registrable deed would have to be devised for this purpose, which would set out the name and address of the OA and the extent of the tenement to which it relates by way of the list of flat title numbers. The information in the deed would have to be entered against each of the relevant flat titles. Entry of this information on the register would have no impact on the property titles themselves – in other words, the titles would continue to define the extent of the tenement in combination with the 2004 Act, and that definition would not be altered by the erroneous inclusion or exclusion of a title number in the list of flats said to form the tenement represented by the OA. The information would not be covered by the Keeper's warranty.[18] Further registration details, including where in the title sheet this information should be included, could be developed in discussion with Registers of Scotland if this option is supported.

5.15 To ensure compliance, the OA could be placed under a mandatory duty to register within a certain time period after it is created, and perhaps two years would be appropriate. As with the other mandatory duties, if the OA failed to do so, a remedial management order could be sought.[19]

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[17] We emphasise here that the identity record contains only the name and address of the OA, and the title numbers of flats in the tenement, which are already accessible to the general public on the Land Register. The information available on request here does not include names or contact details of members of the OA. We consult separately on the suggestion that the manager should maintain a list of names and contact details, with this information to be provided on a more limited basis to take account of data protection concerns, at 6.37-6.39.

[18] See generally Land Registration etc. (Scotland) Act 2012 ss 73-79.

[19] See discussion at 4.21-4.43.

5.16 This option would provide a clear and reliable route to information on the identity of the OA. It involves at least some of the bureaucracy and cost the Working Group intended to avoid, since a solicitor will need to be engaged to prepare the relevant deed and registration fees will be incurred. However, the overall complexity in registering a short deed of this kind should be significantly lower (and the cost therefore cheaper) than, for example, in registering a DMS deed of application. A different potential concern in relation to this option is that searches of the Land Register often incur a fee, although basic information on the title number and price of a property can currently be accessed for free. If consultees support this option, we would recommend that government work with Registers of Scotland to ensure OA information can also be accessed without cost.

Identification option 2(b): a gradual registration requirement

5.17 Option 2(a) would require the OA to enter details of its identity on the Land Register within a relatively short period following the OA's creation. An alternative might be to allow for this process to happen more gradually. In Chapter 4, we consulted on the suggestion that flat owners who wished to retain existing title conditions which modified the application of the OAS should be required to register a preservative deed of conditions.[20] We suggested that a relatively generous deadline should be given for compliance with this requirement, perhaps in the region of 20 years.

5.18 If consultees support the proposed requirement to register a preservative deed of conditions, it might be sensible to provide that the standard form deed of conditions should also include the information required to identify the OA. The advantages of a single registration requirement are obvious, and the longer time period likely to be given for compliance with the requirement under this option may mitigate the Working Group's concerns about the complexity and cost of a standalone requirement to register the OA. The standard form deed would also be used for new (non-preservative) deeds of conditions, assuming consultees support our proposal for use of a standard form in these circumstances.[21]

5.19 If consultees favour this more gradual approach to registration of the identity of the OA, the manager could be placed under a duty to provide information on the OA as under option 1 during the interim period prior to deadline for registration of a preservative deed of conditions. A "sweep up" requirement to register a standalone deed containing the details of the OA as per option 2(a) would also be needed here to deal with tenements where no deed of conditions is registered.

Identification option 3: do nothing, wait for the tenement register

5.20 A final option is simply to do nothing. Consultees may choose this option because they disagree with us about the need for a straightforward record of the OA's identity, trusting parties in practice to be able to operate on the basis of a co-operative manager with details confirmed via titles on the Land Register if necessary. Alternatively, consultees may consider that work being taken forward by the Scottish Government in relation to other

[20] See 4.63-4.71.
[21] See 4.54-4.62.

recommendations of the Working Group is a more appropriate place for any registration requirement to be addressed.

5.21 In its recommendations in relation to tenement maintenance inspections, the Working Group proposed that inspection reports should be held on a national, online register and publicly accessible without charge.[22] The report is intended to be a live document, updated on a regular basis by owners and therefore operating as type of "log book" for the building.[23] The Group suggested that Scotland's Land Information Service (ScotLIS) should present this information, and noted that further exploration of the details of the online register would be required.[24] The Scottish Government has committed to implementing this recommendation.[25]

5.22 At present, it is not clear what form a register for maintenance inspections might take. Bearing in mind the intention that maintenance information should be regularly updated by owners, however, it seems reasonable to suggest that the Land Register would not be appropriate for the purpose, and a new register will be required. Such a register would seem obviously to require information on the identity of the OA, thereby addressing our concerns above about the need for a public record of this information. On that basis, consultees may consider it more appropriate for this aspect of the OA project to be redirected to the relevant Scottish Government workstream.

5.23 We would be grateful for the views of consultees on the issue of OA registration. We ask:

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.

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[22] Final Recommendations Report p 4.
[23] Interim Recommendations Report p 5.
[24] Final Recommendations Report p 4-5.
[25] For discussion of the Scottish Government's response to the Working Group's final report see 1.9.

Disapplying the OA legislation

5.24 Although the OA regime is intended to apply to most tenements, the Working Group recognised that there may be circumstances in which an OA is not desirable or necessary. The Group noted that, where a tenement consisted of as few as two flats, an exception to the requirement to have an OA may be appropriate.[26] It was similarly suggested that a tenement forming part of a development subject to a DMS may not require a tenement-specific OA.[27] In this section, we consider whether there are circumstances in which the OA legislation should not apply or could be disapplied.

5.25 Before looking at specific examples, it is useful to recall the two proposed facets of the OA legislation. First, the legislation will have mandatory elements. The regime is intended to provide a mechanism by which effective maintenance of tenements can be monitored and, if necessary, compelled. This was felt necessary in light of the evidence that the current law, under which owners are effectively free to choose whether to maintain their building, was resulting in degradation of the tenement stock. Under our provisional proposals, the OA will be subject to certain mandatory duties intended to ensure it continues functioning.[28] However, further duties may follow from other elements of the Scottish Government's housing programme, including the planned duties to carry out regular maintenance inspections and establish a reserve fund, in combination with changes to relevant building standards.[29]

5.26 The second intended facet of the legislation is default. The rules of the OAS will apply where the owners have not made or do not make alternative provision for maintenance in the titles in line with their own preferences.

5.27 Determining the circumstances in which a tenement should be excluded from – or entitled to opt-out of – the OA regime requires consideration of both facets. Below, we consider the position in relation to four categories of tenement which have emerged in early consultation as candidates for exclusion from the regime, namely: (i) small tenements; (ii) tenements in which all flats are owned by the same person; (iii) tenements which form part of a development subject to development-wide management conditions, but without a DMS; and (iv) tenements which form part of a development subject to a DMS.

Small tenements

5.28 The Working Group noted that a tenement composed of two flats may merit an exception from the OA regime. The case for this appears strong in connection with the default aspects of the legislation. However, the position is less clear in relation to the mandatory aspects of the legislation.

5.29 It seems uncontroversial to suggest that the machinery of an OA is overly complex for day-to-day management of a tenement of this size. Two owners – or even two sets of co-owners such as married couples – would not seem to require a manager to coordinate maintenance works. Requirements to meet annually and prepare an annual budget also seem

[26] Interim Recommendations Report p 7.
[27] Interim Recommendations Report p 7. Where a DMS is in place, flat owners will be members of the owners' association for the development as a whole.
[28] See 4.11-4.20.
[29] See 1.10-1.21 for discussion.

somewhat artificial in this context. From this perspective, it might be suggested that the OA legislation should not apply in such cases.

5.30 However, three concerns argue in the opposite direction. The first is that owners in a small tenement might wish to take advantage of some of the benefits of having an OA, particularly the ability to open a bank account and enter into contracts as the OA. The second is that the intention to impose mandatory duties as part of the broader housing programme might be undermined if there are tenements in which there is no OA. Alternative approaches may be found in that respect: it may be that small tenements do not require maintenance inspections in any event, or that relevant duties are imposed directly on flat owners and an enforcement mechanism other than remedial management is relied on in such cases. We are wary of adopting a position that might unduly restrict the development of the law in this respect, however. Thirdly, the OAS is intended to operate as a background set of rules applicable where the tenement titles are silent or incomplete. If the OA legislation is disapplied entirely from small tenements, it seems they must instead be able to continue relying on the TMS to fill gaps in the titles. The continuing existence of two similar but distinct schemes of background law in the OAS and the TMS seems undesirable from the perspective of legal certainty and accessibility.

5.31 Our tentative suggestion on a way forward involves a compromise. Small tenements should be subject to the OA legislation. But the mandatory duties arising from this project, those which concern the operation of the OA itself, should be modified or disapplied. The duty to appoint a manager should be modified to provide that both (or all) owners are deemed to be managers. They would remain free to appoint a different manager should they wish. The duties to hold an annual general meeting and prepare an annual budget would be disapplied entirely. Again, owners would remain free to do these things if they wished. The only duty which we think would have to remain unmodified would be the duty to comply with any registration requirement imposed on OAs, as discussed above. The OAS operates only as background law, and could be relied on to assist owners in managing maintenance where their title conditions were silent or incomplete, just as they rely on the TMS at present.

5.32 An alternative, if consultees do not share our concerns about the need for an OA to facilitate the imposition of broader mandatory duties, or about the undesirability of two sets of background law, would be to exclude small tenements from the regime by default. However, owners of flats in small tenements could be allowed to "opt-in" to the restricted regime we describe above where they wish to take advantage of the benefits of the OA. Registration of a notice in the Land Register would be required to opt-in in such circumstances, but since the terms of the notice would be simple, we would hope the cost of doing so would not be prohibitive.

5.33 A separate question concerns the definition of a small tenement. Two-flat tenements are obviously included, and extending the definition to tenements composed of three flats would not, we think, greatly increase the overall number of buildings falling within this definition. Extending the definition to cover tenements of four flats would bring villa "four-in-a-block" properties within its ambit, which might cause the overall numbers to jump up substantially. The need to coordinate four owners rather than three might also be considered the point at which the role of the manager becomes more obviously necessary. Our provisional view is therefore that small tenements should be defined as tenements composed of three flats or fewer.

5.34 We would be grateful for the views of consultees on this finely-balanced issue. We ask:

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?

Tenements in which all flats are owned by the same person

5.35 The position here is similar to that in a small tenement. The OA machinery is obviously inappropriate, but the imposition or enforceability of broader mandatory duties may require the existence of an OA. Again, we think the compromise option of application of the legislation subject to modification or disapplication of inappropriate mandatory duties is likely to be the best approach. In this case, it also has the advantage of ensuring an OA is in place if and when ownership of one or more of the flats in the building comes to be transferred to another person.

5.36 We seek views. We ask:

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?

Tenements subject to development-wide management conditions, but without a DMS

5.37 In recent decades, where new tenements are constructed, this often occurs as part of the construction of a broader development which also includes non-tenement properties. The development as a whole will be subject to a deed of conditions including detailed management provisions, invariably including an obligation for a manager to be appointed. It is common for

some conditions in such a case to apply to all the properties in a development, and for others to apply only to particular properties. As an example, flat owners might be required to share the cost of upkeep of communal gardens with all owners in the development, but share the costs of upkeep of the roof only with other owners in the same tenement. We came across 38 examples of this type of arrangement in the 239 titles we reviewed in our survey of tenement title conditions.[30]

5.38 We are concerned that the imposition of an OA on a tenement which is managed as part of a wider development might complicate matters in a way which renders management less effective. However, the same concern arises here in relation to the imposition of broader mandatory duties as for small tenements. Where the broader development is not represented by a separate legal person, there is no one on whom duties can easily be imposed, or against whom they can easily be enforced.

5.39 We think the solution here might be simply to recognise that the mandatory duties imposed on the OA as part of the current project can be fulfilled as part of arrangements for the broader development. Accordingly, where a person is appointed to manage the development as a whole, this is sufficient to comply with the mandatory duty to appoint a manager for the OA. Similarly, if a meeting of the owners of the development is organised annually, and an annual budget prepared on a development-wide basis, this should be sufficient to comply with relevant mandatory duties imposed solely on the OA. The OAS is likely to be effectively disapplied in its entirety thereafter by the detailed deed of conditions applicable in the development, but could provide answers to any gaps which arise in relation to the tenement alone. In this way, the application of the OA legislation to tenements in such developments should not require any change in existing management arrangements, but allows for the imposition of future mandatory duties if appropriate.

5.40 We would be grateful for views. We ask:

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?

Tenements subject to a DMS

5.41 In the case of tenements subject to a DMS, we think there is no difficulty in suggesting that the OA legislation should not apply. A detailed management scheme, which includes management of the tenement and allows for transactions to be entered into by a separate legal person, is already in place. If broader tenement-specific mandatory duties are to be imposed in future, these could be imposed on the DMS owners' association, which would be under a duty to comply insofar as necessary in relation to the tenement or tenements within the development.

5.42 We cannot see any benefit that would flow from applying the OA legislation in this situation. Our provisional view is that owners and developers should be free to choose

[30] Appendix B para 21.

between these two management schemes. Later, we consider how tenement owners might choose to switch from one of these schemes to the other.[31]

5.43 We ask:

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

Additional exemptions?

5.44 Early consultation for this project and our research to date have not given rise to any further suggestions of circumstances in which the OA legislation ought to be disapplied, or its application modified, in relation to particular categories of tenement. However, we would be grateful to hear from consultees in relation to issues we may have missed in this respect.

5.45 We ask:

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.

[31] See 7.25-7.26.

Chapter 6 The Owners' Association

Introduction

6.1 In this Chapter, we focus on the nature and scope of the Owners' Association. First, we consider which form of legal entity would be most appropriate for the OA. Second, we look at the membership of the OA. Third, we consider which parts of the tenement should be managed by the OA (in other words, the definition of "scheme property" under any new legislation.) Finally, we deal with some administrative matters including how documents can be signed on the OA's behalf. The provisions under consideration in this Chapter would form a mandatory part of the framework of any legislation introducing OAs, except in relation to the provisions on sending documents discussed at the end of the Chapter, which we suggest should apply only where no alternative provision is made in the property titles. We seek the views of consultees throughout.

Characteristics of the OA

6.2 The Working Group recommended that the OA should be an entity with legal personality.[1] Scots law recognises many such entities, including companies and partnerships, but not all possess the other characteristics the Group wished the OA to have. In this section, we consider these characteristics and suggest that creation of a new form of legal person might be the most effective way to implement the Group's recommendations.

Legal personality

6.3 Under current law, it is unusual for tenement owners to operate as an organised collective. Decisions on specific maintenance issues are instead taken as they arise, with one owner acting on behalf of all to implement the decision, or else a factor is appointed to manage maintenance on the owners' behalf. Where owners do wish to operate collectively in a more systematic way, however, there is little option but to come together as an unincorporated association. This is an entity without legal personality – essentially a contractual agreement entered into by a group of people in which one or more parties take on certain responsibilities to represent the others in defined circumstances.[2] The Working Group referred to such arrangements as "informal" owners' associations.[3]

6.4 The Group considered it essential that an OA under any new legislation should have legal personality.[4] It considered that this would offer two key advantages over current "informal" arrangements.[5] First, an OA could enter into contracts, for example with tradespersons, rather than one or two owners having to do so on behalf of the rest. Second,

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[1] Final Recommendations Report p 6.
[2] For further discussion on the definition of an unincorporated association, see Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com 172, 2009) paras 2.1–2.2.
[3] Interim Recommendations Report p 6.
[4] Final Recommendations Report p 6.
[5] See table specifying the impact of the owners' association proposal set out in the Final Recommendations Report p 6.

were a dispute to arise, the OA could raise or defend legal proceedings in its own right, rather than a contractor proceeding directly against the owner who was party to the contract, leaving them to pursue a right of relief against the others once the contractor was satisfied. In addition to these benefits, we note that an entity with legal personality is able to hold rights and take on obligations in its own name. Accordingly, an OA could itself open a bank account and own items of property (for example, cleaning or gardening equipment). In short, an OA with legal personality should simplify the process of dealing with tenement works for contractors and other third parties, and should also simplify for owners the process of dealing with each other.

6.5 In law, the term used for an entity with legal personality is a "legal person".[6] The rights and responsibilities of the OA, and the mechanisms by which it exercises its powers, will be determined to some extent by the type of legal person it is.

Body corporate

6.6 It seems to have been the intention of the Working Group that the OA should be not only a legal person, but also a body corporate. A body corporate is an entity which continues to exist regardless of changes in its membership.[7] The paradigm example of a body corporate is a listed public company, the members of which are the company shareholders. This membership will change from time to time as shares are bought and sold. However, those changes have no impact on the existence of the company itself.

6.7 A legal person which is not a body corporate cannot survive changes in its membership. The paradigm example of a legal person of this type in Scotland is a partnership formed under the Partnership Act 1890, sometimes referred to as a general partnership. The members of a partnership are the partners. The partnership has legal personality independent of the members. However, where there is a change of partners, the existing partnership is dissolved and a new partnership is constituted (unless express provision is made to the contrary).[8]

6.8 The membership of the OA will be made up of the owners of the flats in the tenement in question. This membership will change over time as flats are bought and sold.[9] Since these changes are inherent in the nature of an OA, it would seem sensible for it to be constituted as a body corporate. Although it may be possible to make provision for continuation of legal persons which are not bodies corporate notwithstanding changes in their membership, proceeding in this way would seem to add unnecessary complexity to the regime.

Brought to life by statute

6.9 As discussed in Chapter 5, the Working Group recommended that the OA should be brought to life by way of statute, without the need for conveyancing documents or

[6] Legal persons, also sometimes known as juristic persons, may be contrasted with natural persons, meaning human beings.
[7] This is sometimes referred to as "perpetual succession": see Anderson and Smith, "Introduction to Juristic Persons" in Anderson (ed), *Scots Commercial Law* (2nd edn, 2022) 1-21 at para 1.23.
[8] Partnership Act 1890 s 33.
[9] This is discussed below at 6.22.

registration.[10] As we noted there, this is an unusual way for a legal person to be created in Scots law.

Which body corporate?

6.10 Taking into account the essential characteristics discussed above, our provisional view is that an OA should be a new form of body corporate. This body would be bespoke, meaning that it would exist solely for use in the context of the OA regime. A similar approach is taken in the DMS, where the DMS owners' association is a body corporate available for use only in the context of that scheme.[11]

6.11 Scots law recognises other forms of body corporate which could, in principle, be used to constitute an OA. The most obvious example is a company. However, the use of a company in the OA context would have several drawbacks. First, companies are generally formed through registration at Companies House[12] following the signature and delivery of a memorandum of association by the company members.[13] The need for registration obviously runs counter to the intentions of the Working Group as regards creation of the OA, and although modifications or exceptions to the usual legislative scheme for incorporation of companies could be developed, this would be complex. Second, companies are subject to extensive regulation, principally through the 1300 sections of the Companies Act 2006. Expecting flat owners to navigate this legislation to understand the provisions applicable to their OA seems likely to run counter to the accessibility of the regime, and therefore to work against the intention of the Working Group to make tenement maintenance more efficient. Thirdly, companies are subject to record keeping and public reporting requirements, including duties to file with Companies House annual accounts prepared in line with legislative standards[14] and an annual statement detailing certain non-financial information about the company.[15] Although the stringency of these standards is lower for small companies and micro-entities, they may still be considered burdensome, particularly in those tenements where owners wish to manage their affairs without professional assistance. Fourthly, the usual process applicable in respect of an insolvent company is liquidation, which terminates the company's existence.[16] This would cause an obvious difficulty for an OA which is intended to exist for as long as the tenement exists.

6.12 In essence, companies are intended to be profit-making enterprises, and they are regulated in a way which reflects that. OAs will not be in the same position. The same concerns apply in relation to Limited Liability Partnerships, which are also subject to large parts of the

[10] See 5.2.
[11] DMS Order art 4; see discussion in Report on Real Burdens paras 8.13-8.14.
[12] Companies Act 2006 Part 2.
[13] The form of memorandum is prescribed: Companies Act 2006 s 8 and Companies (Registration) Regulations 2008 (SI 2008/3014) reg 2.
[14] Companies Act 2006 s 441.
[15] Companies Act 2006 s 853A.
[16] We consider this process further, and address the insolvency of an OA more generally, in Chapter 12.

law applicable to companies[17] including the financial reporting requirements[18] and insolvency process discussed above

6.13 One comparison which may argue against our view that a company is an inappropriate vehicle for an OA is the commonhold association found in the law of England and Wales. Commonhold is a relatively new form of tenure introduced in 2002 and intended for use in relation to apartment buildings or any building or property development which involves shared areas or facilities.[19] In a commonhold scheme, each person owns their individual flat or unit, and also becomes a member of the commonhold association which has responsibility for management and maintenance of common parts. The commonhold association must be a company limited by guarantee.[20] Although the requirement to incorporate the commonhold association in this form has been criticised,[21] following recent consultation, the Law Commission of England and Wales recommended that this requirement should be retained.[22]

6.14 Though the comparison with the commonhold association is interesting, there are important differences between the use of commonhold tenure and the OA regime. Commonhold is neither a compulsory nor a default tenure, but can be put in place only through the use of (sometimes highly complex) conveyancing processes. In addition, commonhold tenure was not designed solely for the type of small apartment buildings which form the majority of Scottish tenements, but also for much larger, multi-use developments. In this respect, it is more akin to the DMS than to the OA regime – though of course, the DMS owners' association is not a company. In short, the commonhold example does not change our view that a company would be an inappropriate form for an OA.

6.15 Scots law recognises a number of other bodies corporate including Scottish Charitable Incorporated Organisations (SCIOs) and community benefit societies. Such entities generally need to be constituted for specific purposes, for example to pursue charitable aims,[23] which do not apply to OAs. There appears no obvious contender for formation of an OA amongst these bodies.

6.16 Taking all of the above into account, our preliminary view is that the OA should be a bespoke body corporate. One final point arises here. Could it be suggested that the bespoke body corporate used to constitute an OA is the *same* bespoke body corporate used to constitute a DMS owners' association? We think such an analysis would be conceptually flawed. The defining characteristic of the DMS owners' association is its use within a DMS, and its capacity and operation are regulated on that basis. If consultees support our preliminary view here, the same will be true of an OA regulated by the OA legislation. The two

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[17] See for instance Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (SI 2009/1804).
[18] The Limited Liability Partnership (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008 (SI 2008/1911); the Small Limited Liability Partnerships (Accounts) Regulations 2008 (SI 2008/1912) and the Large and Medium-sized Limited Liability Partnerships (Accounts) Regulations 2008 (SI 2008/1913).
[19] An overview is provided at https://www.gov.uk/guidance/commonhold-property.
[20] Commonhold and Leasehold Reform Act 2002 s 34.
[21] See, for example, Lu Xu, "Managing and maintaining flatted buildings: some Anglo-Scottish comparisons" (2010) 14(2) Edinburgh Law Review 236-258.
[22] Law Commission of England and Wales, *Reinvigorating commonhold: the alternative to leasehold ownership* (Law Com No 394, 2020) para 19.2 available at https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2020/07/Commonhold-Report-final-N14.pdf.
[23] For example, see the Charities and Trustee Investment (Scotland) Act 2005 s 7 for the test applicable to SCIOs.

bodies will share the characteristic of being defined by their context. However, sharing that characteristic does not, of course, make the two bodies the same thing.

6.17 We would be grateful for the views of consultees. We ask:

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

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

When does the OA come into existence?

6.18 As discussed in Chapter 5, the Working Group intended that the OA for any individual tenement should be brought into existence by legislation, rather than requiring flat owners to undertake a conveyancing or registration process.[24] The legislative provisions which create OAs must be clear about when they take effect in relation to any individual tenement, so that the date of the creation of any individual OA can be identified.

6.19 For tenements which are already in existence, it seems to follow from the recommendations of the Group that the OA should be created on the date when the relevant legislative provisions are brought into force. For tenements yet to be constructed, a point must be identified at which the creation of the OA is appropriate. One obvious point in time for creation of the OA may be when ownership of the first flat in the tenement is transferred to someone other than the developer. This is the point at which responsibility for maintenance becomes shared and the need for coordination by way of the OA becomes necessary.

6.20 Provision to this effect will not provide a solution in all cases, however. In Chapter 5, we suggested that the OA legislation should apply (subject to modification of relevant mandatory duties) to tenements where all flats are in single ownership.[25] This suggestion was made in part to facilitate the imposition of broader mandatory duties (for example, to obtain regular building condition inspections) in future. It seems to follow that the OA should be created at the point at which such buildings are substantially complete. On that basis, an appropriate point for creation of the OA may be when the building completion certificate is approved.[26] Where the building remains in single ownership for a period of time following issue of the completion certificate, under our provisional proposals in Chapter 5, there would be no need to appoint a manager, hold an annual meeting or approve a budget. However, the single owner would be responsible for complying with any registration requirement to be imposed on OAs. Once a flat in the building was transferred to a different owner, the mandatory duties would apply in the usual way, requiring the appointment of a manager and so on.

[24] See 5.2.
[25] See 5.35.
[26] Building (Scotland) Act 2003 s 17. This Act requires that where a building has been newly constructed (or converted), a completion certificate must be submitted to confirm this has been done in accordance with building regulations. It is an offence to occupy a building before the completion certificate has been approved (save for where temporary occupation is approved under s 21(3)).

6.21 We would be grateful for the views of consultees. We ask:

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?

Membership of the OA

Owners

6.22 A body corporate requires members. In the case of the OA, the members are obviously intended to be the owners of the flats in the relevant tenement. The OA legislation must accordingly provide that, once the OA has been created, the owners of flats in the relevant tenement are automatically members. Any person who owns a flat at the time the legislation comes into force, or becomes the owner of a flat subsequently, will accordingly be an OA member. Where a person ceases to be an owner of a flat in the tenement, for example by selling their flat, legislation will provide that they cease to be a member of the OA.[27] Where a flat is co-owned by two or more people, for example a married couple, each co-owner will be a member.[28]

6.23 The term "owner" is defined for the purposes of the current law on tenement management in section 28 of the 2004 Act, with a definition in similar terms given in the DMS Order art 18. An "owner" is:

- A person with registered title to a flat in the tenement;
- A person who has right to a flat in the tenement but has not registered their title,[29] sometimes referred to as an "unregistered holder";[30]
- A heritable creditor in lawful possession of a flat in the tenement.[31]

We are not aware of any reason why an alternative definition should be adopted for the purposes of the OA legislation. Any redefinition which resulted in a person who is an "owner"

[27] We consider an outgoing owner's liability for costs at 10.22-10.23.
[28] Later in this Discussion Paper we consult on the idea that the right to vote and liability for costs should generally be allocated on a flat-by-flat basis, rather than an owner-by-owner basis, so that a married couple who co-own a flat may only exercise one vote between them rather than having one vote each. See further discussion at 8.16-8.18 and 8.35-8.37.
[29] There are various situations in which a person may not register title despite being in a position to do so, for example if they have been assumed as a trustee in a continuing trust, or they are dealing with the property as a trustee in sequestration. Further discussion can be found in our Report on Real Burdens paras 13.3-13.5.
[30] Land Registration etc. (Scotland) Act 2012 s 101.
[31] A heritable creditor, sometimes colloquially referred to as a "mortgage holder", may take possession of a property as a precursor to selling it where the debtor is in default on their loan repayments: see generally the Conveyancing and Feudal Reform (Scotland) Act 1970 Sch 3 para 10.

under the 2004 Act not being an "owner" under the OA legislation is likely to give rise to difficulties under A1P1 in any event.

