KEEPING SCOTLAND SAFE

The Building Repairs (Scotland) Bill Consultation

David Stewart MSP
Summary of Bill Proposals

- Extend the circumstances in which an authority can use charging orders to recover costs where it has carried out repair work to dangerous and defective buildings owned by others.

- Increase the period available to homeowners to undertake repairs in relation to defective buildings from 28 days to 12 weeks to enable adequate time for owners to carry out repairs.

Summary of additional related issues considered in the consultation

- In the case of shared buildings, automatically apportion responsibility among owners for repairs in equal shares.

- A certification and regular inspection requirement for properties.
Introduction

Scotland contains some of the finest and oldest buildings anywhere in the world. From the great cities of Edinburgh, Aberdeen, Dundee and Glasgow to the villages of the Highlands, Scotland is fortunate to have such a variety in its built environment.

However this variety and age of our buildings brings its own unique challenges. As the sad case of Christine Foster in 2000\(^1\) made clear there must be vigilance to detect any sign of defective and dangerous buildings ensuring remedial work is undertaken before public safety is compromised.

The Buildings (Scotland) Act 2003 grants substantial powers to Local Authorities, particularly if a building is considered to be dangerous. However in practice it is clear that the enforcement regime does not work well, with a lack of proactive action taken on defective buildings, a substantial backlog of repairs needing completion and substantial losses for Local Authorities in unrecovered debts.

There are a number of barriers to Local Authorities ensuring that remedial work is carried out on defective buildings to prevent them reaching the stage where they would be considered dangerous to the public. These barriers are primarily due to the legal and financial processes involved in recovery of costs\(^2\) and it is these barriers that this Bill would seek to address. It is clear from the examples that follow in this document, from across Scotland, that the current system is not effective and that there is a clear need for change.

The consultation document proposes one primary change to cost recovery legislation whilst consulting more widely on other possibilities to address related areas. The change proposed would be the reintroduction of charging orders as a means of cost recovery for both dangerous and defective building notices. Additionally there would be a change in the timescale requirement for owners to carry out repairs upon defective buildings to ensure that there is adequate time for owners to make arrangements prior to the authority carrying out such work.

The aim of the changes proposed is to ensure that there will be an effective enforcement regime in place to allow local authorities to carry out their duties in a simplified and more cost effective way. This would enable local authorities ultimately to promote public safety whilst at the same time protecting Scotland’s buildings for future generations.

\(^1\) Christine Foster was an Australian student who was fatally injured by falling masonry whilst working as a waitress at a bar in the West End of Edinburgh. The case was subject to a Fatal Accident Inquiry in 2002. (http://www.scotcourts.gov.uk/opinions/FAI%20Foster.html).

\(^2\) In Scotland only 6 out of 32 Local Authorities have served formal Defective Building Notices. In cases where notices have been served there has only been a 48% success rate of cost recovery.
I hope you will be able to respond to this consultation (details can be found on Pg. 20) and that you will be able to pass on this document to any person or organisations who may be interested in this subject.

David Stewart MSP, Highlands & Islands
The Current Situation

The enforcement regime dealing with dangerous and defective buildings does not work well. This can be seen by the substantial backlog of repairs needing to be completed for defective buildings and the considerable outstanding costs to local authorities in unrecovered debts for repairs they have carried out to both dangerous and defective buildings. It is also clear that across Scotland there is a lack of proactive work being undertaken by local authorities in dealing with defective buildings prior to them reaching the stage where they would be considered dangerous. This lack of action in turn leads to the current situation where there are many unsightly and defective buildings that are left in states of disrepair and ultimately could become dangerous unless action is taken.

Backlog of work

- **In Edinburgh alone there is an estimated £1.2 billion backlog of repairs that are needed to address defective buildings.**

Across Scotland there is a considerable backlog of repair work needing to be undertaken on defective buildings. In Edinburgh, where a more proactive building regime exists (due to unique legislation), this backlog is estimated to be around £1.2 billion. In other local authorities accurate estimates are difficult to obtain as there is not a regular or proactive approach to assessment of defective buildings. However across Scotland this backlog could be expected to be worth considerably more.