Non-owner occupiers

6.24 In early consultation for this project, we discussed with stakeholders the position of occupiers of tenement flats who are not owners, such as residential or commercial tenants, or a spouse or civil partner of a flat owner.[32] It was recognised that tenement maintenance decisions may impact significantly on such persons. Where the tenement is poorly maintained, occupiers may experience repercussions in terms of damp or leaks, for example. Where maintenance works are undertaken, occupiers may experience disruption or even require to be decanted from their properties for a period of time. Where maintenance costs are incurred, it may result in an increase in the rent payable under the lease. For these reasons, some stakeholders suggested occupiers in the building should be members of the OA alongside owners.

6.25 Our preliminary view is that the OA regime could not easily incorporate such an approach. Under current law, flat owners have decision making power in respect of maintenance, coupled with liability for the costs thereby incurred.[33] In Chapter 8, we set out our preliminary view that this link between decision making power and liability for costs should be maintained within the OAS.[34] If decision making power was also to be conferred on non-owner occupiers, it would represent a significant dilution of the existing rights of owners. This would be difficult to justify in A1P1 terms, particularly if non-owner occupiers were not also subject to an equivalent share of liability for costs.

6.26 Conferring power to participate in maintenance decisions on tenants of tenement flats may also disrupt the law of leases more generally. It may not be clear why a tenant who happens to lease a tenement flat should have this power in respect of the fabric of the property, whereas a tenant who leases a single family home, for example, does not. Any rebalancing of the rights and responsibilities of landlords and tenants of this kind would therefore seem to require a broader review of the law of leases, which is clearly beyond the scope of this project.

6.27 Although our provisional view is that non-owner occupiers should not be members of the OA, the introduction of the regime may allow for the position of such occupiers to be recognised in other ways. In particular, in Chapter 4, we consult on the suggestion that occupiers should have title to seek a remedial management order where the OA is in default on its mandatory duties.[35] This should strengthen the position of non-owner occupiers in relation to building maintenance without interfering disproportionately with the rights of owners.

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[32] Occupancy rights are conferred on the spouse of a flat owner by the Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 1 and on the civil partner of a flat owner by the Civil Partnership Act 2004 s 101.

[33] See 2.25. Under the TMS, an owner who does not share liability for the costs of a scheme decision is not allocated a vote in respect of that decision: TMS r 2.3.

[34] We consider the relationship between allocation of decision making power and share of liability for costs at 8.9-8.14.

[35] See 4.30-4.35.

6.28 We would be grateful for views. We ask:

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?

Which parts of the tenement should be managed by the OA?

6.29 The focus of the Working Group recommendations is on the common parts of tenement buildings.[36] In other words, the function of the OA is to manage maintenance of parts of the building for which flat owners have shared responsibility. The Tenements (Scotland) Act 2004 reformed the law significantly in this respect by providing a default rule that responsibility for strategically important parts of the building should be shared regardless of who owns the part in question.[37] For example, the roof may be in the sole ownership of the top floor flat, but all owners will share the costs of maintaining it, unless specific alternative provision is made in the property titles.

6.30 In the 2004 Act, the parts of the building for which responsibility is shared are referred to as "scheme property". This term is defined in rules 1.2 and 1.3 of the TMS. Scheme property includes, first, any part of the building which is common property of two or more owners of separate flats. Second, it includes any part of the building in respect of which responsibility for maintenance is shared by two or more owners by virtue of provision in the titles.

6.31 Third, scheme property includes the following parts of the building, even where they are not in common ownership or subject to shared maintenance obligations in the titles:

- The ground on which the tenement is built;
- Its foundations;
- Its external walls;
- Its roof (including rafters and supporting structures);
- Part of a mutual gable wall which separates it from a neighbouring building;
- Any load bearing wall, beam or column.

However, there are specific exclusions from this list, namely:

- Any extension which forms part of only one flat;
- Any door, window, skylight, vent or other opening which serves only one flat;

[36] See, for example, Final Recommendations Report p 4.
[37] Tenements (Scotland) Act 2004 s 4(6).

- Any chimney stack or chimney flue.

6.32 It follows that, where the titles provide that an external wall including a window is common property, both the window and the wall will be scheme property. This is because all common property is scheme property. If the titles provide that an external wall including a window is in the sole ownership of the adjacent flat, the wall will be scheme property, since the wall is included in the list of strategically important parts of the building which overrides the titles. However, the window will not be scheme property, since windows are excluded from that list.[38]

6.33 In the DMS, the deed which applies the scheme to a development must specify the property within the development to which the scheme will apply.[39] If the development includes a tenement, the definition of scheme property given in the 2004 Act will apply in respect of that tenement.[40]

6.34 We understand it to be the intention of the Working Group that the OA should, in broad terms, manage "scheme property" as defined under the current law. It would also be consistent with the A1P1 rights of owners for the new management scheme under the OA to apply to the same property as the current management scheme under the 2004 Act. Accordingly, our provisional view is that the "scheme property" to be managed by the OA should be defined in the same way as "scheme property" under the TMS.

6.35 It may be useful, however, to clarify some areas of uncertainty or ambiguity with the current definition which have been brought to our attention in early consultation. Concerns have been brought to our attention in relation to the following parts of a tenement building:

- *Dormers*: it seems clear that the roof and walls of a dormer, like all parts of the roof or walls of a tenement building, are scheme property by virtue of being included in the list of specific building parts set out in para 6.31 above. Windows (including the window of a dormer) are not included in the list of specific building parts. However, building parts not included in that list will nevertheless be scheme property where they are in common ownership of all the flats in the tenement, or where responsibility for maintenance of that building part is shared by two or more owners by virtue of provision in the titles. A window (including a window in a dormer) which fulfils either of those two criteria will therefore be scheme property. We are not sure that any change to the current definition of "scheme property" is required to deal with dormers.

- *Skylights*: a skylight which lights only one flat is excluded from the list of specific building parts which are scheme property. Where renovation means that a skylight which formerly served multiple flats now serves only one, it will cease to be scheme property by virtue of the list of specific building parts at the point at which it ceases to serve more than one flat. As with a dormer, however, a skylight will nevertheless

[38] Case law suggests that a window installed in a commonly owned roof or wall becomes common property by virtue of acceding to that roof or wall, and as common property, the window is therefore scheme property: see *Waelde v Ulloa* 2016 GWD 11-221 (Sh Ct) and *Mehrabadi v Hough* 11 January 2010, Aberdeen Sheriff Court.
[39] DMS Order art 20(1) and DMS rule 1.
[40] DMS Order art 20(2)-(3).

be scheme property if it is in common ownership or where responsibility for maintenance of it is shared by two or more owners by virtue of provision in the titles. We are not sure that any change to the current definition of "scheme property" is required to deal with skylights.

- *Cupolas*: a cupola is a rounded dome forming part of a roof. In some cases, it will provide light or ventilation. In others, it will be purely decorative. Cupolas are not explicitly mentioned in the current definition of scheme property. However, a cupola which provides light or ventilation would seem to be a "window, skylight, vent or other opening" and treated accordingly. A cupola which does neither is simply part of the roof, and should be treated accordingly. We are not sure that any change to the current definition of "scheme property" is required to deal with cupolas.

- *Floor beams*: floor beams are included in the list of specific building parts which are scheme property only where they are load bearing. It has been suggested that even beams which are not load bearing should be scheme property, since they can provide a structural function in tying walls to a building. In our earlier Report on Tenement Law, we took the view that the definition of scheme property could not cover every potentially structurally significant part of a building since owners could not be expected to easily identify what would meet that test, particularly in light of the fact that experts might reasonably disagree about the structural significance of certain building parts.[41] Accordingly, the definition of scheme property limits itself to parts of the building where structural significance is not in question. We think this justification for the exclusion of non-load bearing beams from the definition of scheme property continues to be sound, but seek the views of consultees below.

6.36 We would be grateful for views on the definition of scheme property to be adopted in the OA legislation. We ask:

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?

Administrative matters

List of members

6.37 The operation of the OA regime requires the manager to be able to contact members, and in some cases for members to be able to contact one another. An up-to-date list of the names and contact details of members is therefore essential. Similarly to the DMS,[42] we suggest the manager should be under a duty to keep a record of the names and contact details of each owner.[43] Members should be under a counterpart duty to provide the manager with

[41] Report on the Law of the Tenement para 5.7.
[42] DMS rule 8(h).
[43] The DMS requires the manager to maintain a list of names and addresses of members. In the OA regime, the address of a member will not necessarily be the flat which they own in the tenement: some members will be

these details. We suggest members should be required to provide this information within three months of the appointment of the first manager, and thereafter to inform the manager of any changes to these details within one month of the changes occurring. Where a member intends to sell or otherwise dispose of their flat, as under the DMS,[44] they should be under a duty to notify the manager of any change to their contact details which will result, the name and contact details of the new owner, the name and address of the solicitor acting for the new owner and the date on which the new owner will be entitled to take entry. Where a member fails to provide this information, the manager should have power to seek it elsewhere (for example, from the Land Register or the Landlord Register) and impose any associated cost directly on the member in question.

6.38 Any member of the OA should be entitled to obtain this information from the manager where necessary in connection with management and maintenance of the building or the operation of the OA, as under DMS rule 4.8.[45]

6.39 We seek views. We ask:

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?

Signing documents and executing deeds

companies with a registered company address, and even members who are human beings may live elsewhere. Legislation which requires a member who is a human being to share their home address may give rise to difficulties under article 8 of the ECHR (the right to respect for private and family life, home and correspondence) where a less intrusive approach can secure the same outcome (see *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 at para [90]). In practice, the manager or members of the OA will be concerned chiefly with a mechanism by which other members can be contacted, rather than requiring their home addresses as such. Accordingly, we consider the requirement to provide the manager with contact details, rather than an address, to be more appropriate for the OA legislation.

[44] DMS rule 4.9.

[45] See also Report on Real Burdens para 8.78.

6.40 The legislation must be clear about how an OA may validly sign a document or execute a deed. As under the DMS,[46] and in keeping with the rules for other bodies corporate,[47] we suggest that the manager should generally be empowered to sign on behalf of the OA.[48] If members wished, they could appoint another person or persons to act as a signatory under the general powers conferred on the OA.[49]

6.41 We ask:

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

Sending

6.42 The legislation will require the manager and sometimes members to circulate documents such as the draft annual budget. In the interests of certainty, we think provision should be made in the legislation about how such information can be sent. Unlike the other matters discussed in this Chapter, we suggest the rules on sending set out in the legislation should operate as a default, applicable only where alternative provision is not made in the property titles. In our survey of title conditions, we found provision for notification was unusual in older titles but showed signs of becoming more common in deeds from the 1980s onwards.[50]

6.43 Following the DMS,[51] we suggest that, by default, it should be possible to "send" information by post, by delivery or through transmission by any reasonable electronic means. "Delivery" should include any of the forms of service available under the Ordinary Cause Rules,[52] namely delivery into the hands of a recipient who is a natural person,[53] leaving the notice in the hands of a resident at the recipient's dwelling,[54] in the hands of an employee at the recipient's place of business,[55] letterbox delivery following diligent enquiry[56] or by leaving the notice at the recipient's dwelling place or place of business in such a way that it is likely to come to their attention following diligent enquiry.[57] We suggest that "electronic means" should be construed as reasonable where the intended recipient has used that method of communication in connection with the business of the OA during the previous year. This will allow for information to be sent by way of platforms such as Facebook or Whatsapp where recipients are accustomed to communicating in that way.

6.44 The DMS also includes two further rules which we suggest should be replicated in the OA legislation. First, sending information to a member's agent will meet the requirement to

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[46] DMS rule 5.
[47] Requirements of Writing (Scotland) Act 1995 Sch 2.
[48] A signature by the manager could not bind the OA where the purported transaction exceeded the manager's actual or apparent authority, on which see 9.42-9.48.
[49] See 7.5-7.9. The decision to appoint a new signatory would be taken by way of one of the processes outlined in Chapter 8.
[50] Appendix B para 28.
[51] DMS Order art 19(2).
[52] Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 ("OCR 1993") rule 5.4.
[53] *Ibid* rule 5.4(1)(a), see *Rae v Calor Gas Ltd* 1995 SC 214 (CSIH) at 219; *Macphail's Sheriff Court Practice* (3rd edn, 2006) para 6.25.
[54] OCR 1993 rule 5.4(1)(b).
[55] *Ibid*.
[56] I*bid*, rule 5.4(3)(a).
[57] *Ibid,* rule 5.4(3)(b).

send it to the member.[58] Second, where a member cannot by reasonable inquiry be identified or found, it will be sufficient to send relevant information to the flat in the tenement which they own addressed to "the owner" or an equivalent term.[59]

6.45 We ask:

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?

Is the OA a "property factor"?

6.46 The Property Factors (Scotland) Act 2011 sets out a framework for regulation of persons who manage common areas of residential property on a commercial or professional basis.[60] We consider this legislation in more detail in Chapter 9, where we look at the role of the OA manager, and consider whether or when a person taking on this role should be regulated by the 2011 Act.[61]

6.47 Regardless of the position of the OA manager, a separate question arises as to whether the OA *itself* might be regulated by this legislation. The regulatory regime applies to any "property factor" as defined by the Act. This definition includes any person who, in the course of that person's business, manages the common parts of land owned by at least two other persons, and used to any extent for residential purposes.[62] The OA will be a person, managing common areas of the tenement on behalf of its members. Whether it does so "in the course of its business" may not be certain, but the possibility of this definition applying to the OA cannot be ruled out.

6.48 The 2011 Act clarifies the position for the DMS by explicitly excluding a DMS owners' association from the definition of "property factor".[63] The reasons for this provision were not explicitly discussed during the passage of the Bill which became the 2011 Act through Parliament. However, it might reasonably be suggested that regulating the owners' association itself, rather than the manager carrying out the day-to-day work of the association, seems inappropriate. The legislation aims to regulate professional standards within the

[58] DMS Order art 19(1)(a).
[59] DMS Order art 19(1)(b).
[60] Property Factors (Scotland) Act 2011 s 1. Local authorities and housing associations who manage common areas are also regulated by the Act.
[61] See 9.8-9.24.
[62] Property Factors (Scotland) Act 2011 s 2(1). Further definitions cover local authorities or housing associations who manage commonly owned or used land, and land management companies: see the discussion at 9.9.
[63] Property Factors (Scotland) Act 2011 s 2(2)(b).

commercial property management sector for the benefit of customers.[64] This aim does not have an obvious fit for an owners' association – it is not a commercial enterprise, and the owners are not customers of the association. Regulating both the association and the manager would also seem confusing and unnecessary.

6.49 For the same reasons, we think it would also be appropriate to exclude OAs from the definition of "property factor" in the 2011 Act. We would be grateful for the views of consultees. We ask:

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?

[64] Policy Memorandum for the Property Factors (Scotland) Bill paras 2-7.

Chapter 7 Powers of the owners' association

Introduction

7.1 In Chapter 6, we provisionally proposed that the OA should be a bespoke legal person. If consultees support that approach, what powers should this new type of legal person be capable of exercising?

7.2 Under current law, power to carry out work to the tenement lies with the owners. This power may flow from their (single or common) ownership of the part of the tenement in question, or may result from a maintenance decision taken in terms of the TMS or relevant title conditions. Although owners may share these powers, in tenements where no factor has been appointed, it is often left to one owner to exercise the powers individually and seek repayment from others for costs incurred. Usually, an owner will take this on because maintenance work has become necessary to keep the building wind and watertight. However, even where owners take a proactive, unanimous decision to renovate or upgrade parts of the building, there is little option but to delegate the work of implementing that decision to one owner.

7.3 The Working Group considered this a significant flaw in the current system which could best be addressed through the introduction of OAs.[1] Rather than an owner taking on responsibility for work, the OA would do so in its own name. As under current law, the OA could exercise these powers on behalf of owners only where they have agreed that it should do so. In Chapter 8, we discuss how such decisions can be made, suggesting that a majority of owners voting in favour will usually suffice. Without the necessary majority, the OA cannot exercise it powers. Where majority agreement is in place, however, the intention of the Working Group seems to have been that the OA should have a broad capacity in relation to management of the fabric of the building.

7.4 In the sections which follow, we consider how the powers of the OA might be defined in any future legislation resulting from this project. We anticipate that the provisions setting out the powers of the OA will form part of the OAS, and therefore (in line with our provisional view in Chapter 4) generally operate as background law, applicable only where provision in the tenement titles is silent or incomplete.[2] Nevertheless, the default rules should aim to be appropriate for as wide a range of OAs as possible. In addition, we think it may be useful for certain mandatory limitations to be placed on the powers of the OA. Without limitations, an OA may be configured to operate in the same way as a profit-seeking company whilst escaping the regulatory regime that would apply under company law. In policy terms, we think this outcome should be prevented.

[1] Final Recommendations Report p 6.
[2] See 4.44-4.53.

Core function and specific powers

Core function

7.5 Legislation may take a range of approaches to conferring powers on a legal person. An initial question is whether a broad statement of the body's capacity is preferred[3] or a more detailed list of specific powers which the body is entitled to exercise.[4] Statute might provide simply that the OA has capacity to take any action necessary for the management and maintenance of the tenement.[5] Such an approach offers a considerable degree of flexibility, which is likely to be useful bearing in mind the range of tenement properties in which OAs will operate and in respect of which maintenance needs might be difficult to anticipate. It would also equip the OA to adopt new techniques or technologies, for example in relation to energy retrofit of buildings, as they emerge: a more defined list of powers may inadvertently exclude such actions and require legislative amendment to bring it up to date.[6]

7.6 The disadvantage of such an approach, however, is potential uncertainty about what lies beyond the powers of the OA. This is a significant concern given the intention that an OA should be able to operate without professional advice.

7.7 In the DMS, a middle path is taken.[7] The function of the association is defined as being "to manage the development for the benefit of the members".[8] The association is then given a general power "to do anything necessary for or in connection with the carrying out of [its] function", supplemented by a non-exhaustive list of specific actions it may take.[9] In recommending the DMS, we suggested that it would be "convenient and, for the owners, perhaps reassuring" to provide such a non-exhaustive list.[10] This approach is in line with legislation in most comparator jurisdictions.[11] It may also be an approach with which owners have some familiarity, bearing in mind the list provided in the TMS of decisions which may be taken by a majority of owners under the rules of that scheme.[12] For all these reasons, we think it would be sensible to adopt a similar approach for OAs.

7.8 In line with the DMS, and with the intentions behind the introduction of OAs, we would suggest the function of the OA should be to manage the tenement for the benefit of members. The OA should then be given the power to do anything necessary for or in connection with that function, supplemented by a non-exhaustive list of specific actions it may take. We would

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[3] By default, both companies and LLPs have unlimited capacity subject to the terms of their constitutions: Companies Act 2006 s 31(1) and Limited Liability Partnerships Act 2000 s 1(3).
[4] See, for example, the list of default powers available to Community Benefit Societies under the Co-operative and Community Benefit Societies Act 2014 ss 26-27.
[5] This is similar to the provision that a Scottish Charitable Incorporated Organisation "has power to do anything which is calculated to further its purposes or is conducive or incidental to doing so" in the Charities and Trustee Investment (Scotland) Act 2005 s 50(5).
[6] A problem akin to this arose with the definition of "maintenance" in the TMS rule 1.5, which did not initially include the installation of insulation. The definition was amended in this respect by the Climate Change (Scotland) Act 2009 s 69.
[7] The approach taken in the DMS is also the approach we recommended in relation to TMS B: Report on the Law of the Tenement para 6.10.
[8] DMS rule 3.1.
[9] DMS rule 3.2.
[10] Report on Real Burdens para 8.14.
[11] Van der Merwe, "Apartment Ownership" paras 337 (Western Europe) and 363 (Anglo-American countries).
[12] TMS rule 3 defines "scheme decisions" capable of being taken by a majority of owners within the rules of the scheme.

be grateful for the views of consultees on this overall framing before we consider the content of the non-exhaustive list.

7.9 We ask:

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?

Non-exhaustive list: key powers

7.10 Assuming consultees support this approach to framing the OA's powers, the question which follows is which powers should be included in the non-exhaustive list. In the DMS,[13] the owners' association is empowered by default to take the following actions:

- Carry out maintenance, improvements or alterations to scheme property
- Enter into a contract of insurance in respect of the tenement or any part of it
- Purchase or otherwise obtain the use of moveable property
- Require owners to contribute by way of a service charge to association funds
- Open and maintain an account with any bank or building society
- Invest any money held by the association
- Borrow money
- Engage employees or appoint agents

7.11 It should be kept in mind that each of the powers on this list would be exercisable only where members had taken a decision that the OA should do so. We consult on the decision making process in Chapter 8, but for present purposes it is worth noting that decisions will generally be taken by a vote amongst members, and where the decision concerns the exercise of a power which is likely to incur significant expense or impact more significantly on owners in other ways, the majority of votes required to exercise that power is also likely to be higher than for more routine decisions.

7.12 It should also be kept in mind that, assuming consultees support our provisional views above, the OA will be able to exercise these powers only insofar as necessary to fulfil its core function of managing and maintaining the tenement. Accordingly, the OA would have capacity to acquire moveable property such as cleaning materials or gardening tools, but not property entirely disconnected from building maintenance. Similarly, the OA may wish to employ cleaners or appoint a manager, but could not employ or appoint any person to carry out duties unconnected to the building.

[13] DMS rule 3.

7.13 Finally, it should be emphasised that the OA will generally be free to take actions not covered in this list, again so long as they are necessary to fulfil its core function of managing and maintaining the tenement.[14] Below, we consult on two powers likely to be used infrequently by an OA, but which we consider might usefully be included in a non-exhaustive list for the sake of clarity, namely the power to demolish the tenement and the power to execute a deed modifying the application of the OA legislation to the tenement. At this stage, it would be useful to hear from consultees if the list set out above covers the majority of routine actions likely to be undertaken by an OA.

7.14 We ask:

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?

Meaning of "maintenance"

7.15 Although it seems uncontroversial to suggest that the OA should have the power to take forward maintenance works, in early consultation for this project, we have heard that the meaning of maintenance in the current legislative scheme may not be entirely clear. Section 8 of the 2004 Act places a duty on an owner of any part of the tenement building which provides support or shelter to maintain that part so as to continue to provide support and shelter.[15] Separately, the TMS provides that scheme decisions can be taken in respect of maintenance of scheme property,[16] and rule 1.5 sets out the following definition of "maintenance" for this purpose:

> "maintenance includes repairs and replacement, the installation of insulation, cleaning, painting and other routine works, gardening, the day to day running of a tenement and the reinstatement of part (but not most) of the tenement building, but does not include demolition, alteration or improvement unless reasonably incidental to maintenance." [17]

7.16 The maintenance required by the section 8 duty is explicitly more limited than the maintenance work encompassed by this definition in the TMS. However, it seems this may not always be well understood, with flat owners instead considering that the section 8 duty extends to all the routine works covered by the TMS definition. In other words, it is erroneously considered that the there is a *duty* to maintain scheme property in line with the TMS definition, even where such property does not provide support or shelter to other parts of the building, or where work covered in the TMS definition is not essential to ensuring that support or shelter

[14] We consult below on whether legislation should include mandatory restrictions on the exercise by the OA of certain powers, namely carrying on a trade or business and acquiring heritable property: see 7.26.
[15] We consider this duty further in Chapter 11, including consulting on whether the wording of the duty should be amended to explicitly include maintenance necessary to avoid the risk of damage to persons or property: see 11.12.
[16] TMS rule 3.1.
[17] TMS rule 1.5.

can continue. It is understandable that flat owners may find this distinction difficult to parse, particularly since the section 8 duty is often referred to colloquially as "the duty to maintain" without the further qualification placed on that duty in the legislation. It has also been suggested to us that works required under the section 8 duty may not be always be covered by the TMS definition of maintenance, meaning that a scheme decision cannot always be taken in respect of work to scheme property required for compliance with the section 8 duty.

7.17 To resolve these potential ambiguities, we suggest that maintenance for the purposes of the OAS should be defined to expressly include any work required to ensure the compliance of scheme property with the duty currently set out in section 8 of the 2004 Act, and also to include other routine works of maintenance as set out in the existing TMS definition. Drawing this distinction between works required under section 8 and other routine maintenance should help to clarify the limited nature of the section 8 duty. Explicit inclusion of works required to comply with section 8 in the OAS definition should avoid any potential difficulty with such works falling outwith the default management scheme.

7.18 Separately, in early consultation for this project, it has been suggested to us that the definition of maintenance should be expanded to include certain works that would currently be categorised as improvements. The focus of stakeholders making this suggestion has been on works such as the installation of a communal heating system or solar panels which would improve the energy efficiency of the tenement. Under current legislation, owners have no obligation to improve the energy efficiency of their building, meaning that there is no clear basis on which to recategorize works of this kind. In Chapter 8, we consult on the suggestion that improvements might be carried out in future on the basis of a special majority vote, rather than requiring unanimity as at present. We note also that other work being taken forward by government in relation to new building standards and the introduction of mandatory condition inspections for tenements may result in new duties on OAs which may justify a change in how decisions around such works can be taken. In the context of the current project, however, our provisional view is that there is no legitimate basis on which to recategorize such works as maintenance rather than improvements.

7.19 We would be grateful to hear from consultees on the issue of how maintenance should be defined in the OA legislation. We ask:

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?

Non-exhaustive list: demolition or sale of abandoned tenement

7.20 We noted above that, under the OAS, the OA will generally be free to take actions necessary to fulfil its core function of managing and maintaining the tenement even where those actions are not included in the non-exhaustive list. A question may arise, however, about

whether demolition or sale of an abandoned tenement are such actions. Our provisional view is that, where owners vote in favour, the OA should have the power to demolish all or part of the building, or to apply for power to sell the building if abandoned. We think it may be useful to include these powers in the non-exhaustive list in the interests of clarity.

7.21 The decision to demolish a tenement will obviously be unusual. Under the current law, unanimous consent of all owners to demolition will generally be required.[18] The 2004 Act makes provision on liability for the costs of demolition if the property titles are silent or incomplete in this respect.[19] The 2004 Act also prohibits any owner from building on or otherwise developing the demolition site unless they are under an obligation to do so or have the unanimous consent of all owners.[20] It allows any owner to apply to court for power to sell the demolition site[21] under the process set out in schedule 3 to the Act, with provision on how the proceeds of the sale should be distributed if the property titles are silent or incomplete in this respect.[22]

7.22 The DMS allows for the owners' association to demolish all or part of the scheme property.[23] The decision to do so requires a higher voting threshold than most other activities,[24] and the consent of the owner is required where it is proposed to demolish property in sole ownership.[25] We think a similar approach is likely to be appropriate under the OAS. In Chapter 8 we consult on the appropriate voting threshold for demolition and suggest, as under the DMS, that the consent of an owner of any affected part of the building should be necessary before demolition can go ahead, generally meaning that unanimous consent to demolition will be required.[26] Where a decision is taken in compliance with those requirements, the OA should have the power to instruct the demolition work, seek approval if necessary to sell the demolition site and administer the proceeds of the sale if required.

7.23 Similarly, under current law, any owner is permitted to seek approval from the court to sell a tenement building which, due to its poor condition, has been entirely unoccupied for more than six months and is unlikely to be occupied by an owner or any other authorised person.[27] We suggest this power should also be exercisable by the OA, which would allow a manager to take action to sell the building if no owner is willing to do so.

7.24 We seek views. We ask:

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

[18] Partial demolition is usually prohibited by the obligation on all owners under section 9 of the 2004 Act not to interfere with support and shelter provided to other parts of the building, although it may be possible in the unlikely case of a top-down storey-by-storey demolition with adequate measures to maintain support and shelter: see Report on the Law of the Tenement para 9.18.
[19] 2004 Act s 21.
[20] 2004 Act s 22(1)-(2).
[21] 2004 Act s 22(3).
[22] 2004 Act s 22(4)-(5).
[23] DMS rule 3.2(b).
[24] DMS rule 13.1.
[25] DMS rule 13.2.
[26] See 8.33.
[27] 2004 Act s 23.

(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?

Non-exhaustive list: execution of a deed modifying the application of the OA legislation

7.25 In Chapter 4, we suggested that the OAS should generally operate as background law, subject to provision made in the tenement titles.[28] Such provision would usually be made by execution of a deed of conditions. In Chapter 5, we consulted on whether it should be possible for certain categories of tenement to disapply the OA legislation, including through registration of a DMS deed of application.[29] We think it may be sensible to clarify that, under the OAS, the OA has the power to execute deeds which modify or disapply the OA legislation in this way. This accords with the position in the DMS, where the owners' association may grant deeds of disapplication or variation where the appropriate voting threshold has been achieved.[30] We consult on the appropriate threshold for a decision to execute a deed modifying the application of the OA legislation in Chapter 8.[31]

7.26 We ask:

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?

Mandatory limitations on the powers of the OA

7.27 Above, we have suggested that the OA should, by default, have power to do anything necessary for or in connection with its function of managing the tenement for the benefit of members. We have also consulted on a non-exhaustive list of specific powers falling within that remit. As part of the OAS, these provisions on the powers of an OA will operate as background law, and alternative provision may be made within the tenement titles. However, we think the freedom of owners to make alternative provision in relation to the powers of the OA may require to be subject to two absolute restrictions. First, we suggest the OA should be prohibited from carrying on a trade. Second, we suggest the OA should be prohibited from acquiring heritable property outwith the tenement.

[28] See 4.44.
[29] See 5.24-5.45.
[30] DMS rule 16.2.
[31] See 8.29-8.34.

Carrying on a trade

7.28 In the DMS,[32] the owners' association is prohibited from carrying on any trade, whether or not for profit. In our recommendations which led to the enactment of the DMS, we noted the following in support of this approach:

> "An owner should have the reassurance that the association will not embark on the manufacture of ball bearings or on a career of property speculation; and the special informality which we are proposing for owners' associations should not be available for corporations which are engaged in trade." [33]

We consider that OAs should be prohibited from carrying on a trade for the same reasons. The more stringent governance requirements placed on trading bodies are essential to protect both their members and the other parties with whom they trade. Restricting the capacity of OAs in this respect justifies the more relaxed standards which should allow the body to operate without the necessity of professional advice.

7.29 We ask:

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

Owning heritable property

7.30 The position in respect of owning heritable property is more complex. In our recommendations for TMS B, we suggested that it should not be possible for an owners' association to acquire land.[34] In the DMS, the owners' association is empowered to own, or acquire ownership of, any part of the development.[35] In support of this, our recommendations as to the content of the DMS suggest simply that the association might wish to own "recreational and other facilities".[36] The owners' association in a DMS is nevertheless prohibited from acquiring land outwith the development.[37]

7.31 In early consultation for this project, it was suggested to us by some stakeholders that an OA should have the power to own parts of the tenement building. Comparative law offers some interesting examples of how this works in other jurisdictions. At one end of the spectrum, the whole building (including the individual flats) may be owned by a body corporate. Instead of acquiring ownership of a flat itself, a person would acquire a share of ownership of the body corporate, which would entitle them to exclusive occupation of a specific flat together with shared use of the other parts of the building.[38] We are not aware of any demand to develop this ownership model in Scotland, and the recommendations of the Working Group did not appear to envisage such an extensive role for the OA. Accordingly, we consider that such a radical reform of the law would fall outwith the scope of our current project.

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[32] DMS rule 3.3.
[33] Report on Real Burdens para 8.14.
[34] Report on the Law of the Tenement para 6.9.
[35] DMS rule 3.2.
[36] Report on Real Burdens para 8.14.
[37] DMS rule 3.3.
[38] See generally Van der Merwe, "Apartment Ownership" paras 50-59.

7.32 However, there may be more limited circumstances in which ownership by the OA of a flat in the building is consistent with the policy justifications for the introduction of the OA regime. Before considering these circumstances, it is important to recall the broader restrictions on the powers of the OA previously discussed. If consultees support the general approach to conferring powers on the OA we suggest above, the OA would be able to own a flat only where consistent with its core function of managing and maintaining the tenement. Under our provisional view above, the OA would also be prohibited from carrying on a trade, which would limit the uses to which the flat could be put. Nevertheless, examples of situations in which the OA may wish to own a flat can be imagined. In our survey of tenement title deeds, we encountered one example of a large development subject to a DMS in which the owners' association retained ownership of a property, use of which was to be given to the development manager. It is feasible that a flat in a larger tenement might be dealt with by an OA in the same way. Demand for such an arrangement within an average tenement of eight or ten flats seems unlikely bearing in mind the cost to the OA of acquiring the flat. We will be grateful to hear the views of consultees on this issue.

7.33 Separately, consideration may be given to allowing the OA to own parts of the building other than the flats. In principle, the OA could own parts of the building which are usually held in common ownership by all flat owners as pertinents of their flats, such as the main door and close or lift. Owners would therefore have to rely not on their ownership of a flat, but on their membership of the OA, as the basis for use of or access through such areas. It seems to us that such an arrangement would be novel in Scots law and risk disturbing settled property law principles in relation to access to and use of a tenement building. We also have not detected any appetite for such an arrangement in early consultation for this project. Our provisional view is that the OA should not be permitted to own indispensable parts of the building of this kind.

7.34 However, a tenement may also have parts which are not essential to use of the flats, most obviously a garden. This area of a tenement may be the closest equivalent to the parts of a development which we thought the DMS owners' association may wish to acquire. It is not immediately obvious what benefit there would be for such areas to be owned by an OA assuming, as recommended above, that power to manage the areas lies with the OA where the areas are scheme property. But equally, there seems no particular reasons to prohibit such ownership if it is thought by consultees to have advantages.

7.35 It is important to note here that provision allowing for an OA to acquire property in this way would not result in an automatic change to the existing ownership arrangements in any tenement building. Flat owners in an existing tenement would have to choose – unanimously, in the case of common property – to transfer ownership of these parts to their OA. Whether there would be any demand for such an arrangement is difficult to predict. Consent of standard security holders in respect of such parts of the building to the transfer would also be required, and seems unlikely to be forthcoming. However, it was represented to us in early consultation for this project by a small number of stakeholders that this type of ownership arrangement may be desirable. Accordingly, we would be interested in the views of consultees.

7.36 We ask:

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?

7.37 The question also arises of whether the OA should have capacity to own heritable property beyond the boundaries of the tenement. It is difficult to envisage how such a capacity might be exercised in a way consistent with the core function we recommend for the OA, namely the management and maintenance of the tenement, particularly if the OA is prohibited from carrying on a trade. We suspect the demand amongst OAs to own property beyond the boundaries of the tenement is also likely to be limited. However, we would be grateful for views.

7.38 We ask:

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

Chapter 8 Running the OA: members

Introduction

8.1 In Chapter 7, we considered the powers that should be exercisable by the OA. Like any legal person, the OA will require human beings to decide when and how its powers should be exercised, and to carry out actions (such as negotiating contracts and supervising tradespersons) on its behalf. We refer to these processes as "operating mechanisms".

8.2 For some types of legal person such as companies, operating mechanisms are set out in legislation. If consultees favour the introduction of OAs using an existing legal person of this kind, we will explain the operational framework in place for that form of person in our final recommendations for the project. However, if the OA is a bespoke legal person as we provisionally propose in Chapter 6, any legislation resulting from this project will need to set out operating mechanisms specific to the OA. Based on early consultation for this project and discussions with our advisory group, we anticipate that consultees will be supportive of the suggestion that the OA should be a bespoke legal person. Accordingly, we now consider which operating mechanisms may be appropriate for the OA created in this form.

8.3 In brief terms, we suggest that the OA will operate through two key mechanisms. First, the owners of flats in the tenement acting collectively as the membership of the OA will have power to decide which actions the OA should take. We consider the role of the membership in this Chapter. Second, the OA legislation will require the appointment of a manager to make day-to-day decisions about exercise of the OA's powers and to carry out actions on the OA's behalf. The role of the manager is considered in Chapter 9.

8.4 Our focus in this Chapter is on *how* members decide which actions the OA will take. The discussion focuses on matters including allocation of votes, voting thresholds for decisions on different issues, how members' meetings can be convened and run, and how voting by consultation outwith meetings may operate. We also consider when and how majority decisions taken by the membership can be challenged. We anticipate that the provisions dealing with decision making by members will form part of the OAS, and therefore (in line with our provisional view in Chapter 4) will generally operate as background law, applicable only where provision in the tenement titles is silent or incomplete.[1]

8.5 In the discussion which follows, our approach is strongly influenced by the rules of the TMS and the DMS. In most cases, we recommend maintaining continuity with the current legal rules on decision making in tenements in order to minimise the interference with the rights of owners under A1P1, and we address potential issues in that respect where they arise. We seek the views of consultees throughout.

[1] See 4.44-4.52.

Ownership, liability and voting rights

8.6 A preliminary comment should be made about the connection between ownership of, liability for, and the right to make decisions in respect of, the common parts of a tenement building. In some jurisdictions, these three aspects of apartment ownership are tied together as a single "unit allocation" or "participation quota".[2] Broadly speaking, in systems of this kind, the quota allocated to each flat determines: (i) its share of ownership of the common parts; (ii) its liability for the costs of managing and maintaining the building; and (iii) the weight of its vote in making decisions about management and maintenance. Where flats are roughly equivalent in size (and/or value), it would be expected that each flat will have the same quota. Accordingly, in a building of ten identical flats, each will own one tenth of the common parts, be liable for one tenth of the cost of works and have one vote out of a total of ten in respect of any decision to carry out works. Where there is variation in the size (or value) of flats, the quota allocated to each flat can reflect that.[3]

8.7 There is an obvious logic in this approach, which works well in jurisdictions where the strategic parts of the building such as the roof, external walls and foundations are commonly owned. The difficulty in Scotland is that ownership of a tenement is generally not distributed in this way. Instead, the roof will be a pertinent of the top flat(s),[4] the foundations a pertinent of the ground floor flat(s)[5] and the external walls owned in sections[6] unless the titles provide otherwise. Historically, this uneven distribution of ownership of the strategic parts combined with the general law of ownership – whereby, for example, a sole owner of the roof generally also had sole power to instruct repair works and sole liability for costs thereby incurred – caused difficulties with maintenance of tenements.[7] When the law was reformed in 2004, it was accepted that legislation could not disturb the allocation of ownership without breaching the rights of flat owners under A1P1.[8] Instead, unless specific provision is made otherwise in the property titles, ownership is decoupled from both decision making power and liability for costs in relation to strategic parts of the building, now termed "scheme property".[9] The result is that, for example, every flat in a tenement usually has a vote in respect of maintenance works to the roof, and shares the cost of that work, even where the roof is in sole ownership.

8.8 Maintaining this separation between ownership on the one hand, and voting rights and liability for costs on the other hand, is the only workable solution to the difficulties presented by the distribution of ownership of strategic parts of a tenement building in Scotland, in our view.[10] However, it may be useful to give the relationship between voting rights and liability for costs more thought.

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[2] See generally van der Merwe, "Apartment Ownership" paras 140-141.
[3] *Ibid*.
[4] 2004 Act s 2(3).
[5] 2004 Act s 2(4).
[6] 2004 Act s 2(1)(b).
[7] Report on the Law of the Tenement para 2.12
[8] Report on the Law of the Tenement paras 3.3-3.4 and 3.6-3.7.
[9] Report on the Law of the Tenement para 5.10. "Scheme property" is defined in TMS r 1.2 and 1.3.
[10] In early consultation, some stakeholders indicated a view that ownership rights within tenements should be reallocated so that (for example) the roof would necessarily be in common ownership of all the flats. Even if a legislative scheme could be devised to carry out such a reallocation in a Convention-compliant manner, changes in the law of ownership seem clearly beyond the scope of the project referred to us.

Relationship between voting rights and liability for costs

8.9 Under the TMS, the link between voting rights and liability is "rough and ready". Where a scheme decision is to be taken, each flat which has liability for the costs incurred as a result of the decision has one vote.[11] Flats with liability also generally share the costs equally.[12] However, two exceptions apply. First, where the cost relates to an area of scheme property which is in common ownership of two or more flats, each flat's share of ownership will determine their share of the cost.[13] Second, where the cost relates to an area of scheme property which is not in common ownership, and the floor area of the largest flat in the building is more than one and a half times greater than that of the smallest, liability is shared in proportion to the floor area.[14] These exceptions to the usual rule on liability have no effect on voting rights, so that in tenements where costs are shared in proportion to floor area for example, every flat continues to have one vote. However, an owner (or group of owners) with 75% or more of the liability for costs resulting from a decision may veto it, so long as they did not vote in favour of the decision in the first place.[15]

8.10 The DMS also includes provision for each unit to have one vote and for equal shares of liability for costs.[16] It would be expected that these rules would be varied where appropriate to take account of differences in the size or value of units, amongst other things.

8.11 In our recommendations which led to the introduction of the 2004 Act, we explored the question of imbalances in voting power and liability.[17] We noted evidence from consultees that, in tenements where there is mixed residential and commercial use (classically a tenement with shops or a pub on the ground floor and residential flats above), the title conditions will often allocate a significantly higher share of the costs of maintenance to the commercial unit(s) than the residential flats. We noted the risk that:

> "Where liability and voting power are seriously out of line, a majority of owners might cheerfully support a repair in the knowledge that it is one of the dissenting voices who must pick up most of the bill."[18]

Nevertheless, we considered a strict link between voting rights and liability to be undesirable, principally as a result of the practical difficulty that would arise in determining which owners were responsible for which percentage of liability for particular works at the point in time when the vote was being taken. Instead, we proposed the rule now embodied in the TMS that those with responsibility for 75% of the costs should be able to annul a majority decision in respect of which they did not vote in favour.[19]

8.12 In early consultation for this project, some stakeholders have expressed concern about the disconnection between voting rights and liability under the TMS. The anecdotal evidence

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[11] TMS rules 2.2 and 2.3.
[12] TMS rule 4.2(b)(ii).
[13] TMS rule 4.2(a).
[14] TMS rule 4.2(b)(i).
[15] TMS rule 2.10.
[16] DMS rule 11.1 (one vote per unit); rule 19.1 (service charge shared equally amongst units).
[17] Report on the Law of the Tenement para 5.29.
[18] *Ibid*.
[19] This could arise where, for example the commercial shop premises on the ground floor of the tenement is liable for 75% of maintenance costs, and the four residential flats above are liable for 6.25% of costs each. The shop could veto a scheme decision taken by the four flats.

we have heard to date suggests this issue comes into sharp focus where liability is apportioned on the basis of the "floor size" rule mentioned above, particularly where renovation within a tenement building has brought this rule into play without equivalent changes in voting power. An increase in liability under this rule may come about where a flat owner carries out renovations which increase the size of their own flat. Alternatively, it may occur where another owner splits what was a single flat into two or more. In that case, owners of the unrenovated flats will likely have the same share of liability for costs as they did previously, but since each smaller flat resulting from the renovation will have its own right to vote, the effective voting power of each unrenovated owner is diluted. It is easy to understand how an owner might feel that the law has treated them unjustly in these circumstances.

8.13 As in our earlier review of tenement law, however, we think the need for simplicity in the voting process continues to present a powerful argument against a strict equivalence between liability for costs and voting power. The OA regime envisions owners meeting at least once per year to make crucial decisions on tenement maintenance, with decisions taken at other times perhaps via consultation, as discussed below. If each flat has the same voting power, this makes votes relatively easy to cast and tabulate. In our discussion of liability for costs in Chapter 10, we consult on various circumstances in which liability may be attributed in a non-equal manner, as under the TMS. If the voting power allocated to a flat varied along with liability, the voting process would become more protracted and complex, and mistakes as to whether the appropriate threshold had been reached would become more common.

8.14 As under the TMS, we think a better approach to protecting the rights of owners with a disproportionately large share of liability for costs may be to provide them with a veto. We make this provisional proposal in our discussion of mechanisms for annulling a decision made by members beginning at para 8.65 below. Providing a protection that can be exercised after the vote allows for simplicity in the voting process to be retained without compromising the position of a minority of owners holding the majority of liability for costs.

8.15 We would be grateful for the views of consultees. We ask:

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?

Principles of decision making

8.16 Members will take decisions on how the OA should exercise its powers by way of a vote. In this section, we consider the default rules in the OAS as to how votes should be allocated to members and the voting threshold required for certain decisions to be taken.

Allocation of votes

8.17 Under current law, where decisions in relation to maintenance of tenement property can be taken by majority, the usual default rule is that each flat is allocated one vote. This rule applies in both the TMS[20] and the DMS.[21] In our survey of tenement title conditions, we found that the "one vote per flat" rule applied in 225 of the 235 deeds surveyed, either by way of

[20] TMS rule 2.2. No vote is allocated where the owner of the flat is not liable for maintenance of, or the cost of maintaining, the part of the building in respect of which a decision is being taken: TMS rule 2.3.
[21] DMS rule 11.1.

express provision in the title or through application of the default TMS rule in the absence of express provision.[22] A similar approach is common throughout Western European[23] and Anglo-American jurisdictions.[24] Against this background, it seems sensible to suggest that one vote per flat should also be the rule in the OAS.

8.18 We noted above that renovation can result in changes to the number of flats in a building. One flat may be subdivided into two, or two flats merged into one. The current legislation applies to a tenement as it is at the time of application, so that where the number of flats in the building increases, so too does the number of votes.[25] We recommended this approach in our Report on the Law of the Tenement for several reasons including its practicality: ascertaining how many flats are in a tenement today is straightforward, whereas tracing the allocation of votes back to the point at which legislation was brought into force becomes increasingly difficult with the passage of time.[26] We think the same approach is appropriate within the OA scheme, but we seek views below.

8.19 We ask:

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?

Voting thresholds

8.20 Prior to the introduction of the 2004 Act, unless the title deeds provided otherwise, decisions in relation to work on strategic parts of the tenement building were either the sole purview of the owner of that part, or required unanimous agreement amongst co-owners where the part was owned in common.[27] The move to majority decision making in relation to maintenance was one of the key drivers for reform of the law.[28] Retaining a principle of decision making by majority is likely to be appropriate within the OAS for the same reasons.

8.21 The current management schemes adopt somewhat different approaches when setting voting thresholds. Under the TMS, scheme decisions can be taken by the majority of votes allocated.[29] This is a simple majority whereby more than 50% of the allocated votes must be in favour.[30] If there is a tie, then no majority is achieved and the decision is not carried.[31]

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[22] Appendix B para 25.
[23] For example, WEG §25(2) (Germany), DCC art 5:113 (Netherlands). See generally Van der Merwe, "Apartment Ownership" para 347.
[24] For example, The Commonhold Regulations 2004 Sch 2 para 27 (England and Wales). See generally Van der Merwe, "Apartment Ownership" para 373.
[25] An example of the application of this rule can be found in *P S Properties (2) Ltd v Callaway Homes Ltd* 2007 [CSOH] 162.
[26] Report on the Law of the Tenement para 4.35-4.36.
[27] Report on the Law of the Tenement para 2.12.
[28] Report on the Law of the Tenement paras 2.19-2.22 and 5.12.
[29] TMS rule 2.5.
[30] 2004 Act Explanatory Notes para 147.
[31] Report on the Law of the Tenement para 5.13. It was suggested in *Humphreys v Crabbe* [2016] CSIH 82, 2017 SCLR 699 at [28] that that an appropriate response to deadlock would be an application under section 6 of the

Scheme decisions cannot be taken in relation to improvements, alterations or demolition of any part of the tenement.[32] Accordingly, a decision of this kind concerning a commonly owned part of the building requires unanimity amongst owners, or lies entirely within the power of the sole owner, unless the deeds otherwise provide,[33] which our survey of title conditions suggests is unusual.[34]

8.22 In the DMS, unless special majority provisions apply as discussed below, decisions are taken by a simple majority of votes *cast*, rather than votes allocated.[35] Decisions can be taken only at a general meeting, which requires attendance from members representing 50% of the votes allocated to proceed.[36] However, there is no compulsion on members in attendance to vote, and if a meeting is postponed because the attendance requirement is not met, then the postponed meeting may proceed regardless of how many members attend.[37] In theory, then, even one vote could be sufficient to make a decision within the DMS if no votes are cast in opposition.

8.23 Where special majority provisions do apply in the DMS, a decision can be taken only by a majority of all the votes *allocated*.[38] A special majority is required to exercise the following powers of the owners' association:[39]

- Making a payment from any reserve fund which has been formed;
- Carrying out improvements or alterations to scheme property where not reasonably incidental to maintenance;
- Demolishing scheme property where not reasonably incidental to maintenance.
- Disapplying the DMS from the development.

In addition, if the decision in question relates to scheme property which is not common property, the consent of the owner of the property is required.[40]

8.24 Determination of appropriate voting thresholds in the OAS requires consideration of the A1P1 rights of owners. If voting thresholds are lowered by comparison with the current law, A1P1 rights will be engaged, since the voting power of any individual owner is effectively diluted. However, this engagement can be justified where it pursues the legitimate aim of improving the quality of the tenement stock provided that it meets the proportionality test.

2004 Act. However, it seems clear that the court has no power to impose a decision on owners where a majority has not been achieved.

[32] Matters on which scheme decisions can be made are specified in TMS rule 3.

[33] It may also be possible for an owner to carry out work to scheme property in the sole ownership of another owner where necessary to ensure that owner's compliance with their duty to maintain their property so as to provide support and shelter to other parts of the building. This duty, set out in the 2004 Act s 8, is discussed at 11.5-11.15.

[34] Appendix B para 23.

[35] DMS rule 11.3.

[36] DMS rules 10.1 and 10.2. In larger developments of more than 30 units, attendance is required from members representing 35% of the votes allocated.

[37] DMS rule 10.3.

[38] DMS rule 13.1.

[39] DMS rule 13.1 and 16.2.

[40] DMS rule 13.2.

8.25 Taking that concern into account, we suggest the starting point for the OAS should be that a simple majority of votes is required for the exercise of most powers available to the OA. This largely replicates the position under the TMS, where scheme decisions can be taken by a majority. However, it will not produce identical results, since the powers available to the OA are somewhat broader than the matters on which scheme decisions can be taken.

8.26 Should the required majority be of votes *allocated*, as under the TMS, or votes *cast*, as under the DMS? Maintaining the position under the TMS is the most reliable way to ensure A1P1 compliance, and requiring a majority of votes allocated accords with the position in the majority of titles we analysed as part of our survey of tenement title conditions.[41] The challenge with this approach, however, is that it favours apathy over action. If a majority of owners simply refuses to engage with the maintenance of the tenement, the result is that work cannot proceed. This outcome seems undesirable in policy terms.

8.27 We think the solution to the problem of apathy in relation to maintenance may lie elsewhere in the OAS. In Chapter 11, we consider the duty on owners under section 8 of the 2004 Act to maintain their property so as to provide support and shelter to other parts of the building. We recommend that a manager who has not been able to obtain majority approval for an annual budget from members should be able to seek approval from the court for an annual budget covering any work necessary to ensure members comply with their duties under section 8.[42] This provides a mechanism under which maintenance to the standard required by statute can be carried out even in the face of member apathy.

8.28 However, we think it may also be worth considering a small change to the current simple majority rules. Under the TMS, a majority requires at least 51% of owners to vote in favour. Where votes are tied, so that half the owners in the tenement vote in favour of action and the other half vote against or, in the more likely case, do not vote at all, work cannot proceed. We think there is a case for saying that, in the case of a tied vote, the law should favour action rather than inaction. In other words, a vote of 50% or more would allow a decision to be made, rather than a vote of 51% or more. Owners who do not vote in favour of a decision, including those who do not cast a vote at all, will have the power to challenge any decision in court, as discussed further below.

8.29 Where a decision concerns the exercise of powers by the OA which would require unanimous consent under the current law, a higher voting threshold would seem appropriate. We anticipate that consultees will support the OA having powers to instruct improvements, alterations to and demolition of scheme property,[43] all of which require unanimity at present. Although we have generally favoured continuity with current rules in our provisional proposals here, we think this may be a case where a change to existing provision can be justified.

8.30 As touched on above, requiring unanimity in the tenement context arguably favours the apathetic owner at the expense of the engaged owner. Renovation plans favoured by all but one of the owners in a tenement will be stymied where the final owner simply refuses to engage, for example. Flats are physically interdependent and require cooperation between owners to maintain. Given that context, we suggest it is not desirable in policy terms for the

[41] Appendix B para 27.
[42] See 11.46-11.48.
[43] We consult on these potential powers of the OA at 7.10-7.14.

law to produce an outcome in which the owner who chooses not to engage is preferred. This is reflected in the fact that special majority rules are far more common than unanimity requirements in other jurisdictions.[44]

8.31 Following the example of the DMS, we think the introduction of a special majority rule in the OAS for decisions which may require unanimity under the current law would be appropriate. A threshold of 75% of votes in favour may be reasonable. To protect the position of the minority in such cases, as under the DMS, special majority decisions affecting scheme property not in common ownership should require the consent of the owner of the part of the tenement in question. The replacement of the rule of unanimity under current law with a special majority vote under the OAS is an interference with the A1P1 rights of owners, but we think the interference will be proportionate bearing in mind the policy arguments set out above, and the right of any owner who did not vote in favour of the decision to challenge it in court, as discussed below.

8.32 We suggest that special majority decisions may be required in relation to:

- improvement and alterations to, or replacements of, scheme property;
- demolition of a part of scheme property;
- making payments from any reserve fund maintained by the tenement;
- execution of a deed which modifies the application of the OA legislation to the tenement;[45]

We seek views on these and other decisions which may fall within this category below.

8.33 Separately, we think a decision to demolish the tenement as a whole should continue to require unanimity. This follows logically from the principle expressed above that the consent of a sole owner of property should be required for any significant work.

8.34 We would be grateful for consultees' views on these issues. We ask:

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?

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[44] For example, French, Belgian and Italian law see special majorities for certain decisions including alterations to scheme property. British Columbia, New South Wales and New Zealand also all make provision for special majority decisions, including improvements. See Van der Merwe, "Apartment Ownership" paras 348 and 374. Spain only requires unanimity for decisions to approve or amend the scheme rules, Spanish Law on Horizontal Property (Ley de Propiedad Horizontal) s 17.

[45] Execution of a deed of conditions requires unanimity under current law, but variation or discharge of conditions can be effected by majority subject to a right of challenge to the Lands Tribunal by any owner in the minority: Title Conditions (Scotland) Act 2003 ss 33-35.

(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?

Who can cast the vote?

8.35 Under the TMS, a vote can be cast by the owner of the flat or by someone nominated by the owner to vote.[46] Where the owner is a legal person, the law regulating persons of that type will determine who can exercise the vote on its behalf, so that a director of a company can normally vote on behalf of the company, for example. The DMS also allows for a vote to be cast by the owner of the unit or someone nominated on their behalf, but in that scheme the nomination must be in writing.[47] It seems the OAS might simply follow the TMS here – requiring nominations to be made in writing increases the burden on owners, and we are not aware of the absence of such a requirement under the TMS causing particular problems. We consult on this issue below, however.