Cost to Local Authorities (Outstanding Debts)

- **There has only been a 48% success rate on cost recovery of Section 28 defective building notices.**

There is a substantial cost to local authorities in the current system in unrecovered debts for work carried out for both dangerous and defective buildings. In the case of defective buildings, there has only been a 48% success rate in recovering costs from work carried out related to defective building notices. In the case of dangerous buildings, local authorities are under a statutory obligation to make safe a building; however, this does not guarantee that costs will be recovered. In Scotland there are estimated to be £1.3 million in unrecovered debts from owners of dangerous and defective buildings. In practice this means that public money is often used to the benefit of private owners when the obligation is on the owners to ensure their

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3 Scottish Association of Building Standards Managers (SABSM) Presentation to Scottish Parliament Cross Party Group for Town and City Centre Development. Pg.20 (www.scotborders.gov.uk/pdf/31950.pdf)

4 SABSM Presentation Pg. 15 (www.scotborders.gov.uk/pdf/31950.pdf)
property remains in a reasonable state of repair. This arises due to the difficulties in recovering the costs that have been incurred by local authorities from the owners of the properties concerned.

Lack of Proactive Action to deal with defective buildings

- Since the Building (Scotland) Act 2003\(^5\) came into force only 6 out of 32 Local Authorities have served a Section 28 Defective Building notice.

As there is no legal obligation on local authorities to make good defective buildings, the poor success rate in cost recovery means that there is a disincentive for local authorities to issue defective building notices; since the Building (Scotland) Act 2003 came into force only six out of thirty-two local authorities have issued a defective building notice.\(^6\)

Unsightly buildings that have the potential to become dangerous

Taken together – the large backlog of repairs, the difficulties for local authorities in effectively ensuring that work is carried out and costs are recovered for dangerous and defective buildings, and the resulting lack of a proactive approach from local authorities – the accumulation leads to the current situation continuing. Unless action is taken, numbers of dangerous building incidents and costs to local authorities (and ultimately the taxpayer) are likely to increase. What I would like to propose is a system that enables local authorities to proactively protect the built environment whilst respecting the rights and obligations of owners in carrying out repairs to their property.

Consultation Question

1. What do you believe are the current problems with the enforcement of dangerous and defective buildings legislation?

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\(^6\) SABSM Presentation Pg. 15 ([www.scotborders.gov.uk/pdf/31950.pdf](http://www.scotborders.gov.uk/pdf/31950.pdf))
Current Legislation

Buildings (Scotland) Act 2003

Local authority powers and responsibilities in relation to dangerous buildings and defective buildings are primarily covered in the **Buildings (Scotland) Act 2003**. There are three other pieces of legislation relevant to the issue of dangerous and defective buildings and considered in this consultation; these are the Civic Government (Scotland) Act 1982, the Housing (Scotland) Act 1987 and the City of Edinburgh District Council Order Confirmation Act 1991.

Buildings (Scotland) Act 2003 (BSA)

In relation to dangerous and defective buildings, the key provisions of the BSA are:

- **Dangerous buildings (Part 4, Sections 29 and 30)**
  - Councils can serve dangerous building notices requiring owners to make repairs.
  - Where necessary councils can carry out these repairs themselves and recover costs (sub-section 3) through procedures for pursuing civil debt.
  - The Sheriff makes the final decision on aspects of liability and recovery in the event of disputes over apportionment between owners.

- **Defective buildings (Part 4, Section 28)**
  - Councils can serve defective building notices requiring owners to commence repairs within 7 days and complete the repairs within a further 21 days.
  - Councils can carry out these repairs themselves and recover costs (sub-section 10) through procedures for pursuing civil debt.
  - The Sheriff makes the final decision on aspects of liability and recovery in the event of disputes over apportionment between owners.

This legislation offers powers to local authorities in dealing with dangerous and defective buildings. This is the case particularly with the emergency provisions in place when a building is

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acknowledged as being at risk of causing imminent danger. In such a case a local authority has a legal obligation to make the building safe.

Civic Government (Scotland) Act 1982 (CGA)\(^8\)

Section 87 of the Civic Government (Scotland) Act 1982 (CGA) includes local authority powers in relation to buildings in need of repair. Where the CGA differs from the BSA is in the cost recovery mechanism and the ability of local authorities to place a ‘charging order’ upon the property as the means of cost recovery. A charging order is placed on property rather than an individual ensuring cost recovery at a future sale of property if not before. Section 108 entitles a local authority to recover any expenses incurred by it under section 87(3) by way of a charging order. Section 87(3) provides that a local authority may repair a building without notice where it appears to be necessary in the interests of health or safety or to prevent damage to any property.

- Section 108 – recovery of expenses incurred under section 87 by charging order

  (1)Where, under—
  (a) section 87(3) of this Act; or
  (b) section 99(4) thereof (to the extent that it relates to failure to rectify a defect specified in a notice served under section 87(1) thereof)

a local authority are entitled to recover any expenses, they may make in favour of themselves an order providing and declaring that the land, building or premises is thereby charged and burdened with an annuity to pay the amount of the expenses.

Housing (Scotland) Act 1987

Although the Housing (Scotland) Act 2006 introduced ‘repayment charges’, the guidance produced by the Scottish Government states “Local authorities should continue to issue charging orders under Schedule 9 of the Housing (Scotland) Act 1987 to recover costs where it has enforced demolition or closing orders under the Act.”\(^9\)

\(^8\) http://www.legislation.gov.uk/ukpga/1982/45
\(^9\) Housing (Scotland) Act 2006, Scottish Government Advisory Guidance, Annex G
City of Edinburgh District Council Order Confirmation Act 1991

The City of Edinburgh has its own unique legislation in relation to dangerous and defective buildings. The main difference from the BSA is that where there is shared ownership of a property (that is, in a tenement building), the terms of the City of Edinburgh District Council Order Confirmation Act (the Edinburgh Act) requires the authority to recover costs on an ‘equal share basis’ regardless of any conditions to the contrary that might be contained in Deeds of Title or private contracts.

Under the powers of the Edinburgh Act the City of Edinburgh Council currently issues more building notices than all of the other Scottish local authorities combined amounting to an annual output of some 2800 statutory notices in response to 36,000 queries from owners. Whilst there is still a substantial backlog of work in each year there are also £32 million of repairs carried out to buildings in Edinburgh annually.

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10 http://www.ozps.gov.uk/legislation/uk/acts/localact91/ukla_19910019_en_1
11 SABSM Presentation Pg. 20 (www.scotborders.gov.uk/pdf/31950.pdf)
Problems with Enforcement and Cost Recovery

It appears that, whilst the Buildings (Scotland) Act 2003 gives local authorities significant powers in theory to deal with dangerous and defective buildings, there is a problem with the enforcement of the legislation in practice.

**Dangerous Buildings**

In the case of dangerous buildings there is a legal obligation on local authorities to act upon buildings that pose a danger to public safety. The primary problem in relation to dangerous buildings is therefore not one of lack of action but of cost recovery for the action that local authorities are legally bound to take. The case of a recent fire damaged nightclub in South Ayrshire is an example of this:

“South Ayrshire had a night club fire which extensively damaged the Club and some street level commercial premises. The Council had to step in and do some works to make the building safe. Four owners, four insurance companies, four loss adjusters, and little chance of agreement on anything. The owner responsible for the largest share of the costs, the night club owner, did not pay, and simply let his company go bust (he has subsequently restarted again under another name), leaving Building Standards over £10,000 out of pocket. Legal advice is that there is no point in taking the bankrupt company to court as we would not recover our costs.”

Similarly in Fife there is another example of the difficulties in local authorities recovering costs:

“An example we have is under dangerous buildings (because we had to step in), £300K costs to demolish (tight town centre site, precarious building heavily shored – risk of collapse into street), 3 owners, 4 shares, one owner sequestrated, one insured, another businessman with 2 shares, no buildings insurance and with absolutely no intention to pay. All owners identified so we can only use normal debt recovery.

An example like that makes it almost certain we will never use defective building legislation at present to incur optional debts...”

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12 SABSM Charging Order Paper 2010 (available from SABSM).
13 SABSM Charging Order Paper 2010 (available from SABSM).
Defective Buildings

In the case of defective buildings there is the added problem of a lack of action in repairing defects on buildings, prior to them becoming dangerous. There is no legal obligation for local authorities to act upon defective buildings and so the problems with cost recovery act as a deterrent to local authorities using powers in relation to defective buildings under the Buildings (Scotland) 2003 Act. This can be seen by the lack of defective building notices issued since the introduction of the Act\textsuperscript{14} and by the Fife example shown above.

Cost Recovery

In both cases the common problem is cost recovery for local authorities and therefore there is a need for a change in the legislation to ensure that there are clear and effective cost recovery mechanisms in place. The following pages outline some of the legislation covering cost recovery. There is confusion about what powers local authorities have at their disposal – this should be clear and unambiguous.