8.36 Where a flat is owned by more than one person, both the TMS and the DMS provide that the vote for the flat may be cast by either (or any) co-owner.[48] If the co-owners cannot reach agreement on how the vote should be cast, the TMS allows a co-owner (or combination of co-owners) whose share of ownership is greater than 50% to cast the vote.[49] This provision, included in the Bill which became the 2004 Act, was a change from our original recommendation in respect of the TMS.[50] We had recommended that where co-owners disagree, no vote could be counted.[51] This latter rule applies to the votes of co-owners within the DMS.[52] While we have not been able to find any discussion about why the TMS rule did not follow our recommendation, it seems reasonable to speculate that it was animated by concern to protect the rights of co-owners of flats by minimising the circumstances in which no vote could be exercised in respect of that flat. Allowing for a majority vote between or among the co-owners of a flat might also be said to correspond with the more general move within the TMS towards a requirement of majority, rather than unanimity, amongst common owners (of parts of the tenement) in relation to maintenance matters. The disadvantage of the rule is that it adds complexity to the scheme.

8.37 We are not aware of any commentary on the distinction between the TMS and the DMS on this point, and no concerns about the exercise of votes by co-owners of flats have been raised with us in early consultation for the project. We seek the views of consultees

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[46] TMS rule 2.2.
[47] DMS rule 11.1.
[48] TMS rule 2.4; DMS rule 11.2.
[49] TMS rule 2.4.
[50] Report on the Law of the Tenement para 5.15.
[51] DMS rule 11.2.
[52] DMS rule 11.2.

below as to which rule should be preferred in relation to the exercise of votes by co-owners within the OAS.

8.38 We ask:

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?

Process of decision making: meetings

Calling a members' meeting

8.39 Under our provisional proposals, the OA will be subject to a mandatory duty to hold an annual meeting of members.[53] In our survey of tenement title conditions, we found provision as to how a meeting to discuss maintenance could be arranged in only around a third of titles.[54] In the interests of certainty, we think it would be useful for the OAS to set out rules as to how a meeting of members can be called. These rules would apply in relation to the compulsory annual meeting, but could also be used to convene meetings at other times should it be necessary or desirable.

8.40 Although the TMS includes no compulsion on owners to meet, any owner may call a meeting with a view to making a scheme decision should they wish to do so. Limited provision is made as to how the meeting should be organised. A meeting is called by that owner giving the other owners at least 48 hours' notice of the date, time and location of the meeting, and the meeting's purpose.[55]

8.41 In the DMS, the power to call a general meeting lies principally with the manager of the development. They are required to call an annual general meeting at least once per year,[56] and must also do so where required to by members holding not less than 25% of the total vote share.[57] Beyond that, the manager has the power to call other general meetings at any time.[58] A meeting is called by the manager sending a notice to each member at least 14 days in advance of the intended meeting date specifying the date, time and location of the meeting, and specifying the business to be transacted at the meeting.[59]

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[53] See the discussion at 4.16-4.17.
[54] Appendix B para 24.
[55] TMS rule 2.6.
[56] DMS rule 9.2.
[57] DMS rule 9.3(b).
[58] DMS rule 9.3.
[59] DMS rule 9.4.

8.42 If the manager fails to call a meeting in circumstances where they are required to do so, or if there is no manager, any member may call a general meeting following the same procedure as above.[60] Notice of the meeting must be sent to the manager if one is in place.[61]

8.43 Our general policy of maintaining continuity with the TMS would suggest that, under the OAS, any owner should be entitled to call a meeting at any time provided 48 hours' notice is given. However, the introduction of the OA regime is likely to provide justification for altering this somewhat.

8.44 The short notice required under the TMS is sensible within a scheme where numerous small decisions may be necessary in every year, each of which require specific action by owners. However, the OA regime envisages a more strategic approach to maintenance in which more significant decisions (such as approval of annual budget) are taken less frequently, and implemented on a day-to-day basis by a manager with a range of powers. Within that framework, a longer notice period seems appropriate to allow owners time to make arrangements to attend the meeting and familiarise themselves with any papers (such as a draft budget) that may be circulated in advance. The inability to call meetings at shorter notice can be justified by the fact decisions that need to be made quickly will generally be taken by the manager rather than owners. The need for a short-notice decision by members themselves should therefore be rare. We also consult below on the suggestion that decision making by way of consultation amongst owners should continue to be possible under the OAS, which would provide an alternative avenue for short-notice decisions if required.

8.45 Against that background, we think it may be appropriate to adopt the approach taken to the organisation of meetings in the DMS for the OAS. We would be grateful for the views of consultees on this issue.

8.46 We ask:

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?

[60] DMS rule 9.6.
[61] DMS rule 9.7.

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?

Members' meetings: quorum

8.47 The DMS makes provision as to the quorum required for meetings of members.[62] A quorum is made up of members representing at least 50% of the total number of votes allocated in a development composed of thirty units or less.[63] In a larger development, members representing at least 35% of the votes allocated is sufficient.[64]

8.48 Specification of a quorum is necessary within the DMS because decisions which bind the owners' association can be taken by a majority of votes *cast* at such a meeting. Without a quorum, in principle only three members out of 30 might attend the meeting, yet if two voted in favour of a decision, all 30 members would be bound. The TMS makes no provision for a quorum at owners' meetings, presumably because decisions can be taken only by a majority of votes allocated. Above, we provisionally propose that OA decisions should also require a majority of votes allocated.[65] Accordingly, we do not consider there to be a need for a quorum within the OAS. However we would be grateful for consultees' views.

8.49 We ask:

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?

Members' meetings: procedure

8.50 We do not consider there to be a need to set out detailed regulations as to how members' meetings should run. No provision of this kind is made in the TMS. However, we do wish to consult on three issues concerning the procedure at meetings where we think clarity may be of benefit to members.

8.51 First, we think the OAS should provide that members are entitled to attend any meeting virtually, for example by way of video call. The TMS and the DMS are both silent on this issue, meaning that the competence or otherwise of virtual attendance is left to the discretion of members. However, the increased familiarity with the use of such technology following the COVID-19 pandemic, and concerns around participation of non-occupier owners in decision

[62] DMS rule 10.
[63] DMS rule 10.1(a).
[64] DMS rule 10.1(b).
[65] See 8.26-8.28.

making on tenement maintenance, suggest that this form of attendance should be explicitly permitted in the OAS. We suggest that the manager should have a responsibility to support virtual attendance at meetings where necessary. Whilst not an exhaustive list, we anticipate that this might include circulating a link to a video meeting on an appropriate platform, bringing a laptop or other device to an in-person meeting to allow virtual attendees to participate with those in the room, or meeting in-person with an attendee more comfortable in that format to facilitate their participation in a meeting where most are attending virtually.

8.52 Second, we note that the DMS requires members in a general meeting to elect a convenor from amongst their number.[66] The convenor takes charge of the running of the meeting to ensure all business is dealt with and to tally votes if necessary. Whilst wary of overly formalistic provision on meetings in the OAS, in practice any meeting requires someone to take charge of it, and it may clarify the position for members simply to have a rule to the same effect as the DMS.

8.53 Thirdly, it would seem sensible to require that a record is kept of decisions taken at the meeting. The record should be circulated to all members following the meeting to allow those who were present to confirm its accuracy, and to apprise those who were absent of the decisions made.[67] As in the DMS,[68] we provisionally propose that responsibility for keeping a record should fall to the manager.

8.54 We would be grateful for views on all of the above. We ask:

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?

Members' meetings: how can a vote be cast?

8.55 Under the TMS, decisions may be taken by vote at a meeting, but no specific provision is made as to how votes might be cast.[69] The DMS provides that voting on any proposal should be by show of hands, but that the convenor of the meeting may determine that voting on a particular proposal is to be by ballot.[70]

8.56 We are not aware that the absence of prescribed voting procedures within the TMS has caused any difficulty in practice. Including a rule may increase certainty for owners, but

[66] DMS rule 12.1.
[67] We consider the circumstances in which decisions might be annulled below: see 8.65-8.76.
[68] DMS rule 12.3.
[69] TMS rule 2.6.
[70] DMS rule 11.4.

also adds to the complexity of the scheme. We have no strong view on whether a rule should be included, but if it is thought desirable to do so, the DMS rule seems a sensible approach.

8.57 We ask:

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?

Process of decision making: consultation

8.58 The TMS allows owners to make decisions outwith meetings by way of consultation.[71] No provision is made to this effect in the DMS. This may reflect the assumption that day-to-day decisions would be dealt with by the manager, with only a few significant decisions each year (for example, approval of the budget) requiring a vote which might sensibly be taken at the annual meeting.[72] It might also reflect the anticipated larger size of developments using a DMS where decision making by consultation might seem impractical. Day-to-day decision making within the OA regime is also likely to be dealt with by the manager, but since the manager may be a flat owner rather than a professional agent, and since the regime will apply in many standard tenements of eight flats or fewer, we think there is value in retaining the option to make decisions by consultation here.

8.59 Where a decision is to be taken by consultation, the TMS requires the owner proposing the decision to consult with all owners who have a vote on the matter unless it is impracticable to do so, for example due to absence.[73] Where a flat is co-owned, consultation with one co-owner will suffice.[74] The consulting owner must then count the votes cast,[75] and notify all owners of the outcome as soon as practicable.[76]

8.60 We are not aware of any issues with this aspect of the TMS and think similar provision with the OAS would be sensible. We suggest that, in addition to any owner having the right to seek agreement by consultation, it would be appropriate for the manager to have the power to do so. We think that, as under the TMS, the rules as to the process of consultation can be relatively "light touch", meaning that the OAS need not prescribe how owners consult, and can allow owners to determine for themselves when it is impractical to consult with a particular person. The TMS rule whereby consultation with one co-owner will suffice seems equally appropriate for the OAS.

8.61 Where a decision is taken by way of consultation, the owner (or manager) who has carried out the consultation bears responsibility for notifying owners of the outcome. Where

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[71] TMS rule 2.7. The stereotypical example of how this would operate is that one owner would go "door-to-door" in the tenement asking the other owners if they agree to particular maintenance work. An example which is perhaps more common today is owners considering matters and reaching a decision by way of a group email discussion.
[72] Report on Real Burdens para 8.25.
[73] TMS rule 2.7(a).
[74] TMS rule 2.8.
[75] TMS rule 2.7(b).
[76] TMS rule 2.9.

consultation has been carried out by an owner, we suggest they should have the power to instruct the manager to complete the notification process.

8.62 We ask:

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?

Procedural irregularity in decision making processes

8.63 Under the TMS, any procedural irregularity in the making of a scheme decision does not affect the validity of the decision.[77] However, an owner directly affected by the irregularity who was not aware costs were being incurred, or who objected immediately to the incurring of those costs, is not liable for the costs and their share of liability must be redistributed amongst the other owners.[78] We suggest that these rules be replicated within the OAS.

8.64 We ask:

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?

[77] TMS rule 6.1.
[78] TMS rule 6.2.

Annulling a decision

Exercising a veto

8.65 As discussed above, under the TMS, an owner (or group of owners) with liability for 75% or more of the costs resulting from a scheme decision may veto it, so long as they did not vote in favour of the decision in the first place.[79] We think retention of this rule within the OAS would be appropriate to address the imbalance which might otherwise exist between the voting rights and liability for costs of any owner.

8.66 We ask:

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?

Applying to court

8.67 The 2004 Act provides for scheme decisions to be challenged in the sheriff court by way of summary application procedure.[80] This right is a mandatory aspect of the legislation and cannot be varied by provision in the property titles. The power available to the court is limited. It may annul a decision, but cannot authorise action in respect of which a majority of owners has not voted in favour.[81] We justified our recommendation to this effect in our earlier Report on the Law of the Tenement as follows:

> "Courts should prevent expenditure but not authorise it. A court has neither the information nor the expertise to embark on a programme of maintenance on behalf of the owners of a tenement. The court cannot be expected to act as a property manager. If an owner is unable to persuade his fellow owners of the wisdom of a repair, it seems an acceptable result that the repair will not get done." [82]

8.68 The court may grant a complete or partial annulment of the decision when satisfied that it is not in the best interests of the owners as a group, or that it is unfairly prejudicial to one owner or more.[83] Where the decision in question concerns maintenance, improvements or alterations, the court is directed to take into account four factors when making its determination, namely the age of the property, the condition of the property, the likely cost of what has been decided and the reasonableness of that cost.[84] The decision of the sheriff court can be appealed only on a point of law to the Court of Session,[85] whose decision will be final.[86]

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[79] TMS rule 2.10. This scenario generally arises where one or two flats have a much higher share of liability for costs than the others, for example the commercial shop premises on the ground floor of the tenement is liable for 75% of maintenance costs, and the four residential flats above are liable for 6.25% of costs each. The shop could veto a scheme decision taken by the four flats.
[80] 2004 Act s 5(1).
[81] 2004 Act s 5(1).
[82] Report on the Law of the Tenement para 5.21. Similar observations were made in respect of our recommendation for equivalent provision in the DMS: Report on Real Burdens paras 8.40-8.44.
[83] 2004 Act s 5(5).
[84] 2004 Act s 5(6).
[85] 2004 Act s 5(8).
[86] 2004 Act s 5(9).

8.69 An application for annulment can be made only by an owner who did not vote in favour of it, or a person who was not an owner at the time of the vote but has become so by the time of the application.[87] The application must be made within 28 days of the applicant being notified of the decision.[88] Where the applicant notifies the other owners that an application has been made, no step can be taken to implement the decision until the outcome of the application is known.[89]

8.70 Virtually identical provision is made for an owner to challenge a decision made by members under the rules of the DMS.[90] We are not aware of any reported case law in respect of this process under either scheme.

8.71 Mandatory provision must also be made in the OA legislation for challenges to decisions made by members. Making this right available to owners is important from the perspective of A1P1 compliance. A first issue which may arise here is whether the sheriff court remains the appropriate forum in which to hear such challenges. We discuss enforcement issues under the legislation more generally in Chapter 11, where we consider in detail whether the sheriff court or the Housing and Property Chamber of the First-tier Tribunal might be the appropriate forum for resolution of disputes amongst members of the OA in future.[91] Here, we suggest simply that whichever forum is considered appropriate following the consultation in that Chapter should have jurisdiction to deal with any challenge to a decision alongside other enforcement matters arising under the regime.

8.72 Consideration should also be given to the orders a court can make when dealing with a challenge to a decision made by members under the OA regime. Under the 2004 Act, the court has the power to annul decisions, but cannot make a positive order for specific action to be taken where no majority has been achieved. It has been suggested to us in early consultation for this project that failure to reach a majority in respect of a maintenance decision is far more commonly the result of a failure to vote by apathetic owners than the result of a majority vote *against* a particular course of action. There is a general recognition that owner apathy presents a significant challenge to the maintenance of tenements in a good state of repair. It may follow that the court should be empowered to support a minority of owners seeking to take positive steps towards care of their building who are prevented from doing so by the inaction of others. It has also been observed that we suggested the court should have such a power in the Discussion Paper on the Law of the Tenement that preceded our earlier Report.[92]

8.73 While we acknowledge the obstacles to tenement maintenance presented by owner apathy, our provisional view is that providing the court with a general power to order positive action is not the appropriate way to address it. The reasons why we recommended against conferring this power on the court in our earlier Report on the Law of the Tenement[93] – most significantly the fact that the court is not equipped to act as a property manager – continue to

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[87] 2004 Act s 5(2).
[88] 2004 s 5(4). This will be within 28 days of the meeting at which the decision was made if the applicant was in attendance, or else within 28 days of receipt of the post-meeting notification.
[89] 2004 Act s 5(10).
[90] DMS Order art 14.
[91] See 11.32-11.40.
[92] Discussion Paper on the Law of the Tenement para 5.9.
[93] Report on the Law of the Tenement para 5.21, discussed at para 8.67 above.

be of considerable force. In Chapter 11, we recommend that a manager who has not been able to obtain majority approval for an annual budget from members should be able to seek approval from the court for an annual budget covering any work necessary to ensure members comply with their duties under section 8.[94] Beyond that limited exception, we do not think the court should be empowered to compel action in respect of which a relevant majority has not been obtained. We seek views from consultees on this issue below.

8.74 Secondly, under the current law, a decision may be annulled where it is not in the best interests of the owners as a group or where it is unfairly prejudicial to one owner or more.[95] The court is directed to consider certain factors in determining whether one of these tests is met where the decision in question relates to maintenance, improvement or alteration to the building.[96] No concern about these tests have been raised with us in early consultation for this project and we are not aware of any relevant case law. We are conscious, however, of the significance of these provisions in relation to the A1P1 compliance of future legislation.

8.75 As discussed in Chapter 3, the ability of an owner to have their particular circumstances taken into consideration by a court empowered to make an order which engages their rights under A1P1 is an important factor in the proportionality of the legislative scheme as a whole.[97] It should be recognised that a majority decision which incurs substantial expense may ultimately have the result that one or more owners can no longer afford to continue in ownership of their property, which may be their home. In legislation where a court is empowered to make an order which may result in the sale of a person's home for debt enforcement purposes, the court is commonly given a non-exhaustive list of factors to take into account in considering whether to grant the order.[98] Relevant factors might include the current and likely future financial circumstances of the owner and family members living with them, and the ability of the owner and other people living in the house to find reasonable alternative accommodation. We think a similar, non-exhaustive list of factors may be of benefit in guiding the court here, and help to ensure the compliance of the legislation with A1P1, article 8, and the UNCRC Incorporation (Scotland) Act 2024.

8.76 We would be grateful for the views of consultees. We ask:

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?

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[94] See 11.46-11.48.
[95] 2004 Act s 5(5).
[96] 2004 Act s 5(6).
[97] See 3.22.
[98] For example, Conveyancing and Feudal Reform (Scotland) Act 1970 s 24(7); Bankruptcy (Scotland) Act 2016 s 113.

(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?

Decisions to be binding

8.77 The TMS provides that scheme decisions are binding on owners and their successors as owners.[99] This means that an incoming owner is bound by a decision to carry out certain work or take out a policy of insurance, for example. We suggest equivalent provision should be made in the OAS since the scheme may not operate effectively without it. We discuss the position of an incoming owner in relation to costs incurred by a previous owner in Chapter 10.[100]

8.78 We ask:

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

Emergency work

8.79 Under the OA regime, maintenance will generally be instructed or carried out by the manager following a decision by members that the powers of the OA should be exercised in that respect. However, where emergency work is required, it would be sensible for any member to have the power to act unilaterally.[101] Provision to this effect is made in the TMS, where emergency work is defined as:

> "work which, before a scheme decision can be obtained, requires to be carried out to scheme property:
>
> (a) to prevent damage to any part of the tenement, or
>
> (b) in the interests of health or safety." [102]

Equivalent provision is made in the DMS.[103] Our provisional view is that equivalent provision should also be made in the OAS.

[99] TMS rule 8.1-8.2.
[100] See 10.22-10.23.
[101] The manager will have also have the power to act unilaterally in such circumstances if consultees support our provisional proposals in respect of the manager's powers, as discussed at 9.21-9.31.
[102] TMS rule 7.
[103] DMS rule 14.

8.80 We ask:

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?

Chapter 9 Running the OA: the manager

Introduction

9.1 In Chapter 7, we consulted on the powers that should be exercisable by the OA. In Chapter 8, we considered how the collective membership of the OA could take decisions about the exercise of these powers. In this Chapter, we consider the person who will exercise the powers of the OA on a day-to-day basis, namely the manager.

9.2 The manager is central to the objectives of the OA legislation. Under current law, where flat owners make a scheme decision, they must also determine how that decision is to be implemented. Often, one owner will (however reluctantly) volunteer to act on behalf of the others, sometimes referred to as "self-factoring". This can be an onerous task and may result in the owner in question having liability to tradespersons for the whole cost of works in the first instance. Without a volunteer, work may simply not proceed at all, contributing to the ongoing degradation of the tenement stock. In tenements where a factor has been appointed, they may have responsibility for implementing scheme decisions, but the extent of any factor's powers will depend on their contract with the owners.

9.3 The Working Group considered the current process, by which control is exerted by owners on a step-by-step basis, to be unsatisfactory.[1] They considered that a manager to whom agreed powers have been delegated would allow for a more effective and efficient tenement management system. Owners would be required only to make a small number of significant decisions (for example, approving the annual budget) while the manager takes forward the day-to-day work of maintaining the building. The Working Group anticipated that this systematic approach to maintenance should result in lower administration costs being paid by owners.[2]

9.4 In Chapter 4, we provisionally proposed that OAs should be subject to a mandatory duty to appoint a manager.[3] The provisions under discussion in this Chapter in relation to the role and powers of that manager will form part of the OAS, and under our provisional proposals will therefore operate as background law, applicable where alternative provision is not made in the tenement title conditions.[4]

A new feature of tenement law

9.5 The necessity within the OA scheme for owners to appoint a manager is a new feature of tenement law. This will engage the rights of owners under A1P1, and may be considered a control of the use of their possessions. However, we think this aspect of the scheme is unlikely to result in a disproportionate interference with owners' rights. It is clear that the less intrusive arrangements in place under current law have proved ineffective to maintain the condition of

[1] Final Recommendations Report p 6.
[2] Final Recommendations Report p 6.
[3] See 4.13-4.14.
[4] See the discussion at 4.44-4.52.

the tenement stock. Where owners choose to appoint a professional manager, this may increase their administration costs by comparison with current law, but we suggest below that owners should have freedom to choose one of their own number to act as a manager,[5] meaning increased costs are not inevitable. Finally, as with other innovations of the OA legislation, it should be kept in mind that the changes in the law will produce direct benefits to owners by virtue of reducing their administrative burden and improving management and maintenance of their building.

9.6 A manager or equivalent is a feature of apartment law in many jurisdictions. However, in developing preliminary proposals for the operation of this role within the OAS, we have been most strongly influenced by the manager provisions of the DMS.[6] These provisions are the product of research and consultation first by ourselves and subsequently by Parliament. The Working Group's endorsement of the provisions may be inferred from their interim recommendation to adopt TMS B for all tenements.[7] We have not heard any concerns about the effectiveness or appropriateness of these provisions in early consultation for this project. Accordingly, rather than "reinvent the wheel", we have adopted these provisions as our starting point. Our general approach below is to explain the DMS provisions, then consult on what modifications, if any, are necessary for equivalent provision within the OAS.

9.7 In recommending the DMS, we explained the manager's role as "the executive arm of the association and hence the equivalent of the board of directors in a company."[8] In the sections which follow, we discuss who may act as a manager and the powers and duties which should be conferred on the manager of an OA. We seek the views of consultees throughout.

OA managers and the Property Factors (Scotland) Act 2011

9.8 A preliminary issue concerns the relationship between the role of the OA manager and the Property Factors (Scotland) Act 2011. This Act sets out a statutory framework for regulation of persons who are "property factors" in the meaning of the Act. In this section, we consider how "property factors" are defined in the legislation and the regulations which apply to them as a result. We look at the circumstances in which an OA manager will fall within the definition of "property factor", and consider whether it should be possible for a person to act as an OA manager where they are not regulated by the 2011 Act, which would usually occur where a flat owner in the tenement takes on the OA manager role.

Regulation of professional property managers

9.9 The 2011 Act was introduced with the aim of regulating commercial or professional property management services. This aim is reflected in the approach taken by the Act to the definition of "property factor." A person who, in the course of that person's business, manages the common parts of land owned by at least two other persons, and used to any extent for residential purposes, is a property factor.[9] Alternatively, a local authority or housing association which manages the common parts of land owned by at least two other persons (or by the local authority or housing association and at least one other person), and used to

[5] See 9.12-9.18.
[6] See generally DMS rules 7 and 8.
[7] Interim Recommendations Report p 7.
[8] Report on Real Burdens para 8.16.
[9] Property Factors (Scotland) Act 2011 s 2(1).

any extent for residential purposes, is a property factor.[10] A flat owner who takes on a "self-factoring" role for their tenement will usually not be a "property factor" for the purposes of the 2011 Act, since they will usually not fulfil the part of the statutory definition which requires them to be acting in the course of their business.

9.10 The Act provides that it is an offence for any person to operate as a factor without being registered on the Scottish Property Factor Register.[11] Registration is possible only where Scottish Ministers are satisfied that the applicant is a fit and proper person within the meaning of the Act.[12] In determining whether this test is met, Ministers are directed to have regard to various matters, including whether the applicant has been convicted of any offence involving fraud or dishonesty, violence or drugs, and whether they have contravened any provisions of the law concerning tenements, property or debt.[13] Once entered, a person remains on the register for three years, at the conclusion of which the entry will be deleted unless a successful reapplication is made.[14]

9.11 One registered, factors are required to comply with the Property Factors' Code of Conduct,[15] which sets out minimum standards in relation to communication and consultation, carrying out maintenance and actions to recover debt from owners, amongst other things.[16] Disputes between owners and factors as to whether these standards have been met are adjudicated by the Housing and Property Chamber of the First-tier Tribunal,[17] which can make a Property Factor Enforcement Order requiring a factor to take certain actions and/or pay compensation where the factor has not adhered to the Code. Failure to comply with such an order is an offence[18] and will prevent the offender from being registered as a factor in future.[19]

OA managers: professional factoring and "self-factoring"

9.12 A person who takes on the OA manager role will be managing the common parts of land owned by at least two persons and used (at least to some extent) for residential purposes. If the person acts as the OA manager in the course of their business, they will accordingly fall within the definition of property factor in the 2011 Act. This will generally occur where the OA appoints a professional property manager or property management company to the role. A local authority or housing association acting as an OA will also be a property factor within the meaning of the Act.

9.13 However, a person appointed as the OA manager who is <u>not</u> acting in the course of their business will not fall within the statutory definition of a "property factor". This might be

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[10] Property Factors (Scotland) Act 2011 s 2(2). The Act goes to define two other categories of person acting in a property management role as a property factor at ss 2(3)-(4), which are concerned with management of land which, although not in common ownership, is available for common use by two or more owners of property neighbouring that land.
[11] 2011 Act s 12. The Register was established under the 2011 Act ss 1-2 and can be accessed at https://www.propertyfactorregister.gov.scot/PropertyFactorRegister/.
[12] 2011 Act s 4(4)-(5).
[13] 2011 Act s 5.
[14] 2011 Act s 4(7).
[15] 2011 Act s 14(5).
[16] The Code of Conduct was most recently revised in 2021 and can be accessed at https://www.gov.scot/publications/property-factors-scotland-act-2011-code-conduct-property-factors-2/.
[17] 2011 Act s 17.
[18] 2011 Act s 24.
[19] 2011 Act ss 4(4)-(5).

expected to occur where the person in question is the owner of a flat in the tenement, taking on a "self-manager" role in the way that some flat owners "self-factor" under current law.

9.14 It has been suggested to us in early consultation for this project that, bearing in mind the level of responsibility and potential complexity attaching to the manager's role, some level of "quality control" in the appointment of managers may be desirable. Requiring the manager to be regulated by the 2011 Act should ensure that managers have the skills necessary for the task. Accordingly, only a person entered on the Scottish Property Factor Register should be eligible for appointment as an OA manager, whether that person is acting in the course of their business or otherwise.

9.15 We accept that the argument in favour of "quality control" has some force. However, there are important counter-arguments. A requirement to appoint a registered property factor as a manager is likely to create difficulties in terms of the A1P1 compliance of the OA regime, due to the additional burden it places on owners by comparison with current law. Owners will either have to appoint a professional property manager, thereby incurring additional expense, or else take on the work of complying with the 2011 Act themselves, including registering as a factor and meeting the terms of the Code of Conduct. Mandating the expense of a professional manager seems difficult to justify when it is clear that some tenements do manage to self-factor effectively at present, and more may do so successfully once the structure of the OA regime is in place. Requiring self-managers to comply with the same regulations as professional managers may also appear disproportionate when the absence of regulation seems not to prevent successful self-factoring in some cases at present.