This consultation document proposes a system to enable charging orders to be used efficiently on both dangerous and defective buildings to enable local authorities to recover costs effectively.

\textsuperscript{14} SABSM Presentation Pg. 15 (www.scotborders.gov.uk/pdf/31950.pdf)
Charging Orders

Charging orders are a cost recovery mechanism that place a ‘charge’ on a property. Local authorities have powers to use charging orders in certain circumstances under the Civic Government (Scotland) Act 1982 and the Housing (Scotland) Act 1987.

Charging Orders have a number of distinct advantages as a means of cost recovery when compared with the current arrangements of recovering costs as a civil debt. These are as follows:

Charging Order

- Charging order is placed upon property rather than individual ensuring cost recovery at a future sale of property if not before.
- In most cases a charging order has priority over other debts.
- Cost is significantly cheaper as local authorities can record the charge themselves at the Land Register. This typically costs less than £100.

Civil Debt

- Cost of tracing and pursuing individual.
- Joins the queue of all other creditors.
- Requires a court judgment so leads to significant extra cost – typically up to £5000 in legal expenses.\(^\text{15}\)

Advantages of charging orders for dangerous and defective buildings:

Specifically with the problems identified with dangerous and defective buildings legislation there are a number of advantages to charging orders. My proposal is to extend the circumstances in which an authority can use charging orders to recover costs where it has carried out repair work to dangerous and defective buildings owned by others.

\(^\text{15}\) SABSM Presentation Pg. 8 (www.scotborders.gov.uk/pdf/31950.pdf)
The use of charging orders would:

- Enable effective cost recovery for repairs to dangerous and defective buildings.
- Lead to local authorities having deterrent effect by being able to issue defective building notices.
- Enable local authorities to effectively issue defective notices as a last resort.
- Lead to backlog of repairs diminishing.
- Lead to a proactive system of dangerous and defective building enforcement.

This would ultimately lead to:

- Increased public safety
- A better protected built environment.

Consultation Questions

2. In your opinion, what changes should be made to current legislation to allow for a more effective system of identification and enforcement?

3. What do you see as the benefits of charging orders in enabling local authorities to recover costs from owners of dangerous and defective buildings?

4. What do you see as the disadvantages of charging orders?

5. What do you see as the benefits of charging orders to owners of dangerous and defective buildings?

6. What do you see as the disadvantages of charging orders to owners of dangerous and defective buildings?
Protection for owners

It is important that owners of properties are not unfairly affected by any revised charging order proposals and that the rights of owners are properly protected. This would be done in three ways:

- The Defective Building Notice ‘notice period’ would be increased to 12 weeks to ensure that owners would have adequate time to carry out repairs themselves before a charging order could be placed on the property.

- There would be a requirement upon local authorities to show that ‘all reasonable steps’ were taken to work with the owner prior to a charging order being issued. This would include local authorities keeping a written record of dealings with owners.

- In all cases owners may appeal. This may be to a review panel, to an Ombudsman or to a sheriff.

Increasing the minimum Defective Building Notice ‘notice period’

At present a Defective Building Notice must specify (a) a date not less than 7 days after the date of service of the notice by which the owner must have begun the work required by the notice, and (b) a date not less than 21 days after the date specified under paragraph (a) by which the owner must have completed that work. Whilst there is provision for extending these dates it is clear that this is a very short space of time for an owner to make provision for repairs to their building.

In introducing charging orders (with the likelihood of cost recovery in almost all circumstances) it would be paramount to ensure that owners were able to have sufficient time to attempt repairs themselves and it is important that there could be no impression of over-zealous local authorities taking unfair action upon owners. By increasing the notice period for owners to commence work to 12 weeks this would provide adequate protection and increased time for owners in dealing with the defects to their building.

16 BSA Section 28 http://www.opsi.gov.uk/legislation/scotland/acts2003/asp_20030008_en_1
Consultation Questions

7. What would be the benefits or disadvantages of changing the notice period in relation to defective building notices?

8. Do you think this would allow adequate time for owners to carry out repairs to their properties and please give a reason for your response?
My Proposal

If these two changes were made I envisage that my proposal would be for an enforcement regime that would operate in the following way:

**Dangerous Buildings**

- A notice to be served on owners of dangerous buildings.
- The notice to specify the date by which work must be carried out.
- Action by the local authority if not taken by owners: repairs and notification of costs to owners.
- Charging order to be issued to recover costs and expenses incurred by the Local Authority.
- Appeal to an Ombudsman or Sheriff if owner not satisfied at an appropriate point.