9.16 There is also a more practical counter-argument, namely that it is doubtful whether there is sufficient capacity within the professional property management sector to take on this role for every tenement in Scotland where owners are unable or unwilling to comply with the 2011 Act requirements. The difficulty may be particularly pronounced in less populous areas of the country, where we have been advised in early consultation for the project that professional managers tend not to operate. We accept that the introduction of a requirement to appoint a regulated factor as the OA manager may result in an increase in the availability of such services. However, we do not think it would be responsible to impose a requirement on owners when it is not clear whether the market will allow them to meet it in all cases.

9.17 The DMS does not place restrictions on the eligibility of any person to act as the development manager. In our Report recommending the scheme, we suggested that the manager could be one of the owners of a unit in the development, or an outside professional such as a property manager (or a firm of property managers).[20] We noted that, where the manager is one of the owners, they might choose to appoint an outside professional to assist them in the role.[21] This is possible since the manager has general capacity to exercise the powers conferred on the owners' association under the scheme,[22] one of which is the power to engage employees or appoint agents where necessary to manage the development for the

[20] Report on Real Burdens para 8.16.
[21] Report on Real Burdens para 8.16.
[22] DMS rule 4.5.

benefit of members.[23] Accordingly, the manager might contract with a finance professional to assist in the preparation of the annual accounts, for example.

9.18 Our provisional view is that the position taken in the DMS should also apply in the OAS. Any person may be appointed the OA manager where members so decide. Where that person falls within the definition of "property factor" in the 2011 Act, the provisions of that Act will apply. However, we do not suggest any amendment to that definition is necessary. Accordingly, a person appointed as the OA manager who does not take on the role in the course of their business (and is not a local authority or housing association) will not be regulated by that Act.

9.19 We would be grateful for the views of consultees on these issues. We ask:

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?

Payment for self-managing?

9.20 The DMS provides for the manager to receive reasonable remuneration for the role, and it should be clear in any new legislation that the OA is also able to pay a manager for their services. However, we think it may be useful to clarify the relationship between payments to a manager and the definition of "property factor" in the 2011 Act.

9.21 We anticipate that, in most cases, payments will be made to a manager where they are a professional appointed to provide that service. However, if consultees support our view that "self-managing" without regulation under the 2011 Act should be possible, it is feasible that an OA might wish to give a benefit of some kind to the self-manager. Although this may be a direct payment of money, perhaps a more likely scenario is that the self-manager is given a "discount" on maintenance costs in exchange for taking on the role, with the other owners covering the cost of the "discount" between them.

9.22 Would an OA self-manager who received a payment or other benefit for that work be "acting in the course of their business" in the meaning of the 2011 Act? If so, that would bring the self-manager within the Act's definition of "property factor" and therefore require the self-manager to comply with the requirements of that legislation. We do not think the answer to this question is clear. The limited case law on the 2011 Act to date does not address the situation where a self-factor receives a benefit for this work.[24]

9.23 We think it may be useful to clarify the position for OA self-managers in future. Our tentative view at this stage is that a member of an OA who acts as the manager of that OA

[23] DMS rule 3.2(i).

[24] *Proven Properties (Scotland) Ltd v Upper Tribunal for Scotland* [2020] CSIH 22; 2020 SC 455 considered the situation where a flat owner runs a business from their flat, and arranges or carries out maintenance work such as stair-cleaning in part for the benefit of that business without remuneration from other owners, concluding that this would not amount to managing the common parts of the tenement "in the course of their business" in the meaning of the 2011 Act.

should not be considered to be "acting in the course of their business" *solely* because they are in receipt of a moderate benefit for that work. This does not rule out the possibility that a self-manager might be "acting in the course of their business" where that is suggested by circumstances other than (or additional to) receipt of a moderate benefit, for example that a person owns flats in several different tenements and self-manages the OA for each. However, it should allow a person who, for example, acts as a self-manager solely in respect of the OA in the tenement in which they live to receive a moderate benefit in return without being required to comply with the provisions of the 2011 Act.

9.24 We would be grateful to hear from consultees on this issue. We ask:

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?

Appointing a manager

Mandatory duty to appoint a manager

9.25 In Chapter 4, we made a preliminary recommendation that the OA should have a mandatory duty to appoint a manager within six months of the position becoming vacant.[25] In Chapter 7, we considered that the OA should have a counterpart power to employ or appoint a person to this role.[26] In Chapter 8, we considered the processes by which members can decide to exercise this power. If members fail to do so in breach of their mandatory duty, an application can be made for appointment of a remedial manager by any person with an interest, including the local authority, as discussed in Chapter 4.[27]

9.26 Assuming consultees are supportive of these proposals, nothing further need be said about appointment of a manager here.

Certificate of appointment

9.27 The DMS provides for a "certificate of appointment" recording the appointment of a specific person as manager and noting the period for which the appointment has been made. The certificate must be signed by the manager and a member (acting on behalf of the owners' association) within one month of the manager's appointment.[28] In recommending this provision, we suggested that it may be useful "to satisfy contractors and other third parties" of the manager's power to act.[29]

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[25] See 4.13-4.14.
[26] See 7.10.
[27] See 4.21-4.40.
[28] DMS rule 7.3.
[29] Report on Real Burdens para 8.19.

9.28 We think this is also likely to be useful within the OAS, and seek views from consultees. We ask:

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?

Powers and duties of the manager

General capacity and duties

9.29 In the DMS, the core function of the owner's association is to manage the development for the benefit of the members.[30] The association accordingly has a general capacity to do anything necessary for or in connection with the carrying out of this function, supplemented by a non-exhaustive list of specific actions it may take.[31] The DMS envisages that the manager will be the person carrying out these acts on behalf of the association on a day-to-day basis. Consequently, the manager is designated an agent of the association.[32] The manager also has capacity to exercise any of the powers available to the association under the scheme.[33]

9.30 The benefit of designating the manager an agent of the association is that the general law of agency applies, providing a solid grounding for the relationship between the association and the manager. The law of agency can be a complex topic[34] but some key rules can be outlined. The agent (in this context, the manager) is a fiduciary of the principal (in this context, the owners' association). In simple terms, this means that the principal places its trust in the agent, who owes the principal their loyalty in return. It follows that the agent has a duty to avoid conflicts of interest in relation to the principal's business.[35] The agent also has a duty to pass on any benefits received in the course of that business, sometimes referred to as the rule against taking a secret profit at the principal's expense.[36] Additionally, the agent is under an obligation to follow instructions from the principal using reasonable skill and care.[37] An agent who breaches these duties is liable in damages to the principal.

9.31 The application of these general principles in a development management context is obviously useful in governing the relationship between the owners' association and the manager. Designating the manager an agent also allows for the application of certain principles to dealings between the manager and third parties such as tradespersons, an issue to which we return below.[38]

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[30] DMS rule 3.1.
[31] DMS rule 3.2.
[32] DMS rule 4.4.
[33] DMS rule 4.5.
[34] A full account of the law in Scotland can be found in L J Macgregor, *The Law of Agency in Scotland* (2013).
[35] See generally Macgegor, *Agency* paras 6-21 to 6-24.
[36] See generally Macgregor, *Agency* paras 6-30 to 6-34.
[37] Bell, *Commentaries* I, 516; Macgregor, *Agency* paras 7-01; 7-04 to 7-07.
[38] See 9.32-9.49.

9.32 As noted above, in addition to being an agent of the owners' association, a manager under the DMS has a broad capacity to exercise the association's powers.[39] To ensure they do so appropriately, they are placed under a corresponding responsibility to manage the development for the benefit of members.[40] This broad responsibility is supplemented by a number of specific duties, discussed further in the following section.[41]

9.33 Our preliminary view is that it would be appropriate for the general capacity and responsibility of the manager of the OA to be modelled on the position of a manager under the DMS. In other words, the OA manager should be designated an agent of the OA, should have a broad capacity to exercise the powers conferred on the OA, and should be subject to a counterpart responsibility to manage the tenement for the benefit of members.

9.34 We would grateful for the views of consultees. We ask:

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?

Specific duties

9.35 The DMS supplements the manager's broad duty to manage the development for the benefit of members with a non-exhaustive list of specific duties.[42] In recommending the inclusion of these duties within the DMS, we noted simply that they "might be helpful both to the owners and also to the manager".[43] We think a non-exhaustive list of this kind is also likely to be helpful within the OAS, providing some concrete guidance on the nature of the manager's role and the work they are intended to undertake.

9.36 The specific duties imposed on the manager are principally contained with rule 8 of the DMS, with some additional provision elsewhere in the scheme. If these rules are modified to account for their application in the context of a tenement rather than a development, the following non-exhaustive list of responsibilities emerges for the manager of the OA:[44]

- To implement any decision made by the OA;

[39] DMS rule 4.5(a).
[40] DMS rule 8.
[41] See 9.35-9.38.
[42] See generally DMS rule 8.
[43] Report on Real Burdens para 8.18.
[44] These duties are drawn from DMS rule 8 except where otherwise specified.

- To comply with directions given by the OA as respects the exercise of the manager's powers or compliance with their duties;[45]
- In so far as it is reasonable to do so, to enforce (i) any obligation owed by any person to the OA and (ii) the provisions of the OA scheme;
- To arrange for the carrying out of maintenance to scheme property;
- To keep a record of the name and contact details of each member of the OA;
- To fix the financial year of the OA;
- To keep, as respects the OA, proper financial records and prepare the accounts of the association for each financial year;
- On request by any member, to make available for inspection any document which relates to the management of the development (other than correspondence with individual members).[46]

9.37 We suggest the manager should be under one further specific duty. The 2004 Act places an obligation on flat owners to take out insurance on any part of the tenement which they own.[47] We suggest that the manager should be under a duty to monitor the compliance of owners with that obligation, by requiring sight of insurance documents where necessary. This should help to address concerns raised with us in early consultation that, in tenements without a block insurance policy (which are usually tenements in which there is no factor), compliance with this duty may be inadequate.[48]

9.38 The manager under a DMS is subject to some other specific duties in relation to the administration of general meetings[49] and the winding up of the owners' association.[50] We deal with the responsibilities of the OA manager in these respects in our discussion of general meetings in Chapter 8,[51] and our discussion of winding up in Chapter 13.[52] If further statutory duties are placed on the OA in due course, as we anticipate in Chapter 4,[53] it might be thought appropriate to place corresponding duties on the manager, for example to instruct inspection reports or administer a reserve fund. That issue can no doubt be addressed in any legislation implementing the recommendations of the Working Group in those respects.

9.39 We would be grateful for the views of consultees. We ask:

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?

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[45] DMS rule 4.7.
[46] DMS rule 4.8.
[47] 2004 Act s 18.
[48] The power of the OA to take out a block insurance policy in its own name should also help to address these concerns in future: see para 7.10.
[49] DMS rule 9.2-9.4 and 12.3.
[50] DMS rule 6.
[51] See 8.39-8.46.
[52] See 13.5-13.9.
[53] See 4.19.

To whom are the manager's duties owed?

9.40 The DMS specifies, for the avoidance of any doubt, that duties on the manager are owed both to the members of the DMS and to the DMS owners' association itself. Clarification of the persons to whom duties are owed facilitates enforcement action against a manager who is not performing adequately. We think it would be sensible to make similar provision within the OA scheme.

9.41 We ask:

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

What if the manager exceeds their authority?

9.42 If consultees support the approach we set out above, the manager's capacity to act on behalf of the OA will be broad but not unlimited. In particular, some actions taken by the manager will be valid only where explicitly authorised by a collective decision of the membership. The question therefore arises of the status of transactions purportedly entered into by a manager which go beyond the manager's capacity.

9.43 This problem is not unique to the OA regime. It arises in any area of law where one person acts as an agent for another. The general rule is that acts by an agent which exceed their authority are void. This protects the interests of the person for whom the agent acts, since it prevents that person becoming bound by the agent in a way that had not been authorised. However, it can be argued that the rule provides insufficient protection to third parties. It may be difficult for a third party to correctly ascertain the extent of an agent's authority. A third party who contracted in good faith with an agent may subsequently discover that the purported contract is void, and the third party's right to payment from the principal under the contract therefore non-existent, through no fault on the part of the third party. For this reason, the director of a company is generally able to bind the company when transacting with a third party who is in good faith, even if the transaction in question goes beyond the director's powers.[54]

9.44 We considered this issue when recommending the manager provisions in the DMS.[55] There, we took the view that it was not necessary for the manager of the DMS owners' association to have the ability to bind the association when acting beyond their powers. The rule by which a director acting beyond their powers nevertheless binds the company is appropriate in that context because there is huge diversity in the objects and powers of different companies, making it difficult for third parties to know what any individual director is authorised to do. Owners' associations in the DMS have a far more limited range of powers which can generally be identified from relevant legislation and/or the Land Register, making it easier for third parties to accurately gauge the capacity of the manager. We consider the same will be true of OA managers, and suggest a blanket rule of the kind applicable in company law would therefore also be inappropriate for OA managers.

[54] Companies Act 2006 s 40.
[55] Report on Real Burdens paras 8.71-8.74.

9.45 In the absence of a company law-type rule, we noted three specific difficulties for third parties transacting with a DMS manager.[56] First, the third party will wish to be sure that the person claiming to be the manager actually *is* the manager. Again, this problem occurs in any area of law where one person acts as an agent for another. There is provision in the DMS for the manager to obtain a certificate of appointment from members:[57] we suggest above that equivalent provision would be appropriate in the OAS.[58] A certificate of this kind provides greater proof of an agent's authority than is generally available in the commercial world, and we do not think further provision to protect the interests of third parties is required in this respect.

9.46 Second, within the DMS, certain actions can be taken by the manager only where approved by a special majority vote of members.[59] We consulted in Chapter 8 on whether special majorities should also be required for certain actions of the OA.[60] A third party may be concerned that the appropriate majority has not been obtained. In recommending the DMS, we noted here the case of *Royal British Bank v Turquand*,[61] which established that a third party acting in good faith is entitled to assume, when dealing with a company director, that internal company procedures have been complied with. The court deemed this appropriate since it was not practicable for third parties to investigate the internal company position for themselves. We took the view that the same rule would apply in relation to actions by the DMS manager.[62] We adhere to the same view in respect of actions by the manager of the OA, and do not think any specific provision is necessary in this regard.

9.47 Finally, within the DMS, members can vote for limitations to be placed on the power of the manager so that, in a change from the usual position, they are not authorised to exercise the full range of powers available to the owners' association.[63] Again, we suggest a similar power should be available to members of an OA.[64] A third party may be concerned that such a decision has been taken by members in relation to the manager with whom the third party is dealing. In the DMS context, we considered the general law of agency to provide an appropriate solution here. We explained:

> "At common law, an agent binds his principal if he acts within apparent authority even where the act is beyond his actual authority. To benefit from this rule, a third party dealing with the agent must be in good faith in the sense that he must not know, or reasonably suspect, the absence of actual authority. Since, in the normal case, a manager may exercise all the powers of the owners' association, it can hardly be doubted that such powers fall within his apparent authority. Hence a third party could rely on the manager's powers to bind in all matters concerning the management of the development unless he knew of a restriction on the manager's power or unless the

[56] Report on Real Burdens paras 8.73.
[57] DMS rule 7.3.
[58] See 9.27-9.28.
[59] DMS rule 13.1.
[60] See 8.29-8.32.
[61] *Royal British Bank v Turquand* (1855) 5 E&B 248.
[62] Report on Real Burdens para 8.74.
[63] DMS rule 4.7.
[64] See 9.36.

proposed contract was so extravagant or unusual that the possibility of a restriction might reasonably be expected." [65]

In other words, a third party would be entitled to assume the manager was empowered to exercise all the powers of the DMS owners' association, and contracts entered into on that basis would be binding even if the manager's powers had been restricted by members. The onus would lie on members to clarify any restriction of the manager's powers.

9.48 We consider this analysis would apply equally to acts by an OA manager following a restriction of their powers by the members of the OA. We also think this common law rule strikes the right balance between the interests of members and those of third parties in the OA context. The members are protected by the basic rule above that the manager cannot bind them by actions beyond the powers they would be expected to have under statute. However, since a third party cannot easily discover that those statutory powers have been further limited by a members' vote, it is appropriate to prefer the interests of the third party in this respect. The onus lies on members to ensure that, where the manager's powers have been restricted, this restriction is made known.

9.49 Following from the above, we do not think there is a need for any specific provision within the OA legislation to deal with acts by the manager in excess of their authority. However, we would be grateful for views. We ask:

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?

[65] Report on Real Burdens para 8.74.

Chapter 10 Liability for costs and financial administration

Introduction

10.1 In the previous Chapters, we considered which powers should be conferred on the OA and the processes by which those powers could be exercised. In this Chapter, we focus on costs incurred by the OA.

10.2 Under current law, owners are usually required to contribute to management and maintenance costs on an a piecemeal basis, as and when specific work is contracted for or completed. The Working Group intended the OA regime to support a more systematic approach, in which maintenance costs could be budgeted for over a longer period. This would allow owners to make regular, planned payments rather than having to find potentially large sums only at the point when work is imminent or urgent. In Chapter 4, we accordingly proposed that approval of an annual budget should be a mandatory duty on OAs.[1]

10.3 In this Chapter, we discuss how liability for costs incurred by the OA should be attributed. We consider how payment of such costs should be administered by way of an annual budget and service charge. We also consider safeguards required for funds held on behalf of the association. We seek views from consultees throughout.

10.4 The matters under discussion in this Chapter will form part of the OAS, and under our suggested proposals will therefore operate as background law, applicable where alternative provision is not made in the tenement title conditions.[2] This Chapter does not consider how payment of costs should be enforced, which instead forms part of the broader discussion of enforcement to follow in Chapter 11.

Liability for costs

Allocation of liability: current law

10.5 The 2004 Act includes various provisions in relation to costs incurred in managing and maintaining the tenement where the property titles are silent. Rule 4 of the TMS makes provision on liability for and apportionment of "scheme costs", which are those resulting from scheme decisions.[3] These provisions also apply to costs incurred by any owner maintaining scheme property in line with the duty in section 8 of the 2004 Act,[4] and to costs incurred where

[1] See 4.18.
[2] See the discussion at 4.44-4.52. Our survey of tenement title conditions found a range of approaches to allocation of costs: see Appendix B para 29.
[3] Scheme decisions, as defined in TMS rule 3, generally deal with management and maintenance of scheme property: see 2.18-2.21.
[4] 2004 Act s 10 provides that TMS rule 4 applies to costs incurred complying with duties under the 2004 Act s 8.

emergency repairs to scheme property have been carried out by any owner under Rule 7 of the TMS.[5]

10.6 Where scheme costs relate to **maintenance** of parts of the building, liability depends on ownership. If the part of the building in question is in common ownership, each owner's share of that ownership determines their share of the costs.[6] If the part in question is not in common ownership, costs are shared equally,[7] unless the largest flat has a floor area more than 1.5 times the size of the smallest flat, in which case each owner's share of the total floor area of all the flats in the building determines their share of costs.[8]

10.7 In our Report recommending the introduction of these provisions, we recognised that the rules were somewhat complicated[9] and that in an ideal world, there should be a single rule determining liability for maintenance in all cases.[10] However, we considered there to be two strong justifications for the more complex set of rules we recommended.

10.8 First, we thought the rules on liability for maintenance in the TMS should respect any provision that had been made within the title deeds. We said:

> "Such provisions deserve to survive, not merely because they form the basis on which individual flats have been bought and sold in the past, but because they are specially designed for each individual tenement flat and are likely to provide, far better than any general rule, a properly sensitive basis for distributing liability."[11]

We considered that provision had been made for maintenance liability in the title deeds not only where there were relevant title conditions,[12] but also where parts of the tenement had been placed in common ownership, since this operated as an "indirect" mechanism for ensuring maintenance liability was shared. The rules adopted in the TMS therefore begin by replicating the common law position in respect of property held in common ownership, in other words that share of cost is determined by share of ownership. Only where the titles make no provision on liability, whether direct or indirect, do the rules specific to the TMS apply.[13]

10.9 Second, we thought that adopting a single, universal rule on liability (applicable only where no direct or indirect provision had been made in the title deeds) was likely to result in unfairness.[14] In essence, the range and diversity of tenements means that a single rule is unlikely to be a good fit in all cases. Equal sharing of liability may make sense where the flats are all of roughly equivalent size and value, but in the case of a Victorian villa on three floors where the attic storey has been sold off as a separate flat, for example, we did not think it

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[5] TMS rule 7.2 provides that the owners are liable for the costs of emergency work as if they were scheme costs.
[6] TMS rule 4.2(a).
[7] TMS rule 4.2(b)(ii).
[8] TMS rule 4.2(b)(i). Where the roof over the close is common property only of the flats taking access through the close by virtue of the default rule in section 3(1)(a) of the 2004 Act, the cost of repairs to that section of roof is nevertheless shared by all the flats in the tenement either equally, or in proportion to floor size where that rule is relevant in the tenement in question: TMS rule 4.3.
[9] Report on the Law of the Tenement para 5.68.
[10] Report on the Law of the Tenement para 5.59.
[11] Report on the Law of the Tenement para 5.59.
[12] As in almost every area of tenement management, provision made in the burdens will apply in preference to the provisions of the TMS: see 2.13.
[13] Report on the Law of the Tenement para 5.60.
[14] Report on the Law of the Tenement para 5.64.

would be acceptable for the same liability burden to fall on the attic flat as on the remainder of the villa.[15] Accordingly we proposed the compromise now incorporated in the TMS, where liability is shared equally unless the largest flat has a floor area more than one and a half times that of the smallest flat.[16] We thought this would strike an appropriate balance between certainty and fairness in terms of maintenance costs.

10.10 Where scheme costs relate to **management** of the building (including remuneration paid to a manager, costs relating to the calculation of the floor areas of the flats where necessary and the cost of installing an entryphone system), the position is simpler. All costs are shared equally.[17] The costs of a common block insurance policy are also shared equally unless owners determined otherwise when deciding that the policy should be taken out.[18] Simpler liability rules were considered possible in relation to management costs since the common law of common ownership has no bearing on liability for management. In addition, the benefits of management are enjoyed just as much by the owner of a small flat as by the owner of a large flat, so the fairness concerns outlined in relation to maintenance costs above were not considered to apply.[19]

10.11 Where a flat is in common ownership, each co-owner has joint and several liability for the share of scheme costs allocated to the flat. If one co-owner pays in full, they have a right of relief against the other co-owner(s) for their share of those costs.[20]

10.12 The DMS adopts a much simpler default rule, namely that all units are liable for an equal share of costs incurred in the management and maintenance of the development.[21] We noted in our Report recommending the DMS that we expected this provision would be varied where the units in a development are not of equal size, however.[22] Similarly, the default rule applies regardless of who has ownership or makes use of the property in respect of which costs are incurred, but variation might also be anticipated in that respect.

Allocation of liability: OAS

10.13 In considering appropriate liability rules for the OAS, we think it is difficult to suggest anything other than replication of the default rules under the TMS. A1P1 compliance argues in favour of retaining the status quo unless changes can be justified. We acknowledge, as we did in our earlier Report on Tenement Law, that ideally these liability rules would be simpler. However, the reasons given in that Report for the rules incorporated within the TMS have continuing force. The rules operate to preserve the rights and liabilities on the basis of which owners purchased their flats, and may better represent an appropriate attribution of liability within any particular tenement than a blanket rule could do. Moreover, we have not identified any reported case law in which the application of these rules was in issue, nor any critical

[15] Report on the Law of the Tenement para 5.64.
[16] Report on the Law of the Tenement para 5.64.
[17] TMS rule 4.5.
[18] TMS rule 4.4.
[19] Report on the Law of the Tenement para 5.79.
[20] 2004 Act s 28(7).
[21] DMS rule 19.1.
[22] Report on Real Burdens para 8.51.

commentary in that respect, notwithstanding concern during the passage through Parliament of the Bill which became the 2004 Act about how the rules might operate in practice.[23]

10.14 A potential argument could be made in favour of adopting a simpler approach for the OAS based on the financial administration framework discussed below. Anecdotal evidence suggests that maintenance to tenements is generally carried out at present on a "task by task" basis. It is accordingly necessary only to work out which liability rule applies to that particular task when demands for payment are issued to owners. However, the new regime anticipates that an OA will produce an annual budget covering all works planned for that year alongside estimated costs. Payment for all planned works will be demanded by way of an annual service charge imposed on each flat. If the TMS liability rules are adopted for the OAS, different costs identified in the annual budget will have to be divided in different ways – it will not be a simple case of taking the overall cost anticipated for the year and dividing it by the number of flats in the tenement. The task for the manager in preparing the budget using the TMS liability rules is therefore more complex, and more likely to result in mistakes, than if a simpler liability rule was adopted. Although this challenge should be acknowledged, it is not clear to us that it presents a stumbling block so significant that the status quo should be altered. As we noted in our earlier Report, complexity is the price of providing rules adapted to the needs of individual tenements.[24]

10.15 We would be grateful for the views of consultees. We ask:

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?

Exempting an owner from liability

10.16 The TMS allows for owners to take a scheme decision that an owner is not required to pay their share (or some part of their share) of scheme costs.[25] The vote of the owner who stands to benefit from such a decision is not to be counted when that decision is taken.[26] In recommending these provisions, we suggested that the power to exempt an owner:

> "could be exercised on compassionate grounds, or perhaps for practical reasons. For example, it might be more sensible to accept a percentage of the total share from an impecunious owner than to attempt to sue him for the full amount."[27]

10.17 We think the same power should be available in the OAS for the same reasons, subject to the same caveat that the vote of an owner who stands to benefit should not be counted in making the decision. We would be grateful for the views of consultees.

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[23] Stage 1 Report on Tenements (Scotland) Bill para 30.
[24] Report on the Law of the Tenement para 5.59 and 3.8.
[25] TMS rule 3.1(g).
[26] TMS rule 3.5.
[27] Report on the Law of the Tenement para 5.82.

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?

Redistribution of exempt or missing shares

10.18 A share of costs may need to be redistributed due to a decision taken in line with the suggestion above to exempt an owner from payment for compassionate reasons or otherwise. It may also be the case that an owner defaults on payment of their share of the costs, and it proves impossible for the share to be recovered, for example because the owner has been sequestrated.[28] The question arises of how liability for such exempt or missing shares is to be dealt with.

10.19 Under the TMS, an exempt or missing share must be paid by the other owners who are liable for a share of the same costs. The other owners have a right of relief against an owner responsible for a missing share (but not, of course, against an owner who is exempt from paying their share).[29] Equivalent provision is made within the DMS for redistribution of a missing payment of a service charge, where the missing amount is to be shared equally amongst the other owners, or to be met out of the reserve fund should the other owners so decide. Again, the other owners have a right of relief against the defaulting owner in this circumstance.[30]

10.20 We can see no reason why equivalent provision should not be made within the OAS and seek confirmation from consultees below. We note for completeness that the local authority in which the tenement is located has a power (though not an obligation) to pay the share of a defaulting owner as discussed in para 2.52. As we noted there, the powers of local authorities in relation to missing shares will remain unaltered by this project.

10.21 We ask:

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?

[28] We consider how missing shares might be recouped from the owner in default in Chapter 11.
[29] TMS rule 5.
[30] DMS rule 19.4.

Mandatory provisions on liability for costs

10.22 For completeness, we note that the 2004 Act contains a number of provisions on liability for costs which cannot be varied in the tenement title conditions. Section 11 sets out rules as to the date or time at which liability for various costs arising under the Act is incurred. Section 12 provides that an owner who is liable for costs incurred does not, by ceasing to be an owner, cease to be liable for those costs. However, the new owner will be severally liable alongside the former owner for the costs where a "notice of potential liability" for those costs was registered against the title of the flat at least 14 days prior to the new owner's acquisition of it. Section 13 makes further provision as to when and by whom a notice of potential liability for costs may be registered, and the form it must take. Section 14 provides that any owner with a right of recovery in relation to a share of costs against any other owner does not lose that right by virtue of ceasing to be an owner. Section 15 amends the Prescription and Limitation (Scotland) Act 1973 to include liability for costs arising under the 2004 Act to the list of obligations under the 1973 Act to which a five-year prescriptive period applies.

10.23 We do not consider that any changes to these provisions are necessitated by the introduction of the OA regime.[31] However, we would be grateful to hear from consultees on this point.

10.24 We ask:

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

Financial administration

From piecemeal arrangements to an accounting system

10.25 Once liability for costs is allocated, the question arises of how payment of such costs should be administered. The 2004 Act does not make any prescription in this respect, leaving owners to choose their own arrangements. The TMS does, however, include rules which can facilitate the organisation of payment should owners wish.

10.26 Where a scheme decision has been taken to instruct work, a decision may also be taken to require each owner to deposit a sum of money not exceeding their share of the estimated cost of that work with a nominated person or into a nominated maintenance account.[32] If the sum to be deposited (or the aggregate of sums required over a 12-month period) exceeds £100, the request must be made in writing[33] accompanied by details including how the estimate was arrived at, why it is considered reasonable, the timetable for completion of the work and how the owner's share of liability was calculated.[34] A depositor may demand that funds be returned (with accrued interest) if the works do not begin within 28 days of the

[31] In Chapter 11, we consult on the suggestion that the OA manager should have power to enforce obligations owed by flat owners to one another. If that suggestion is supported by consultees, section 13 may need to be amended to provide that the manager is entitled to register a notice of potential liability in appropriate circumstances: see 11.27.
[32] TMS rule 3.2(c).
[33] TMS rule 3.3.
[34] TMS rule 3.4(b).

proposed commencement date.[35] Once the cost of works has been paid in full, any surplus funds remaining are to be repaid to depositors (with accrued interest) in proportion to their initial deposit, or shared in any other way agreed by the depositors in writing.[36]

10.27 It is not clear how often these rules are employed in practice. It has been suggested to us in early consultation for the project that, in tenements where no factor is in place, the difficulty in organising payment for works not infrequently has the result that maintenance is simply not carried out at all.

10.28 The introduction of the OA regime will require a more systematic approach to budgeting for and administering payment of costs. This is implicit in the Working Group's endorsement of TMS B in its Interim Recommendations Report,[37] and accepted more explicitly in its Final Recommendations Report, where it notes that OAs will exert control over "an annual repair plan and budget", making property management "easier, more effective and more efficient."[38] The recommendations of the Group are reflected in our suggestion in Chapter 4 that OAs should be subject to a mandatory duty to approve an annual budget.[39]

10.29 The imposition of a budgeting system will engage the rights of owners under A1P1. However, we think the budgeting system is likely to comply with the demands of proportionality. Although the system removes a freedom currently enjoyed by owners, it can also be suggested that the absence of a defined system operates as a barrier to routine maintenance with negative consequences for owners and for society more generally. It is also not clear that a budgeting system will increase the overall administrative burden on owners, and may ultimately operate to reduce time spent in planning and organising payments. As with all the innovations of the OA regime, the provision of advice and support to owners in familiarising themselves with the new system, coupled with an appropriate time period in which owners can adapt, will also be important in ensuring the proportionality of this measure.[40]

Annual budget and service charge: the DMS

10.30 The OAS should provide a default set of rules for the annual budgeting system. The obvious place from which to take inspiration in designing this system is the DMS, which has identical provisions to those recommended for TMS B.[41] We gave the following overview of the operation of that system in our Report recommending its introduction:

> "Each year, the manager must produce a draft budget and present it to the annual general meeting for approval. The draft budget sets out the projected expenditure of the [DMS owners' association] for the coming 12 months on maintenance, insurance and other matters and estimates the amount of service charge which will require to be levied on members in order to finance that expenditure. The draft budget must be circulated in advance. At the meeting the budget may either be accepted (whether in its original or in an amended form) or it may be rejected. If it is not accepted the

[35] TMS rule 3.4(g).
[36] TMS rule 3.4(h).
[37] Interim Recommendations Report p 7.
[38] Final Recommendations Report p 6.
[39] See 4.18.
[40] See discussion at 3.15-3.16.
[41] Report on the Law of the Tenement, draft Bill, Sch 2, rules 10-11.

manager must prepare a revised draft budget for submission to a second meeting held within two months."[42]

10.31 As may be clear from the above, rather than requesting payment for costs on a "task by task" basis, the budget totals all the estimated costs of works planned in the coming year. Each unit then receives a single demand for payment of a sum representing their share of liability for those total costs.[43] The demand for payment of that sum is referred to as the "service charge".

10.32 Provisions as to the content of the budget are contained in rule 18 of the DMS. The draft budget must set out an estimate of the expenditure of the association over the budget year, the total service charge, the date (or dates) on which the service charge will be due for payment and an estimate of any funds other than the service charge which the association is likely to receive in the budget year together with an explanation of their source. Where the budget includes payments to be made into a reserve fund, it should specify the amount.[44]

10.33 The DMS does not require the budget to set out in detail what maintenance works it is intended to cover, estimates of the costs for different works or information of that kind. The manager in the DMS has the power to instruct maintenance where necessary without the specific approval of the owners,[45] a power which we suggest in Chapter 9 would also be appropriate for the manager of an OA.[46] In our Report recommending the introduction of the DMS, we suggested that "often – perhaps very often" owners would be content simply to pay their service charge and allow the manager to make decisions about maintenance, hence the light-touch approach to the required content of the annual budget.[47] However, we also noted that owners could vote to require production of a more detailed budget, whether exceptionally or routinely, at an annual meeting if greater oversight of the maintenance plan was preferred.[48] In Chapter 9, we suggest an OA manager should be under a duty to comply with directions given by members as to the exercise of the manager's powers, which would allow members to specify greater detail in the content of the budget as desired.[49]

10.34 In the DMS, once the draft budget has been approved, the manager must send to each owner a notice requiring payment of the service charge by a specified date (or dates).[50] The manager can send a further notice requiring payment of interest on the service charge if it remains outstanding not less than 28 days after payment was due.[51]

10.35 The budget is based on estimated costs. If costs are lower than estimated, no provision is made within the DMS for surplus service charge payments to be repaid: instead, the surplus

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[42] Report on Real Burdens para 8.46.
[43] Although a single demand is received annually, payment of that sum may be made in instalments over the year: DMS rule 18.2.
[44] DMS rule 18.2.
[45] DMS rules 8(a)-(b).
[46] See 9.29 – 9.34.
[47] Report on Real Burdens para 8.56.
[48] Report on Real Burdens para 8.56.
[49] See 9.36.
[50] DMS rule 19.3(a).
[51] DMS rule 19.5. Further enforcement powers are available to the manager and other owners under the DMS where an owner remains in default, and we discuss these along with debt enforcement proposals for the OA scheme in Chapter 9.

remains available the following year.[52] If costs are higher than expected, an additional service charge of up to 25% of the original service charge may be levied by the manager.[53] If a figure greater than 25% is required, the manager must prepare an additional budget and seek approval from owners,[54] before notice requiring payment of the additional charge can be sent out.[55]

Annual budget and service charge: the OAS

10.36 Throughout this Discussion Paper, we have noted the desirability of aligning the OAS with the TMS where possible from the perspective of compliance with A1P1. We noted above that the recommendations of the Working Group require the law in respect of administration of costs to move away from the current approach, in which owners have freedom to organise payments as they prefer, to a budgeting system. Our preliminary view is that, rather than "reinvent the wheel", it would be sensible to adopt a version of the DMS budgeting system for the OAS. However, we consider some modification to the DMS system may be appropriate for the OAS, partly with a view to retaining a closer alignment with the TMS.

10.37 As we outlined above,[56] the TMS includes provisions under which a scheme decision may be taken to require owners to deposit their share of the cost of works in a maintenance account in advance. In this system, demands for payment must come accompanied by details of the work to be undertaken, how the estimate was arrived at, the likely timescale for the work and so on.[57] Although this process is optional, we think it may nevertheless reflect the way tenement works tend to be organised in practice at present. Anecdotal evidence we have heard in early consultation for the project suggests that tenement owners are accustomed to receiving and reviewing estimates for work for anything other than very minor repairs, regardless of whether the tenement is professionally factored or self-factored. The budget provisions within the DMS require far less detail in relation to estimated expenses in the coming year. The justification for this in the DMS context – essentially that owners will be content to leave the manager to "get on with it" – may apply more readily in a larger development than in a smaller tenement, particularly when the change to an annual budget already represents a change in current practice. The disadvantage of requiring more detail in the budget is, however, that the process of drawing up the budget becomes more onerous and perhaps makes it more likely that a professional manager will need to be employed, with attendant expense.

10.38 A separate issue concerns the treatment of any surplus. Under the TMS, owners are entitled to repayment of any surplus if works cost less than estimated.[58] This is not the case in the DMS, where the surplus is simply rolled over to help fund costs the following year.[59] Bearing in mind the overall ambition of the reform to achieve a more systematic approach to tenement maintenance, our provisional view is that the case for retaining the DMS rule within the OAS is sufficiently strong to justify the change from the current position.

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[52] Report on Real Burdens para 8.47.
[53] DMS rules 20.1 and 20.2.
[54] DMS rules 20.1 and 20.3.
[55] DMS rule 19.3(b).
[56] See 10.26.
[57] See generally TMS rules 3.3 and 3.4.
[58] TMS rule 3.4(g) as discussed at 10.26.
[59] See 10.35.

10.39 We would be grateful for the views of consultees on these issues. We ask:

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?

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?

Treatment of association funds

10.40 The introduction of an annual budgeting system has the effect that funds paid over by owners will regularly be held in a maintenance account, so that payments can be made in respect of maintenance works as they fall due. There is little in the 2004 Act to regulate the treatment of funds held on this basis, unsurprisingly since the existence of such an account is unusual within a system where owners' associations do not have legal personality. Rule 3.4(g) of the TMS provides that sums deposited in a maintenance account by virtue of a scheme decision are held in trust for all the depositors, for the purpose of being used by the persons authorised to make payments from the account as payment for maintenance. Where a factor has been appointed, they may hold funds on behalf of owners subject to the financial obligations set out in Section 3 of the Property Factors' Code of Conduct.

10.41 More detailed provision is made within the DMS. Rule 21 provides that association funds must be held in the name of the association in a bank or building society account.[60] Where funds are likely to be held for some time, the manager must ensure that they are deposited in an account which is interest bearing or invested otherwise as per a decision of the general meeting of owners.[61] Where a reserve fund is established, the manager must ensure that these funds are kept separately from other association funds.[62]

10.42 Common sense would suggest that the more detailed provisions of the DMS are replicated within the OAS. We note that the Scottish Government is currently carrying out work on the introduction of compulsory reserve funds for OAs.[63] It may be that further regulation of

[60] DMS rule 21.1.
[61] DMS rule 21.2.
[62] DMS rule 21.3.
[63] See 1.6-1.9.

such funds follows from that work, and the OA legislation could presumably be amended to give effect to that regulation if appropriate.

10.43 We ask:

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?

Chapter 11 Enforcement of maintenance obligations

Introduction

11.1 In this Chapter, we consider how obligations connected with tenement maintenance can be enforced. The Chapter looks at obligations between and amongst members of the OA and the manager, and obligations arising under contracts entered into by the OA and third parties such as tradespersons. It considers which remedies should be available, and the appropriate forum for seeking such remedies.

11.2 Obligations arising between and amongst members of the OA and the manager fall into two categories. First, under the 2004 Act, flat owners owe a number of duties to the other flat owners in the tenement including the obligation to maintain any part of the tenement they own so as to provide support and shelter to other parts,[1] and the obligation to insure any part of the tenement which they own.[2] These obligations cannot be set aside in the title conditions. Secondly, obligations will arise between members and the manager based on the management scheme applicable in the tenement (currently the TMS, and in future the OAS if new legislation is enacted, as modified by relevant title conditions). The Working Group intended the OA to play a role in enforcing obligations in both categories. This Chapter considers the rights of enforcement which should be held by members and the manager in that respect, and consults on the potential introduction of two new mechanisms to enforce such obligations, namely a maintenance budget order and tenement-restricted land attachment.

11.3 The Chapter will also consider which court or tribunal should have jurisdiction to hear disputes arising between and amongst members of the OA and the manager, and look at the role of alternative mechanisms for dispute resolution such as mediation.

11.4 Finally, the Working Group intended the OA to be able to enter contracts in its own right with tradespersons and other providers of services in connection with maintenance. The Chapter will consider the rights available to such parties if the OA defaults on its contractual obligations. We seek the views of consultees throughout.

Which obligations do flat owners owe one another?

Mandatory obligations

11.5 The 2004 Act imposes a limited set of duties on the owners of tenement flats which cannot be set aside by conditions in the property titles. These duties are enforceable by other owners in the building who would be affected if the duty was breached. The owner of any part of a tenement which provides support and shelter has a duty to maintain that part so as to

[1] 2004 Act s 8.
[2] 2004 Act s 18.

ensure that it continues to do so.[3] All owners are liable for the costs of such work on the basis of the rules set out in the management scheme applicable to the tenement if the part of the tenement in question is scheme property.[4] Similarly, an owner of any part of a tenement which provides support and shelter is prohibited from doing anything reasonably likely to impair to a material extent the support or shelter provided, or the natural light enjoyed, by any part of the building.[5] Where sufficient notice is given, owners are required to provide access on or through parts of the building which they own for maintenance and connected purposes.[6] Owners also have an obligation to insure the parts of the building which they own.[7]

The limits of the duty to maintain under section 8

11.6 In strict terms, these mandatory duties fall outside the scope of the current project since they do not form part of the management scheme applicable to a tenement. However, the section 8 duty to maintain the tenement so as to provide support and shelter plays an important role in the overall maintenance framework. Management schemes such as the TMS and, if enacted, the OAS support owners to carry out maintenance, but they do not compel them to do so. In a tenement where most owners are apathetic or absent, such that obtaining a majority in favour of maintenance work is impossible, the section 8 duty is the only route by which an engaged owner can enforce maintenance to a minimum standard.[8]

11.7 In early consultation for this project, our attention has been drawn to certain aspects of the section 8 duty which give rise to uncertainty at present. Given the likely importance of this duty to the success of the OA regime as a whole, we think it may be sensible to address these in any legislation following from this project.

11.8 The first issue concerns the extent of the duty under section 8. Owners are obliged to maintain supportive or sheltering parts of the building so as to ensure that they continue to provide that support or shelter.[9] The duty to maintain in this respect applies only in so far as it is reasonable to do so, having regard to all the circumstances including in particular the age of the tenement, its condition, and the cost of any repair.[10] The duty does not extend to maintenance so as to avoid damage to persons or property.[11] This reflects the fact that section 8 was a statutory restatement of a common law duty arising under the doctrine of common interest.[12] The duty to take reasonable care to maintain property so as to avoid damage to others arises under the common law of delict, and when recommending the provision which became section 8, we considered that there was sufficient provision within the general law to deal with negligence of this kind.[13]

11.9 In practice, anecdotal evidence we have heard to date suggests that placing certain maintenance duties arising under common law on a statutory footing whilst leaving others to

[3] 2004 Act s 8.
[4] 2004 Act s 10.
[5] 2004 Act s 9.
[6] 2004 Act s 17.
[7] 2004 Act s 18.
[8] An engaged owner could also seek assistance from the local authority, which has certain powers to compel owners to take action in relation to maintenance: see 2.49-2.52.
[9] 2004 Act s 8(1).
[10] 2004 Act s 8(2).
[11] *Lacey v McConville and Carton* (2020) SLT (Sh Ct) 237 at [36].
[12] Report on the Law of the Tenement para 7.4-7.13.
[13] Report on the Law of the Tenement para 7.15-7.17.

the common law has caused confusion. In addition, it causes complexity in the enforcement process. Enforcement of the section 8 duty is dealt with by way of summary application under section 6 of the 2004 Act, whereas a delictual action would have to be pursued under an alternative civil court procedure.[14]

11.10 To streamline these matters in future, we think it may be sensible to extend the section 8 duty to cover not only obligations previously owed under the doctrine of common interest, but also certain duties owed by flat owners under the law of delict. We do not suggest an attempt to restate the law of delict as it applies to owners of tenement property in its entirety, which would seem significantly beyond the scope of the project. The common law of delict should remain undisturbed. Instead, we suggest a more limited extension of section 8 to cover some duties which also exist at common law, but which might sensibly be enforced alongside the current duties in section 8 as part of the same proceedings.

11.11 To that end, we suggest that section 8 should be amended to include a duty on owners to maintain any part of the building which they own so as to prevent damage to any part of the tenement or in the interests of health and safety. This formulation draws on the definition of emergency work which any owner is entitled to instruct under rule 7 of the TMS, and which we suggest should be replicated in the OAS.[15] The emergency work rule only allows for such work to be carried out "before a scheme decision is obtained" to do so. Incorporation of this duty into section 8 allows for the work to be enforced even where obtaining a scheme decision proves impossible. As with the current duty under section 8, the duty to maintain so as to avoid damage or in the interests of health and safety should be owed only in so far as it is reasonable to do so having regard to all the circumstances, including in particular the age of the tenement building, its condition and the likely cost of any maintenance.

11.12 We would be grateful to hear the views of consultees on this issue. We ask:

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?

11.13 Separately, it has been suggested to us in early consultation for this project that there is uncertainty as to what maintenance work is necessary to comply with the section 8 duty. One example brought to our attention concerns the installation of a damp proof course at the base of the walls surrounding the ground floor flat in a tenement. A damp proof course is a barrier which prevents moisture rising from the ground into the walls of the building and causing damp. In the first instance, this benefits the residents of the ground floor flat by preventing damp penetrating the interior of the building. However, damp left unchecked can cause problems for the structural integrity of the building over time. It is not clear whether that risk is such that installation of a damp proof course should be considered work required for compliance with section 8 (in which case, the costs of the work are split as they would be for

[14] Whether the action is dealt with under the simple procedure rules, the summary cause rules or the ordinary cause rules will depend on the value and complexity of the claim and the remedy sought.
[15] See 8.77-8.78.

maintenance work carried out as the result of a scheme decision, as opposed to resting with the ground floor flat alone).[16]

11.14 We recognise that the absence of a clear rule in legislation may result in disputes over issues of this kind. Matters may be addressed by including in the statute a non-exhaustive list of work covered by the section 8 duty, which might focus on areas of uncertainty rather than works which more obviously fall within the duty. However, we have some concerns about the extent to which the role of certain types of work may depend on the construction of an individual tenement building. The heterogeneity of the tenement stock has been noted elsewhere in this Paper as a reason why a degree of flexibility in the legislation is essential. Where the structural significance of certain types of works may depend on the facts and circumstances of the case in question, attempting to categorise those works through rules in statute would seem obviously inappropriate.

11.15 Again, we would be grateful to hear from consultees on this issue. We ask:

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?

Obligations under the management scheme

11.16 In addition to the mandatory obligations placed on owners under the 2004 Act, the management scheme applicable to the tenement will place a number of obligations on owners as discussed throughout this Paper. The most significant of these in practice is likely to be the obligation to pay a share of costs incurred under the scheme, which is likely to occur through the levying of a service charge in any new legislation following from this project.[17] In addition, the OAS would introduce a new set of obligations between the manager and members of the OA. In most cases, these obligations would be owed by the manager to members as discussed in Chapter 9, but members also owe some obligations to the manager, particularly the obligation to provide details of their name and contact details.[18]

Other obligations

11.17 We note for completeness that conditions in the property titles may place obligations on owners covering matters other than management and maintenance. Amenity burdens obliging owners, for example, to use their flats as a residence for a single family or refrain from keeping pets, are common in tenement titles. In tenements where a factor has been appointed, the factor will owe obligations to owners as set out in the factoring contract and further regulated by the Property Factors (Scotland) Act 2011.

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[16] 2004 Act s 10.
[17] See generally 10.36-10.39.
[18] See 6.37-6.39.

Enforcing obligations between owners: current law

11.18 An owner may take action to enforce any of the mandatory obligations set out in the 2004 Act, or any obligations arising under the management scheme applicable to the tenement, by way of summary application to the sheriff court under section 6 of that Act. No alternative dispute resolution process is prescribed by the 2004 Act as an alternative or precursor to raising proceedings. However, in our survey of tenement title conditions, we found a significant minority of cases in which the conditions required owners to go through a mediation or arbitration process instead of, or prior to, raising proceedings in court.[19]

11.19 Where a summary application is made under section 6, the sheriff may make "such order as he thinks expedient", subject to conditions if appropriate.[20] Broadly speaking the sheriff may make an order requiring a person to take certain actions (known as implement) or prohibiting a person from taking certain actions (known as interdict), or may make an order for payment.

11.20 Where an order for payment has been made, the person to whom the payment is owed may take further action under the general law of debt recovery. The main option available is to pursue a remedy in diligence, which in very broad terms allows a creditor to seize assets belonging to the debtor and use them to pay off the debt.[21] Scots law recognises different forms of diligence depending on the types of property the debtor owns. Where the debtor is a human being, the diligence perhaps most likely to be effective is arrestment, which allows the creditor to seize the debtor's money in the hands of a third party such as a bank and direct it to be paid to the creditor rather than the debtor.[22] A portion of a debtor's wages can also be arrested in the hands of their employer and redirected to the creditor.[23] Where the debtor is a company or other corporate entity, the diligence of attachment may be used to seize corporeal moveable property belonging to the debtor and sell it, with the proceeds of sale used to pay the debt.[24] Under current law, there is no effective diligence available against the debtor's heritable property. The relevant diligence of adjudication for debt is virtually obsolete in practice, and the intended successor diligence of land attachment has yet to be brought into force. We discuss this further below.

11.21 Where the debt is above a certain level, a creditor may also have the power to trigger an insolvency process, with sequestration (bankruptcy) the appropriate process for human beings[25] and liquidation (winding up) the usual process for companies and other corporate entities.[26]

11.22 Other obligations arising under tenement title conditions (meaning principally amenity obligations) or at common law may be enforced by raising proceedings in the sheriff court,

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[19] Appendix B para 30.
[20] 2004 Act s 6(2).
[21] A guide for laypersons on diligence processes can be found on the Accountant in Bankruptcy's website at https://aib.gov.uk/publications/scottish-diligence-statistics-2022-23/guide-to-diligence-processes#publication-content. A law student guide to the subject can be found in F McCarthy, "Judicial Security: Diligence" in R G Anderson (ed) *Scots Commercial Law (2nd edn)* (2022) ch 12.
[22] Debtors (Scotland) Act 1987 ss 73A-73T.
[23] Debtors (Scotland) Act 1987 ss 46-50.
[24] Debt Arrangement and Attachment (Scotland) Act 2002 ss 10-57.
[25] Guidance is available at https://www.mygov.scot/creditor-making-you-bankrupt.
[26] Guidance is available at https://www.mygov.scot/liquidate-limited-company.

usually by way of ordinary cause procedure. In tenements where a factor has been appointed, it is common for the factor to be given power to enforce obligations against any owner on behalf of the others.

11.23 Where a factor is in place, an owner can make an application to the Property and Housing Chamber of the First-tier Tribunal if the factor is not fulfilling their duties as a factor or not complying with the Property Factor Code of Conduct.[27]

Enforcing obligations between owners: options for reform

Who should have the right to enforce obligations owed between owners?

11.24 Under current law, obligations arising under the 2004 Act or under the management scheme applicable to the tenement can be enforced by owners against one another where they would be affected by a breach.[28] In practice, owners are often unwilling to seek to enforce against one another due to the social consequences that may result, particularly where the owners are also neighbours.

11.25 The introduction of the OA regime allows for an alternative enforcement route to be created. The OAS could provide the manager of the OA with the right to enforce any obligation owed by one owner to another. The manager would enforce on behalf of the OA. This right would exist in relation to both the mandatory obligations in the 2004 Act and to obligations arising under the management scheme in place in the tenement. Conferring the right to enforce such obligations on the manager seems consistent with the manager's overall role in relation to the tenement, and avoids the need for owners to enter litigation with one another directly. In our survey of tenement title conditions, we found provision for the factor to enforce obligations in a significant minority of deeds.[29] In the DMS, the manager has not only the right, but also the *duty* to enforce any obligation owed by any person to the owners' association in so far as it is reasonable to do.[30] Our suggestion here differs slightly, since the focus is on obligations owed to other owners rather than the OA itself. However, this is explained in part by the fact that, in a DMS, obligations which would normally be due to other owners are also due to the owners' association.[31] Providing the manager with the right or duty to enforce such obligations is common in other jurisdictions[32] and is also a term we understand to be common in factoring agreements in Scotland. Including such a rule within the OAS seems to us likely to reduce some of the conflict in tenement neighbour disputes in future.

11.26 Reform to the law here could go further, by providing that enforcement rights against owners in relation to their obligations to one another are exercisable *only* by the manager on behalf of the OA. This is the position within the DMS unless explicit provision is made otherwise.[33] In line with our policy in this project of retaining the status quo where possible to

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[27] 2011 Act s 17(1).
[28] 2004 Act s 6, as discussed above.
[29] Appendix B para 30.
[30] DMS rule 8(f).
[31] See Report on Real Burdens para 8.27.
[32] See, for example, Turkey in Van der Merwe, "Apartment Ownership" paras 260-261. Many United States statutes provide for enforcement actions which can be instituted by the manager, see Van der Merwe, "Apartment Ownership" para 265. See also Spain, Horizontal Property Act 49/1960 s 21. For Italy and Portugal, see Van der Merwe, European Condominium Law (2015) pg 348-349 and 356.
[33] Report on Real Burdens para 8.27.

minimise the intervention with the A1P1 rights of owners, we tentatively suggest that this approach would not be appropriate for the OAS. Instead, we consider that the right to enforce obligations owed by owners to one another should be exercisable both by individual owners and by the manager. Owners could make alternative provision in the property titles if they wished.

11.27 We would be grateful for the views of consultees on these issues. We ask:

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 <u>right</u> 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 <u>duty</u> 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?

How can the manager's obligations be enforced?

11.28 If the OA regime is introduced, the manager of the OA will owe obligations to its members. We suggested in Chapter 9 that members should have the power to direct the manager in the performance of their duties.[34] If that approach is supported by consultees, it will follow that members will generally enforce performance by the manager of their obligations through such directions, or by dismissing and replacing a manager who is not fulfilling their responsibilities appropriately. Under our provisional proposals, owners are also empowered to act directly in place of the manager in certain circumstances, namely by calling a general meeting where the manager has failed to do so.[35] This correlates to the position in the DMS.[36]

11.29 The question arises of whether owners should also have individual rights of enforcement against the manager in connection with the manager's duties under the OAS. When considering this issue in connection with the DMS, we noted that members of a company do not usually have rights of enforcement against the directors. We went on to note, however:

> "The usual justification for [the rule that members of a company do not have enforcement rights against the director] is that it prevents multiplication of law suits, but the danger seems slight in the case of an owners' association. Owners are lethargic rather than litigious. Where a breach of duty affects the development as a whole, they will be all too willing to leave enforcement to collective action, decided on at a general meeting. Individual action is likely only where the general meeting declines to take

[34] See 9.36.
[35] See 8.41.
[36] Report on Real Burdens paras 8.27-8.29.

matters further, and the owner is not satisfied with the decision. Such cases will not be common."[37]

We also considered that an individual right of action would be useful for cases in which the manager's breach of his duties affected only one unit in the development, in which case a majority vote in favour of action might be difficult to assemble.[38] The DMS accordingly provides that managers owe duties to each member as well as to the owners' association.[39]

11.30 We think a similar approach may be appropriate in relation to the manager of the OA. This is, in part, for the same reasons outlined in relation to the DMS manager above. In addition, we are conscious that the manager of an OA may often be a person entered on the Scottish Property Factor Register, meaning that individual owners will have the right to make an application to the Property and Housing Chamber of the First-tier Tribunal where a relevant dispute arises concerning the compliance of the manager with their duties in that respect.[40] If such an individual right is not available to owners under the OA legislation, the results could be complex. We would be grateful for the views of consultees on this issue.

11.31 We ask:

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?

Which forum should have jurisdiction?

11.32 Under current law, proceedings in relation to enforcement of tenement law obligations are split across a number of courts and tribunals. Enforcement of obligations arising under the 2004 Act or the management scheme applicable in the tenement proceeds by way of summary application to the sheriff court. Enforcement of common law obligations or obligations arising under amenity burdens proceeds by way of simple, summary cause or ordinary cause procedure in the sheriff court. As noted above, disputes concerning a registered factor proceed by way of application to the Housing and Property Chamber of the First-tier Tribunal.

11.33 In early consultation for this project, we have heard concerns about the suitability of the sheriff court as the forum for tenement disputes. It has been suggested to us that disputes between neighbouring owners in relation to common repairs might more appropriately be dealt with by the Housing and Property Chamber. Here, we consider whether the introduction of the OA legislation could or should provide an opportunity to make that change.

11.34 As noted above, the usual enforcement route for owners in relation to obligations arising under tenement law is to make a summary application to the sheriff court.[41] We recommended the sheriff court as the appropriate forum in our Report on the Law of the Tenement[42] since it already had jurisdiction to consider appeals against statutory repairs

[37] Report on Real Burdens para 8.28.
[38] Report on Real Burdens para 8.29.
[39] DMS rule 4.6.
[40] 2011 Act s17(1).
[41] 2004 Act s 6.
[42] Report on the Law of the Tenement para 5.20.

notices under the Civic Government (Scotland) Act 1982[43] and the Housing Scotland Act 1987.[44]

11.35 The summary application process is intended to be more straightforward than other types of sheriff court action, with fewer rules of procedure and a broad discretion given to the sheriff to determine the progress of the application.[45] As MacPhail notes,[46] however, this does not necessarily result in applications being resolved speedily[47] or with less formality, for example in relation to the required form and content of court documents such as written pleadings.[48] The application is also subject to the adversarial process usually adopted in civil court actions, meaning that the sheriff's role is to pass judgment on the merits of the case presented by each party rather than to operate in a more investigatory or interventionist manner. Arguably these aspects of the summary application procedure mean it is ill-suited to the resolution of day-to-day disputes concerning tenement maintenance, at least where it is the only available forum.

11.36 Two main arguments can be made in support of the Housing and Property Chamber as a more appropriate forum. The first concerns the approach to management and determination of cases in the Tribunal setting. Although the Tribunal is a judicial decision-making body,[49] it takes an inquisitorial approach not generally possible in the other civil courts in Scotland. Tribunal members play an interventionist role, drawing on their (legal or non-legal) professional expertise to ask questions and draw out relevant information about the case.[50] They may arrange an inspection of a property in dispute where they consider it will assist in their decision making.[51] Although detailed procedural rules apply in respect of applications to the Housing and Property Chamber,[52] the overriding objective of the Tribunal is to deal with proceedings justly,[53] which allows it to seek informality and flexibility in proceedings.[54] The Tribunal can also ensure, in so far as is possible, that parties are able to participate fully, including assisting any party in the presentation of their case without advocating the course that they should take.[55] The Tribunal rules are intended to enable parties to reach a satisfactory resolution without the need for legal representation.[56] In addition, there are (at least currently) no fees payable in connection with Tribunal applications. It has been suggested to us that the

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[43] Civic Government (Scotland) Act 1982 s 106.
[44] Section 111 of the 1987 Act has now been repealed, but the sheriff has a broadly similar jurisdiction under the Housing (Scotland) Act 2006 s 64(1).
[45] MacPhail, Sheriff Court Practice, para 26.43 citing *O'Donnell v Wilson* 1910 S.C. 799 at 803, per Lord Salvesen; *Secretary of State for Trade and Industry v Lovat* [2000] B.C.C. 485 (Sh. Ct). See also Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999, rule 2.31.
[46] MacPhail, *Sheriff Court Practice*, para 26.40.
[47] Sheriff Court (Scotland) Act 1907 s 50 directs the sheriff to decide upon the action at the first hearing, but the sheriff's general discretion allows for a hearing to be continued or an action sisted (paused): See MacPhail, paras 26.84 and 26.94.
[48] SAR 1999 r 2.4 and Form 1.
[49] Tribunals (Scotland) Act 2014 s 14(1).
[50] Scottish Government, *A Consultation on Procedure of the First-Tier Tribunal Housing and Property Chamber*, January 2017 para 72.
[51] First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, rules 44, 53, 63 and 73.
[52] See generally the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.
[53] First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, rules 2(1) and 3.
[54] 2017 rules, rule 2(2)(b).
[55] 2017 rules, rule 2(2)(c). See also rule 25 which provides that, in relation to hearings of the FTT(HPC) the chairing member must take reasonable steps to introduce parties to the tribunal members, explain the purpose of the hearing and ensure that parties both understand the hearing and can participate in it.
[56] Scottish Government, *A Consultation on Procedure of the First-Tier Tribunal Housing and Property Chamber*, January 2017 para 1 and 3.

flexibility and pragmatism of the Tribunal system is a better fit for the types of disputes likely to arise amongst flat owners, where disagreements about factual matters and questions of reasonableness are more often at issue than points of law.

11.37 The second main argument in favour of allocating jurisdiction for tenement disputes to the Tribunal concerns the subject matter of such applications. The Housing and Property Chamber of the Tribunal has jurisdiction to consider a range of housing-related disputes,[57] some of which have an obvious resonance with the types of issues which seems likely to arise under the OA regime. The Tribunal currently hears applications from tenants or the local authority relating to the compliance of privately rented properties with the repairing standard,[58] which seems likely to involve similar practical questions to those which may arise in relation to the compliance of tenement works with maintenance needs under the duty to provide support and shelter, or potentially in the condition inspection reports that the Working Group recommended should become mandatory for tenements in future. As noted above, the Tribunal also deals with applications from homeowners relating to the compliance of their factor with the Property Factors' Code of Conduct,[59] which clearly seem likely to involve similar issues to those which might arise where owners are unhappy with the OA manager. It seems obviously desirable in terms of the coherence of our legal system as a whole to suggest that disputes with similar subject matter should be dealt with by the same decision-making body.

11.38 Consideration of the likely subject matter of disputes under the OA legislation may also give rise to a counter-argument, however. Enforcement action against an owner who defaults on payment of their service charge will inevitably be a common reason for raising proceedings under the OAS. In tenements where significant maintenance is required, the costs involved could be substantial, and the potential consequences for an owner occupier in default could be as serious as losing their home.[60] Debt enforcement processes in Scotland are generally dealt with in the sheriff court. It might be noted however that the Housing and Property Chamber of the Tribunal has jurisdiction in relation to private tenancy disputes which will frequently involve non-payment of rent, and is empowered to make payment orders and consider time to pay applications in this respect.[61] Where enforcing parties proceeded to take further action in the form of diligence or insolvency proceedings, these would be dealt with in the sheriff court in the usual way with relevant debtor protections concerns taken into account.[62]

11.39 Separately, it should be noted that a change in forum will have implications in relation to the expenses of raising proceedings. In the sheriff court, the usual rule is that whichever party is successful in the proceedings will be awarded the expenses of those proceedings against the other party. The Tribunal has power to award expenses only where a party through

[57] A full list of the matters within the jurisdiction of the FTT(HPC) can be found on its website: https://housingandpropertychamber.scot/apply-tribunal.
[58] Housing (Scotland) Act 2006 ss 13 (specification of the repairing standard) and 22 (conferring a right to apply to the Chamber on tenants and other parties).
[59] Property Factors (Scotland) Act 2011 s 17.
[60] See 11.46-11.55.
[61] Private Housing (Tenancies) (Scotland) Act 2016 s 71.
[62] For example, an order permitting a trustee in sequestration to sell the debtor's home can be granted by a sheriff only after consideration of various debtor protection concerns: Bankruptcy (Scotland) Act 2016 s 113.

unreasonable behaviour in the conduct of the case has put any other party to unnecessary or unreasonable expense.[63] The effect is usually that parties bear their own expenses.

11.40 We would be grateful for the views of consultees on this issue. We ask:

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.

Should non-judicial dispute resolution processes play a role?

11.41 A distinct but connected concern raised with us repeatedly during early consultation for this project related to the use of alternative dispute resolution mechanisms within the tenement context. As we noted above, formal judicial processes can be seen as an unattractive mechanism by which to resolve disputes between neighbours, in addition to which, disputes often have both legal and non-legal aspects. It has been suggested to us that an alternative form of dispute resolution such as a mediation should be made permissible, or even mandatory, following the introduction of the OA regime.

11.42 In principle, we recognise the attraction of alternative forms of dispute resolution in the tenement context. Processes which focus on collaboration-building and compromise are arguably more suitable for resolution of disputes between parties who must necessarily have a continuing relationship, such as owners of neighbouring flats, and the greater creativity possible in finding appropriate remedies may also be beneficial in such cases. We noted above that provision is sometimes made for compulsory mediation or arbitration in tenement deeds, although it seems this may be unusual outwith the context of larger modern developments. We have also heard evidence that factors sometimes play an informal mediation-type role where owners cannot agree, although the extent to which this occurs and its effectiveness is obviously difficult to quantify.

11.43 Despite the potential benefits of alternative dispute resolution processes, we do not think that a duty to make use of such a process would be appropriate in legislation introducing the OA regime. The principal difficulty here is the practical concern that Scotland does not have a national mediation service or similar body. Dispute resolution services are offered on a piecemeal basis by a range of providers funded in different ways.[64] Without a system that is available equally to all tenement owners across Scotland with fees charged at a standard rate, access to justice concerns dictate that owners should not be required to make use of such a process. We note in this connection that a commitment to develop a draft model for the delivery of mediation services across sheriffdoms was set out in a recent letter from the First Minister to the Cabinet Secretary for Justice and Home Affairs setting out agreed priorities for 2023-

[63] The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 Sch 1 rule 40.
[64] A pertinent example is the Neighbour Mediation Scheme funded by SafeDeposits Scotland, available where at least one of the parties to the dispute is in private rented accommodation and certain other requirements are fulfilled: https://www.scottishmediation.org.uk/why-mediation/types-of-mediation/neighbour-mediation-project/.

24.[65] If there are developments in that respect, we will take those into account when producing our final recommendations in this project.

11.44 In the absence of a national mediation service or equivalent, however, we think it may nevertheless be possible to integrate the use of such processes into the tenement law regime in other ways. One possibility would be to empower 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 to have power to refer the matter for mediation if appropriate in all the circumstances of the case. The sheriff has such a power in family law actions under ordinary cause rule 33.22, or in cases raised under the simple procedure (meaning the financial value of the claim cannot exceed £5,000).[66] A second possibility would be to allow a sheriff or tribunal to take into account any attempts by any party to the case to engage with an alternative dispute resolution process when determining the award of any expenses.

11.45 We would be grateful for the views of consultees on this issue. We ask:

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?

Enforcement orders: two new remedies?

11.46 The orders available to a court or tribunal are, generally speaking, a matter for the law of civil procedure, and we do not suggest any restriction in that respect is required in the tenement context. However, we think legislation introducing the OA regime might include provision for two tenement-specific remedies which could be awarded by the court or tribunal in appropriate circumstances.

11.47 First, we think provision should be made for the manager of the OA to seek the approval of the court for a maintenance budget covering work required for compliance by owners with their duties under section 8 of the 2004 Act. This order is designed to deal with circumstances in which the manager cannot obtain approval for a budget through the usual process of a vote by members, whether as the result of apathy or active opposition. Allowing for court approval of a "section 8 budget" seems the most straightforward way to enable enforcement of the section 8 duty by the manager, since approval of the budget will enable

[65] https://www.gov.scot/publications/justice-and-home-affairs-fm-letter-to-cabinet-secretary/.
[66] Act of Sederunt (Simple Procedure) 2016 Sch 1 rule 12.3(1).

the manager to make use of the powers of the OA to instruct the work, and also provide a basis on which to enforce obligations against owners to pay for the work, though the use of further debt enforcement mechanisms if necessary.

11.48 We ask:

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?

11.49 Second, we provisionally propose a new mechanism for enforcement of payment of financial obligations arising under the 2004 Act or the management scheme in place in the tenement. In brief, we suggest that the diligence of land attachment should be available to the OA in relation to relevant tenement property for the enforcement of such debts.

11.50 Provision was made in the Bankruptcy and Diligence etc. (Scotland) Act 2007 for the new diligence of land attachment,[67] however the key provisions have yet to be brought into force. The diligence is intended to work as follows. The creditor (in this case, the OA to whom payment of the service charge is owed) must register a notice of land attachment against heritage owned by the debtor in the Land Register or Register of Sasines (in this case, the relevant flat in the tenement), and against the debtor's name in the Register of Inhibitions.[68] 28 days later, the attachment takes effect to provide the attacher with a right in security over the property.[69] After six months have passed, if at least £3,000 of debt remains outstanding, the attacher can apply to court for warrant to sell the property.[70]

11.51 Section 98 of the 2007 Act makes special provision in respect of attached land which comprises or includes a dwellinghouse, and that dwellinghouse is the sole or main residence of the debtor, the attached property owner or certain family members.[71] A dwellinghouse may be a sole or main residence irrespective of whether it is used to any extent by the debtor, the owner or one of the family members for the purposes of any profession, trade or business.[72] Where an application is made for warrant to sell a property falling within the section 98 definition, the sheriff must have regard to:[73]

- The nature of and reasons for the debt secured by the land attachment;
- The debtor's ability to pay the debt outstanding if the effect of the warrant for sale were suspended;
- Any action taken by the creditor to assist the debtor in paying that debt;

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[67] These provisions largely implement recommendations contained in Scottish Law Commission, *Report on Diligence* (Scot Law Com No 183, 2001) available at: https://www.scotlawcom.gov.uk/files/6412/7989/7339/rep183.pdf.
[68] 2007 Act s 83.
[69] 2007 Act s 81.
[70] 2007 Act s 92.
[71] The relevant class of family members is the spouse, civil partner or cohabitant of the debtor or owner, or a former cohabitant of the debtor or owner who remained living in the dwellinghouse with a child of the relationship after the debtor or owner ceased living there.
[72] 2007 Act s 98(8).
[73] 2007 Act s 98(5).

- The ability of those occupying the dwellinghouse as their sole or main residence to secure reasonable alternative accommodation.

The sheriff may refuse to grant the warrant, or suspend its application for up to one year, if to do otherwise would be "unduly harsh" to the debtor or any other person with an interest.[74]

11.52 Under section 92 of the 2007 Act, Scottish Ministers may, by regulations, provide that an application for warrant to sell may only be made in respect of attached land which does not comprise or include a dwellinghouse.

11.53 The land attachment provisions have proved controversial due to political disagreement as to whether it should be possible for a person to lose their home on the basis of unpaid debt.[75] This seems to be the reason why the provisions, despite being enacted, have yet to be brought into force. The Accountant in Bankruptcy's website notes an announcement by a former First Minister that a debtor's home will not be subject to land attachment.[76] A review of debt enforcement solutions currently underway is intended to include consideration of the treatment of the family home in such processes, from which further recommendations in relation to land attachment may result.[77]

11.54 It may be the case that, by the time any legislation introducing the OA regime is enacted, land attachment is already available in certain circumstances, or an alternative diligence in relation to heritable property is proposed. However, given the current state of uncertainty over the law in that respect, we provisionally propose that land attachment should be available to the OA in the restricted circumstances outlined above. Human rights concerns suggest that the power of sale should not be available to the OA where the flat in question is used as a family home as defined in section 98 of the 2007 Act. In these cases, registration of a notice of attachment will provide the OA with a right to recoup the debt from the proceeds of sale of the property (for example, a voluntary sale by the debtor or sale by a creditor under a standard security) subject to prior securities on the home. For flats which are not a family home in the meaning of section 98, we suggest the power of sale should be available.

11.55 We would be grateful to hear from consultees on this issue. We ask:

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?

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[74] 2007 Act s 97(3).
[75] It is accepted that this may occur where the debtor has voluntarily granted a standard security (often referred to by the English law term "mortgage") in respect of a loan, and then defaults on repayment of that loan. The concern is with the loss of the debtor's home when no such security or mortgage has been voluntarily granted.
[76] See Accountant in Bankruptcy's Diligence Working Group, *Review of Diligence in Scotland – Report of recommendations to modernise diligence* (March 2021) para 5.19 available at: https://www.aib.gov.uk/media/jdhiuig2/diligence-review-diligence-working-group-final-report.docx.
[77] https://aib.gov.uk/about-aib/consultations-and-reviews/wider-review-scotlands-debt-solutions/wider-review-stage-3.

(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?

Obligations owed by the OA to third parties

Current law

11.56 Owners of tenement flats will almost inevitably have to enter into contracts with third parties at some stage, for example to carry our maintenance work to the building or to provide stair cleaning services. In principle, all the owners in a tenement could contract jointly with the third party. However, the impracticality of arranging a contract with so many parties means that usually one owner will enter the contract, taking on individual liability to the third party for all costs, and relying on their right to recover scheme costs from the other owners to recoup what they have paid out (minus their own share). Alternatively, a factor may contract on behalf of all owners assuming relevant powers have been included in the factoring agreement.

11.57 The disadvantages of the current law were identified by the Working Group. One owner might be held individually responsible for the whole group's debts.[78] Equally, that owner might be the only person with the power (or the responsibility) to enforce the obligations undertaken by the third party should it become necessary. From the third party's perspective, in the event of default on payment, they might have recourse only against the owner who signed the contract rather than against owners as a bloc.[79] The Working Group considered that empowering the OA to contract directly with third parties would better protect all involved in such arrangements.[80]

OA scheme

11.58 In Chapter 6, we provisionally recommended that the OA should have the power to enter contracts and to take enforcement action if necessary in respect of the obligations taken on by third parties under those contracts.[81] We expect those recommendations will be supported by consultees. If so, the question of how the OA may enforce such obligations will be dealt with under the usual rules of contract law.

11.59 A more complicated question is how a third party should be able to enforce obligations undertaken by the OA. As per the usual rules of contract law, the third party would be entitled to raise proceedings, including debt enforcement proceedings, against the OA. If the OA has a healthy reserve fund, debt enforcement proceedings should be effective: shortly put, the OA will have assets that can be seized if payment is not made voluntarily. But if the reserve fund is empty or non-existent, the OA is unlikely to have other assets, and the third party would be left without an effective remedy. Since the beneficiaries of the third party's work are the members of the OA just as much as (or more so than) the OA itself, fairness suggests that where enforcement against the OA has proved ineffective, the third party should also have a

[78] Final Recommendations Report p 6. This may be because that owner alone has contracted with the third party. Alternatively, where the owners have engaged a factor, the common law of agency allows the factor to recover their whole costs from one owner, who is then left to recover their fellow owners' shares from them directly. The terms of the contract with the factor may restrict the liability of owners to their individual share, however.
[79] Final Recommendations Report p 6.
[80] Final Recommendations Report p 6.
[81] See 6.4 and Ch 7 generally.

right of recourse directly against the members. This right is available to third parties under the DMS,[82] and is also common in other jurisdictions.[83]

11.60 Under the DMS, each member's liability to the contractor is restricted to their individual share of the relevant costs.[84] In recommending this approach, we noted:

> "The underlying issue is whether inconvenience should lie with the creditor or with the members. If a member is liable only for his own share of the debt, the creditor has the inconvenience of having to recover individually from each. Conversely, if members are liable [for the whole amount] any one member can be made to pay the whole debt of the association and will be left with the labour of recovery *pro rata* from his fellow members."[85]

Our view was that a third party is better able to protect itself at the time of entering a contract (for example, by requiring payment up front or ringfencing of funds) than members are able to protect themselves against one another. Accordingly, we recommended that members' liability should be restricted to their own share.

11.61 We further recommended that a third party should be able to enforce directly against members of a DMS by levying a service charge against them in the way that the manager would normally do, provided that the existence of the debt was evidence by court decree.[86] This recommendation did not make its way into the DMS as enacted. We have been unable to identify any discussion of the reasons for its omission.

11.62 Our preliminary view is that the approach taken in the DMS is likely to be appropriate for the OA legislation. Third parties should have a power to enforce debts directly against members where proceedings against the OA have been ineffective. Limiting the liability of owners vis-à-vis third parties to their individual share of costs seems fair for the reasons set out in our earlier Report, and also meets the concerns of the Working Group that one owner should not face liability for the entirety of a debt. We continue to think that providing a third party with the power to levy a service charge directly against owners is a creative debt enforcement solution possible within the parameters of the OA regime. We suggest that this should be possible here.

11.63 We would be grateful for the views of consultees. We ask:

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?

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[82] DMS Order art 12-13.
[83] For example, Sectional Titles Act no 95 of 1986 s 47 (South Africa).
[84] DMS Order art 12(2)-(3).
[85] Report on Real Burdens para 8.65.
[86] Report on Real Burdens para 8.66-8.68.

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

(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?

Chapter 12 Insolvency

Introduction

12.1 The Working Group identified the power of the OA to enter into contracts and take on liability for debts as a key strength of the recommended scheme.[1] Any legal person with the capacity to incur debts also has the capacity to become insolvent, by which we mean that their liabilities may exceed their assets. In this Chapter, we consider which insolvency process would be appropriate for an OA which finds itself in intractable financial difficulties.

12.2 For some types of legal person such as companies, existing legislation governs which insolvency process or processes can be used. If consultees favour the OA taking the form of an existing legal person of this kind, we will explain the insolvency processes available to that person in our final recommendations for the project. However, we anticipate that consultees will support the introduction of the OA as a bespoke legal person as we suggest in Chapter 6.[2] In that case, the OA legislation will need to make provision for the insolvency of that legal person.

12.3 The risk of an OA becoming insolvent should be low.[3] If funds were required, these could usually be raised from owners by way of a service charge, as discussed in Chapter 10.[4] The recommended introduction of reserve funds, if implemented, should also assist in ensuring a pool of funds for maintenance are always available.[5] However, if owners themselves are unable to meet their service charges, and have no assets against which debt enforcement action can be taken,[6] an insolvent OA could be the result.

12.4 In the sections which follow, we outline the three formal insolvency processes most likely to be of relevance in the OA context, namely sequestration (often referred to as "bankruptcy"), liquidation and administration. For reasons explained further below, our provisional view is that sequestration is likely to be the appropriate process for OAs. However, we seek the views of consultees at the conclusion of the Chapter. For the avoidance of doubt, we note that provisions on the availability of an insolvency process would form a mandatory aspect of the OA regime, and could not be varied in the tenement titles.

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[1] Interim Recommendations Report p 6.
[2] See 6.10-6.17.
[3] We took this view in relation to owners' associations in our recommendations for TMS B (see Report on the Law of the Tenement para 6.66) and the DMS (see Report on Real Burdens para 8.102).
[4] See 10.30-10.39. As discussed in these paragraphs, if unexpected costs arise following approval of the annual budget, we suggest following the DMS model in which it is possible to levy an additional service charge of up to 25% of the original service charge.
[5] See 1.7.
[6] We discuss debt enforcement procedures at 11.20-11.21.

Sequestration[7]

12.5 The appropriate insolvency process for almost all persons in Scotland other than companies and LLPs[8] is sequestration. In this process, all the debtor's assets at the date of the sequestration are vested in an insolvency practitioner (known as the "trustee in sequestration") who acts in the interests of the debtor's creditors.[9] The trustee is tasked with recovering or realising the debtor's assets and redistributing them amongst the creditors in proportion to their claims.[10] As in any insolvency process, a creditor in a sequestration will not generally receive repayment of the debt in full. Instead, they will accept partial repayment, with the remainder of what is owed "written off".

12.6 An insolvent person may apply to the Accountant in Bankruptcy for their own sequestration, or a creditor may apply to the Sheriff Court for sequestration of their insolvent debtor.[11] Whilst sequestrated, the debtor is subject to various restrictions including a requirement to advise any potential new creditor about the sequestration.[12] The debtor will usually be discharged once 12 months have elapsed from the date of sequestration.[13] At this point, the restrictions are lifted and they are free of debt,[14] though the trustee may still be in the process of redistributing the sequestrated estate to the satisfaction of existing creditors.

Liquidation[15]

12.7 Liquidation is a procedure available to companies[16] and LLPs[17] throughout the UK under the Insolvency Act 1986.[18] Unlike sequestration, liquidation is not purely an insolvency process, and may be used by a solvent company or LLP. This is because liquidation does not only involve a redistribution of the debtor's assets at a particular point in time to relevant creditors. It also involves the "winding up" or termination of the entity subject to the liquidation, meaning that the legal person in question is dissolved at the conclusion of the process and struck off any relevant register.[19]

12.8 In a liquidation, an insolvency practitioner known as a "liquidator" is appointed to wind up the entity's affairs and distribute its assets.[20] The property of the entity will be deemed to be in the custody of the liquidator,[21] who can then apply to have it vested in them by the court.[22]

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[7] An overview can be found at https://aib.gov.uk/bankruptcy. A detailed scholarly account of the law in this area can be found in D McKenzie Skene, *Bankruptcy* (2018) Chapters 6-19.
[8] See Bankruptcy (Scotland) Act 2016 s 2 and 5-6.
[9] 2016 Act s 78(1).
[10] 2016 Act s 50.
[11] 2016 Act s 2.
[12] 2016 Act s 218.
[13] 2016 Act s 137(2), 138(2).
[14] 2016 Act s 145.
[15] An overview can be found at https://www.gov.uk/liquidate-your-company. A detailed scholarly account of the law in this area can be found in N Grier, Company Law (5th edn, 2020) para 17.01–17.58.
[16] Insolvency Act 1986 ss 73(1), 221(1).
[17] Limited Liability Partnerships Regulations 2001/1090 reg 5(1)(a).
[18] Insolvency Act 1986 Parts IV, V, VI and VII.
[19] 1986 Act ss 201, 204, 205.
[20] 1986 Act ss 91, 138.
[21] 1986 Act s 144(1).
[22] 1986 Act s 145(1).

From there, the liquidator will realise any assets of the entity and distribute in accordance with the relevant legislative provisions.[23]

12.9 The overall goal of liquidation is to achieve a fair and orderly distribution of the entity's assets to creditors for debts due. It can be initiated through a voluntary winding up or through a winding-up order of the court.[24] The length of time that liquidation takes depends on the particular entity's assets and liabilities. However, early dissolution can occur where it is clear that the assets of the entity will not even cover the expenses of liquidation.[25]

Administration[26]

12.10 A second insolvency procedure available to companies[27], LLPs[28] and certain other entities[29] is administration. Administration is, in the first instance, intended to rescue a debtor and allow it to continue as a going concern capable of returning to solvency.[30] If this is impossible, then the administrator's role is to achieve a better result for creditors than would be achieved through liquidation.[31] If even that is impossible, then the debtor's property will be realised and distributed to creditors.[32]

12.11 In an administration, an insolvency practitioner known as an "administrator" is appointed to manage the affairs of the debtor by doing anything "necessary or expedient for the management of affairs, business and property of the [debtor]".[33] The administrator takes control of all of the debtor's property and is given broad powers to deal with the entity,[34] including by selling or hiring out property,[35] borrowing money and granting security over property,[36] and carrying out the business of the company.[37]

12.12 An insolvent company may apply to court for its own administration or an application may be made by one of its creditors.[38] Alternatively, the company or the holder of a qualifying floating charge[39] may appoint an administrator without the need for a court order.[40]

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[23] See generally 1986 Act Part IV Chapters VII and VIII.
[24] 1986 Act ss 84,122.
[25] 1986 Act s 204(2).
[26] An overview is available at https://www.gov.uk/put-your-company-into-administration.
[27] 1986 Act s 8; 1986 Act Sch B1 as inserted by Enterprise Act 2002 s 248.
[28] Limited Liability Partnerships Regulations 2001/1090 reg 5(1)(a).
[29] Co-operative and Community Benefit Societies and Credit Unions (Arrangements, Reconstructions and Administration) Order 2014/229 art 11(4). Societies that provide social housing are not included here: a special administration known as housing administration was introduced by the Housing and Planning Act 2016 to cover these, which adds the additional objective of preserving housing as social housing.
[30] 1986 Act Sch B1 para 3(1)(a).
[31] 1986 Act Sch B1 para 3(1)(b).
[32] 1986 Act Sch B1 para 3(1)(c).
[33] 1986 Act Sch B1 para 59(1).
[34] 1986 Act Sch B1 para 67.
[35] 1986 Act Sch 1 para 2.
[36] 1986 Act Sch 1 para 3.
[37] 1986 Act Sch 1 para 14.
[38] 1986 Act Sch B1 para 12(1).
[39] A right in security taken over all or a part of an entity's assets, but that does not attach to any particular asset until certain circumstances occur, such as the insolvency of the entity.
[40] 1986 Act Sh B1 paras 14(1), 22.

Administration automatically ends after a year,[41] if not extended,[42] and can transition into liquidation or dissolution if necessary.

Discussion

12.13 Our provisional view is that sequestration is the most appropriate insolvency procedure for an OA. This is the process available to an owners' association under the DMS.[43]

12.14 The outcome of the sequestration process – a "debt-free" entity given a fresh start – seems to align most obviously with the intention behind allowing an OA to take advantage of a process of this kind. Liquidation, which is designed to terminate the existence of a legal person, does not fit well with an entity like an OA which must necessarily continue to exist notwithstanding the financial difficulties in which it may find itself. In England and Wales, where the owners' association at the centre of a commonhold scheme must be constituted as a company limited by guarantee, this problem was overcome through the introduction of "succession orders" by which a court may constitute a successor association at the conclusion of the liquidation process winding up the insolvent association.[44] While this seems a sensible solution for a problem inherent in a scheme with a company at its heart, the problem will simply not arise in the OA scheme if liquidation is not available.

12.15 Administration, on the other hand, is intended to rescue a debtor as a going concern. However, administration can be a costly process, particularly if an administrator is tasked with running a struggling entity for a prolonged period. The Law Commission of England and Wales considered whether insolvent commonhold associations should necessarily be subject to administration before any application could be made for liquidation, with the aim of avoiding dissolution of the association if possible.[45] However, this proposal was rejected after consultation as administration would be too costly in most cases.[46] The remedial management system on which we consult in Chapter 4[47] seems likely to offer a more straightforward and cost-effective mechanism for ensuring an OA continues as a going concern, with any insolvency concerns dealt with separately through the sequestration process.

12.16 Drawing together the threads above, our provisional view is that sequestration is the only insolvency process that should be available to the OA. However, we would be grateful for the views of consultees. We ask:

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

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[41] 1986 Act Sch B1 para 76(1).
[42] 1986 Act Sch B1 para 76(2).
[43] Bankruptcy (Scotland) Act 2016 s 6(1)(c).See also Report on Real Burdens para 8.102.
[44] Commonhold and Leasehold Reform Act 2002 s 51.
[45] See Law Commission, *Reinvigorating commonhold: the alternative to leasehold ownership*, Consultation Paper (No 241, 2018) paras 7.53-7.55 available at https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2018/12/181207-Commonhold-CP-WEB-VERSION.pdf . Save where the commonhold association was deemed "irretrievable insolvent".
[46] See Law Commission, *Reinvigorating commonhold: the alternative to leasehold ownership*, Report (Law Com No 394, 2020) para 19.51(1). As a company limited by guarantee, administration remains open to commonhold associations, as an optional process rather than a pre-liquidation requirement: Insolvency Act 1986 Sch B1 para 11(1A).
[47] See 4.21-4.43.

Chapter 13 Termination and winding up

Introduction

13.1 It will not usually be possible for members to terminate an OA, since the existence of an OA for every tenement will be mandated by the legislation. However, the tenement itself may cease to exist where the building is demolished and the land sold,[1] or where the building is converted from flats into a single unit. Additionally, if consultees support our provisional proposals in Chapter 5, the OA regime may be disapplied where a tenement is subject to a DMS.[2] Consultees may also support the power of flat owners in tenements in certain categories (for example, small tenements) to opt out of the OA regime.[3] Accordingly, legislation must make provision for the termination and winding up of an OA in circumstances where this is possible.

13.2 In this Chapter, we consider how the OA can be wound up and any assets distributed. We suggest the winding up process must begin with registration of a deed or notice in the Land Register. Following registration, we suggest members should be free to modify the rules of the winding up process in title conditions, and provisionally propose default rules to be set out in the OAS. We seek the views of consultees throughout.

Registration of disapplication

13.3 Legislation should provide that the process of terminating and winding up an OA begins automatically when the OA regime is disapplied from a tenement or plot of land through registration of a relevant deed or notice in the Land Register. If the OA is to be terminated because the tenement has ceased to exist, for example through demolition or renovation, registration of a disposition consolidating the former flats into a single plot will begin the winding up process. If the OA is to be terminated as a result of the tenement becoming subject to a DMS, registration of the DMS deed of application will begin the winding up process. If it is possible for the OA to be terminated due to owners opting out of the OA regime, registration of a deed of disapplication will begin the winding up process. This mirrors the position in the DMS, where the process of termination an owners' association begins with registration of a deed of disapplication of the DMS.[4]

13.4 We would be grateful for the views of consultees. We ask:

76. Should the OA legislation provide that the process of terminating an OA begins automatically when the regime is disapplied from a tenement or

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[1] Demolition of a tenement and its consequences are discussed at 7.20-7.24. It should be recalled that tenement flats continue to exist in a legal sense even where the physical tenement building is demolished.
[2] We consult on the suggestion that a DMS could be used in place of the OA legislation at 5.41-5.43.
[3] We consult on other circumstances in which it may or may not be appropriate to allow flat owners to disapply the OA scheme at 5.24-5.40.
[4] Title Conditions (Scotland) Act 2003 s 73.

plot of land through registration of a relevant deed or notice in the Land Register?

Termination and winding up

The manager's role

13.5 In the DMS regime, following registration of a deed of disapplication, responsibility for winding up the owners' association falls largely on the manager.[5] In our Report recommending the DMS, we suggested that there was no reason why the manager in post should not carry out this process, but noted that a new manager could always be appointed specifically for the task if members felt it necessary.[6]

13.6 In the DMS, the winding up process commences on the date of registration of the deed of disapplication. From that date, the manager must first use association funds to pay off any debts as soon as practicable.[7] Remaining funds must then be distributed among the owners (as at the date of commencing winding up).[8] We consider how funds should be allocated as between different owners below.

13.7 Second, the manager must prepare the final accounts of the association, outlining how the winding up was conducted and how funds were disposed of.[9] A copy of these accounts must be sent to the owner of every unit in the development no later than six months after the commencement of the winding up.[10]

13.8 We think this model is also likely to be appropriate for the winding up of an OA. We therefore suggest provision similar to that in the DMS should be made in the OAS.

13.9 We ask:

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?

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[5] DMS rule 6.
[6] Report on Real Burdens para 8.100.
[7] DMS rule 6.2.
[8] DMS rule 6.2.
[9] DMS rule 6.3.
[10] DMS rule 6.3.

Allocation of funds

13.10 In the DMS, when funds are distributed amongst owners during the winding up process, each unit is entitled to an equal share.[11] This aligns with the default liability for costs in the DMS, where each unit pays an equal share of the service charge.[12]

13.11 The position for OAs may be more complicated. In Chapter 10, we consulted on the proposal that the default rules on liability for costs within the OAS should mirror those under the TMS, meaning broadly that maintenance costs may be allocated on the basis of a percentage share of common ownership of a part of the tenement in some instances, or on the basis of the floor area of the flat where there are significant variations in the sizes of flats in the building. In other cases, maintenance costs will be divided equally amongst flats, and management costs will always be dealt with in this way.[13]

13.12 The question arises of which default rule should apply to distribution of association funds on dissolution. The interests of simplicity may suggest that equal division of funds is the appropriate default. Bearing in mind the approach to budgeting on which we consulted in Chapter 10,[14] it will not usually be the case that an OA will have significant funds to distribute on dissolution, meaning that the complexity of a regime more closely aligned with the default rules on allocation of liability may not be justified. Members would be free to vary the rules applicable in their particular tenement if this was thought necessary.

13.13 We would be grateful for the views of consultees. We ask:

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

Date of dissolution

13.14 An owners' association under the DMS is deemed to be dissolved six months after the deed of disapplication has been registered, or on a later date if that deed so provides.[15] If necessary, members may vote to further delay dissolution beyond the six-month period, or the period specified in the deed.[16] We are not aware of any issues with these provisions in regard to the DMS.

13.15 An OA is unlikely to have substantial assets. It accordingly seems likely that a six-month window following registration of a notice of disapplication should allow sufficient time to satisfy outstanding debts and distribute remaining funds in most cases. However, to account for unusual circumstances, there seems no reason not to also permit members to vote in favour of a further delay to dissolution, as under the DMS.

[11] DMS rule 17.
[12] DMS rule 19.1.
[13] See 10.13-10.15.
[14] See 10.36-10.39.
[15] DMS rule 6.4; Title Conditions (Scotland) Act 2003 s 73(a)-(b).
[16] DMS rule 6.5.

13.16 We ask:

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?

Chapter 14 List of Proposals and 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)

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)

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)

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

(Paragraph 4.24)

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)

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

(Paragraph 4.34)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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

(Paragraph 5.43)

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)

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)

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)

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)

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)

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)

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

(Paragraph 6.41)

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)

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)

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)

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)

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)

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)

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)

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

(Paragraph 7.29)

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)

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

(Paragraph 7.38)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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

(Paragraph 8.78)

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)

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)

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)

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)

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)

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)

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

(Paragraph 9.41)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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

(Paragraph 12.16)

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)

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)

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

(Paragraph 13.13)

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)

Appendix A - Acknowledgements

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Appendix B Survey of tenement title conditions

Introduction

1. Maintenance of the common parts of a tenement is usually regulated, at least to some extent, by conditions in the flat titles. If the titles are silent in relation to certain aspects of maintenance, the default provisions of the Tenement Management Scheme will apply to fill any gaps.[1]

2. Provision for maintenance is made in a property title by way of legal devices known as title conditions. Title conditions generally place obligations on an owner of property, enforceable by neighbouring owners. This survey was carried out to understand the types of provision being made for maintenance in tenement title conditions.

Objectives of research

3. The survey considered the following questions:

(i) How common is provision for maintenance of common parts within tenement title deeds?

(ii) What types of provision are made for specific aspects of maintenance including the majorities required for different types of work, allocation of votes, the processes by which votes can be cast, allocation of costs and enforcement mechanisms?

(iii) How common is provision for the creation of an owners' association in any form, and where it exists, what type of provision is made?

(iv) Is the Development Management Scheme[2] used for tenement management?

(v) Can any trends be identified in the data on maintenance provisions in connection with the age of the tenement or the type of tenement building?

[1] 2004 Act s 4 and Sch 1. For an explanation of the Tenement Management Scheme see 2.13-2.36.
[2] The Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009. For an explanation of the Development Management Scheme see 2.37-2.48.

Methodology

Approach and limitations to data selection

4. We asked Registers of Scotland (RoS) for access to data in the burdens section[3] of titles to around 250 tenement flats.[4] We requested that the titles selected should include:

- Titles from a range of geographical areas;
- Titles from a range of tenement types, to include traditional pre-1919 tenements, "high flats", "four-in-a-block" villas, colonies[5] and converted villa/townhouse properties;
- Titles from tenements with a range of ages, particularly including modern apartment blocks constructed in the past 25 years or so;
- Complete sets of burden data from a selection of tenements within the broader sample. Title conditions are often included in flat titles through registration of a single deed which is incorporated into the title of every flat in the tenement. In such cases, the conditions in every flat title are obviously identical. Conditions may alternatively be created in each individual flat title, in which case the conditions may not be identical for every flat. Access to complete sets of titles for some tenements where there is no common deed imposing conditions would allow for investigation of the extent of variation amongst flats in the same tenement.

5. In discussions with RoS, we identified some limitations on the data which could be obtained. It was accepted from the outset that the research could not attempt to produce statistically significant results: reliable statistical data on the mixture of different tenement types, their ages and geographical distribution within Scotland does not exist. It was also accepted that data could not be drawn from titles recorded on the (non-digital) Register of Sasines.[6]

6. It was noted that RoS does not hold reliable data on the ages of tenements, meaning that mechanical identification of pre-1919 tenements was not possible. However, other markers would allow RoS to mechanically filter titles of various tenement types which would fall outwith the pre-1919 category (such as high rises and four-in-a-blocks). A sample would

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[3] The "burdens section" is the section of the Land Register title to a property in which the title conditions are reproduced: Land Registration etc (Scotland) Act 2012 ss 3, 5 and 9. An overview of a title sheet can be found on the Registers of Scotland website at https://www.ros.gov.uk/services/order-deeds/what-title-documents-can-tell-you.

[4] We were ultimately able to access data for flats in 239 tenements, as discussed at para 11 below.

[5] Ten areas of colony houses were constructed in Edinburgh from around the middle of the 19th century to the early 20th. They are made up of a small number of back-to-back terraces which originally had upper and lower flats. They are characteristically arranged so that the front door of each flat is on the opposite side of the building to the other front door, and with an outside stair leading to the upper flat. This allowed each flat to have its own front door and front garden.

[6] Titles to land were historically recorded in the Register of Sasines, but since 1979 have gradually been transferred to the Land Register. As of January 2024, titles in the Land Register cover 95% of Scotland's land mass. For current information on completion of the Land Register, see https://www.ros.gov.uk/performance/land-register-completion.

be taken from the remaining titles and manually filtered to identify pre-1919 flats. Similarly, RoS does not hold specific data on which tenements are high rises. However, tenements in this category could be identified by mechanically filtering on connected data including the size of the building plot and the number of addresses in the building. It was accepted that this approach might bias the sample in favour of larger high rise buildings, since the filtering could not operate in such a away as to reliably identify smaller high rises (for example, five or six storey tenements).

7. It was agreed that location data should be provided in the form of local authority areas and localities. The research team would not have access to Land Register title numbers of postal addresses.

Dataset: complete sets and duplicates

8. The data provided to us by RoS included complete sets of titles for 9 tenements which were explicitly identified as complete sets. Elsewhere in the data, we identified a further 11 complete sets of tenement titles. Within 19 of these 20 tenements, identical burdens applied to each flat.[7] The remaining tenement was composed of three flats, which appeared to be a commercial unit taking up the whole ground floor, with two separate residential units on the first floor. The commercial unit was responsible for half the cost of maintenance to common areas, with the residential units responsible for one quarter of the cost each.

9. We identified a further 10 cases in which titles to more than one flat in the same tenement appeared in the data set. In each case, titles from the same tenement had identical burdens.

10. Overall, there is little in the data to suggest variation in title conditions *within* individual tenements. We note for completeness that where costs are allocated between flats on the basis of rateable value, the effect is likely to be that commercial units bear a higher proportion of the overall cost than residential units.[8]

11. In the final data set, we included only one flat title from each tenement. The results which follow are based on data from 239 flat titles, each of which relates to a different tenement building.

Data capture

12. A pilot version of the data capture tool was developed by the research team in line with the objectives of the research. The tool was refined by way of an initial exercise in which the three members of the team each independently reviewed the same 12 title deeds and recorded the data in the pilot tool. A comparison of the three sets of results was then undertaken to identify refinements to the tool necessary for consistency in the capture of data. One member of the team subsequently captured data in a further 20 deeds, following which the tool was reviewed again and some small refinements made. This final version of the tool was used for the remainder of the data capture exercise.

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[7] For the avoidance of doubt, conditions were not identical across all 20 tenements. Rather, within each tenement, each flat was subject to identical conditions.
[8] See 29 below.

13. The tool captured data in eight “demographic” categories including the property identification number assigned by RoS in preparing the data, the local authority area in which the flat was based and the type of tenement in which the flat was situated. Data on the content of the title conditions was then captured in 13 categories. In some categories, data was captured using simple yes/no labels, for example in the categories on whether the flat was subject to a DMS or whether provision was made for the appointment of a factor or equivalent. In some categories, a wider range of labels was used, for example to record whether the costs of maintenance were divided equally amongst units, based on floor space, based on a comparative value such as rateable value or on some other basis.

14. The data capture exercise took approximately six months, during which one member of the research team spent approximately 50% of their working hours reviewing deeds and inputting data. During that period, the team met approximately once per week to review and resolve any issues which had arisen with the data since the previous meeting.

Results

“Demographic” information

15. The breakdown of titles from different **local authority areas** was as follows:

Local authority area	Number of titles	Percentage of titles
Aberdeen City	11	4.60%
Aberdeenshire	2	0.84%
Angus	1	0.42%
Argyll & Bute	1	0.42%
Clackmannanshire	1	0.42%
Comhairle nan Eilean Siar	-	-
Dumfries and Galloway	-	-
Dundee	3	1.26%
East Ayrshire	8	3.35%
East Dunbartonshire	-	-
East Lothian	1	0.42%
East Renfrewshire	3	1.26%
Edinburgh	82	34.31%
Falkirk	7	2.93%
Fife	12	5.02%
Glasgow	43	17.99%
Highland	7	2.93%
Inverclyde	1	0.42%
Midlothian	-	-
Moray	1	0.42%
North Ayrshire	-	-
North Lanarkshire	8	3.35%
Orkney Islands	1	0.42%
Perth & Kinross	1	0.42%
Renfrewshire	10	4.18%
Scottish Borders	6	2.51%

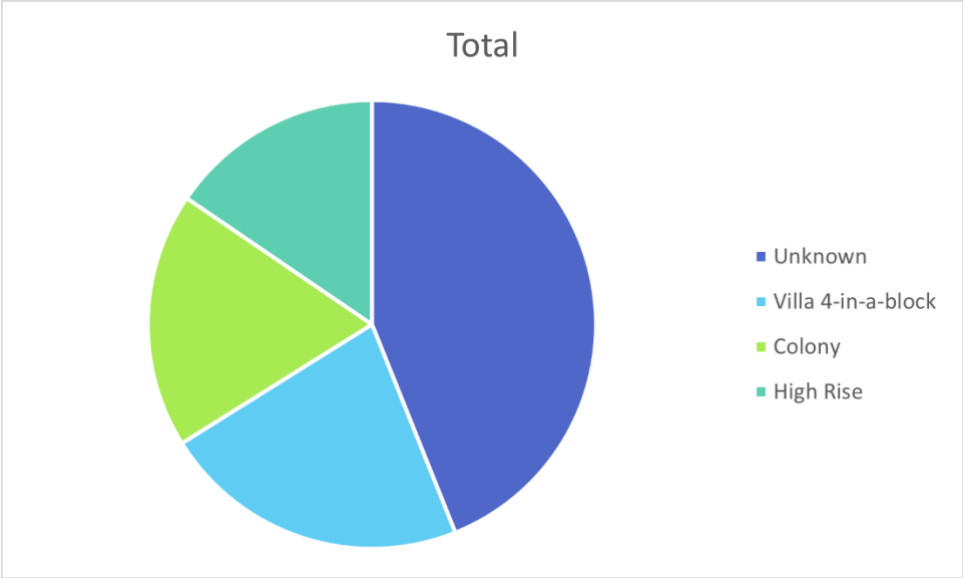
Shetland Islands	-	-
South Ayrshire	2	0.84%
South Lanarkshire	15	6.28%
Stirling	5	2.09%
West Dunbartonshire	3	1.26%
West Lothian	4	1.67%
Grand Total	**239**	**100.00%**

16. The sample included flat titles from most local authority areas. The number of titles from Edinburgh was particularly high due to the inclusion of colonies within the list of tenement types we wished to be represented in the sample. Colonies appear to be unique to Edinburgh.

17. The breakdown of **tenement types** was as follows:

Colony	44
High rise	37
Villa 4-in-a-block	53
Unknown	105
Total	**239**

Represented in a pie chart, these findings appear as follows:



The “unknown” category covers tenements which do not fall within any of the other categories, and will therefore include traditional tenements and conversions, amongst other things. Although the dataset is not intended to be a representative sample, it seems clear that colonies are overrepresented as a result of our sampling parameters.

18. RoS does not hold data on tenement construction dates. However, we recorded an approximate age for each building based on the date of the deed in which tenement-type conditions were first imposed. The breakdown of **construction dates** is as follows:

Date	Number of deeds
1830-1839	1
1860-1869	34
1870-1879	14
1880-1889	6
1890-1899	3
1900-1909	7
1920-1929	2
1930-1939	5
1940-1949	2
1960-1969	6
1970-1979	9
1980-1989	42
1990-1999	23
2000-2009	67
2010-2019	17
2020-2030	1
Grand Total	239

The inclusion of villa 4-in-a-block properties (as noted earlier, amounting to 53 titles) and high-rises (37 titles) within our sampling parameters offers a partial explanation for the tendency towards more recently constructed buildings within the sample. It is not clear to what extent our sample diverges from the age profile of the tenement stock as a whole.

Development Management Scheme

19. From our sample of 239 titles, flats were subject to a DMS in only four titles. In each case, it appeared that the DMS was applicable to a wider development involving multiple properties. We did not encounter a title in which a DMS was used solely for one tenement.

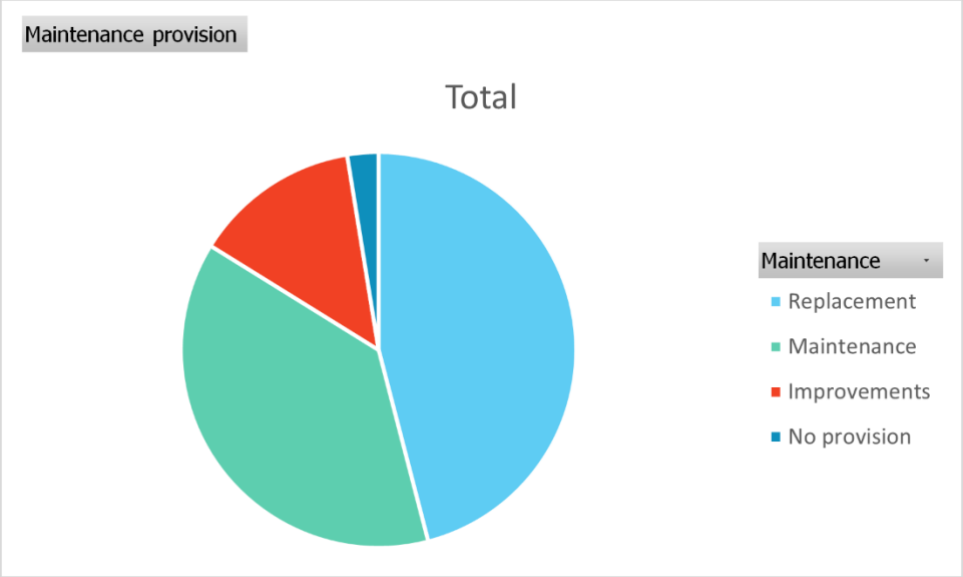
20. We have excluded the four titles in which a DMS applied from the remaining findings of the survey, since the OA regime will not apply in such cases.

21. We also recorded a separate category of properties in which the title conditions revealed the tenement was being managed as part of a wider development, but without a DMS. Such cases invariably involved a manager appointed for the development as a whole, and certain facilities (at a minimum, landscaped areas or garden ground) in respect of which maintenance costs were shared by all units in the development, although maintenance costs for the common parts of the tenement were shared only amongst the tenement flats. We labelled these cases DMSX, and found 38 examples in the titles.

Maintenance

22. The survey supports our anecdotal understanding that tenement title conditions will almost invariably make provision of some kind for maintenance.

23. We identified conditions setting out responsibility for maintenance of common parts of the building in almost all the titles in the dataset. 89 titles included conditions imposing a maintenance obligation, with the obligation explicitly extending to both maintenance and repair of common parts of the tenement in a further 108 titles. 32 titles included conditions concerning improvements to parts of the tenement, with all but four of these titles dating from 1980 onwards. Only 6 titles in the sample were silent on the question of maintenance, with four of these titles dating from 1895 or earlier.



Meeting

24. Provision as to how a meeting of owners to discuss maintenance should be arranged was identified in 87 of the 235 deeds in the sample. Of these 87, all but ten dated from 1980 onwards, suggesting a trend towards more detailed maintenance provisions in more recent deeds.

Voting

25. Of the 114 deeds in which provision was made in the title conditions as to how votes in relation to maintenance decisions were allocated, 104 provided for one vote per flat. In the 121 deeds in which no provision was made for votes, the default TMS rule of one vote per flat will apply, meaning that the position is the same across 225 of our 235 deeds.

26. In the remaining 10 deeds, voting power was linked explicitly to responsibility for costs, so that a flat responsible for 25% of a particular cost would have 25% of the voting allocation

in relation to a decision to incur that cost. This is a version of the "participation quota" or "unit allocation" model for decision making found in the apartment law of some other jurisdictions.[9]

Majority

27. 121 of the 235 titles surveyed made no provision for the majority required to carry out particular acts of maintenance. Of the 114 titles in which provision was made, a split emerged based on the date of the provisions. The majority of deeds in which provision was made (83) dated from 1980 onwards, and 88% of those set a voting threshold based on votes *cast* by owners during a meeting. Each of those deeds also made provision for how a meeting should be called, again suggesting the trend mentioned above towards more detailed provision in more recent deeds. In the 43 pre-1980 deeds in which provision was made, the voting threshold was based in 77% of cases on the votes *allocated* within the tenement.

Notification

28. 45 of the 235 titles survey included provision on how owners should be notified of a decision to carry out maintenance works or the costs involved. All but three of these deeds dated from 1980 onwards.

Costs

29. Almost all the titles surveyed made provision to allocate the costs of maintenance amongst the flats. Most commonly, costs were equally divided amongst the flats in the building, although a substantial minority allocated costs by reference to the feuduty or rateable value of the flat. In the "other" category, more complex provisions were usually found, whereby different shares of costs were allocated for maintenance to different parts of the tenement taking into account, for example, which flats made use of the part in question.

Allocation of costs	**Number of titles**
Equal division by flat	126
Based on feuduty/rateable value	59
Based on size of flat	5
Other	38
No provision	7
Total	**235**

Enforcement

30. Specific provision was made in around half of the titles surveyed as to enforcement of obligations set out in the conditions. The usual provision made was that: (i) the factor or manager had title to enforce obligations against owners in the factor's own name; (ii) arbitration was required before parties could proceed to court action in respect of a dispute; (iii) a combination of (i) and (ii) was provided for. The breakdown is as follows:

[9] See the discussion at 8.6-8.15.

Provision for enforcement	Number of titles
No provision	118
Factor has title to enforce	30
Arbitration required	38
Factor has title to enforce AND arbitration required	47
Other	2
Total	**235**

Owners' Association

31. Provision was made for the establishment of some form of owners' association in only 16 of the 235 deeds reviewed. This suggests the relative novelty of this approach to managing tenement maintenance.

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