**Defective Buildings**

- A notice to be served on owners of defective buildings.
- The notice to specify the date by which work must be carried out.
- The date specified would be no less than 12 weeks from the notice being issued.
- Action by the local authority if not taken by owners: repairs and notification of costs to owners.
- Charging order to be issued to recover costs and expenses incurred by the Local Authority.
- Appeal to an internal panel and Ombudsman or Sheriff at an appropriate point.

**Consultation Question**

9. What do you see as the advantages or disadvantages of the proposal?
Other considerations for consultation

The other issues that I am consulting on are the apportionment of shared costs on an ‘equal shares basis’ and the possible introduction of a requirement for owners to submit to a regular certification and inspection regime of buildings. I am keen to hear views on these issues.

In addition to charging orders, two other measures may also be considered to help provide a more effective and robust regime in cost recovery and helping local authorities.

- Automatic apportionment of costs of repairs on an equal shares basis in the case of shared ownership;
- Introducing a requirement for building owners to submit to a regular certification and regular inspection regime of their property.

Division of cost of repairs to common property by equal shares

As outlined earlier, at present, in the case of shared ownership of tenement buildings, the provisions of the Edinburgh Act currently automatically apportion costs for repairs undertaken by the Council on an equal shares basis amongst the owners who are then liable to pay to the City Of Edinburgh Council. This power saves time and cost where complicated shared ownership exists. This specific apportionment can be challenged by owners who may take action against other owners to recover sums paid, or recovered from them (although this would not then involve the local authority).

This may be a provision that would be useful to other local authorities in the case of shared ownership.

Consultation Question

10. What do you see as the advantages and disadvantages of an automatic equal shares provision for local authorities in cost recovery for work carried out by them on dangerous and defective buildings?

Certification and inspection requirement for properties

It could be inferred that there is a lack of proactive action taken by local authorities in relation to defective buildings (see earlier section entitled “The current situation”).
One option to rectify this may be to require owners to hold a ‘certificate of building repair’ stating that the property was not defective and in a good state of repair. This would need to be granted on a regular basis (perhaps every five or ten years) and would work as a form of ‘property MOT’. The scheme would need to be administered by a local authority but checks not necessarily carried out by it.

**Inspection Requirement**

In addition to a certification scheme, Local Authorities could be granted the power to inspect properties on either a regular basis or to carry out spot checks to ensure that the certification scheme was robust.

**Consultation Question**

11. What do you see as the advantages and disadvantages of a certification and inspection regime for buildings?
Financial and Enforcement Implications

Financial Implications

A major advantage of these proposals would be that, with an effective cost recovery regime, Local Authorities could save money as they recover costs. The present system means that in the case of dangerous buildings, Local Authorities can fail to recover costs and in the case of defective buildings often do not act at all. 17

Enforcement

Local Authorities would continue to enforce dangerous and defective building legislation. The proposals would allow for a more effective enforcement regime.

Consultation Questions

12. Do you have any comments on the financial implications of the proposals?

13. Do you have any comments on enforcement of the proposals?

14. Are there any equality issues that arise from these proposals?

17 SABSM Presentation Pg. 16-17 (www.scotborders.gov.uk/pdf/31950.pdf)
Conclusion

This consultation document highlights ways in which legislation could be changed to help Local Authorities deal with defective buildings and prevent them from reaching a stage where they would be considered as dangerous to public safety. In so doing there would also be a positive impact to protecting Scotland’s built heritage and in reducing financial burdens on Local Authorities in a time of reduced public expenditure.

There may be provisions and alternatives that we have not yet considered and invite all responses in good faith that we may be able to navigate through the current issues in Dangerous and Defective buildings legislation and its effective enforcement.

Please ensure that responses are received by my office 11th March 2011.

I look forward to hearing your response to the Consultation questions that follow.

David Stewart MSP

Consultations can be directed to the following address:

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To help inform debate on the matters covered by this paper and in the interests of openness it is intended all the responses submitted on this consultation document will be made public. You should therefore be aware that by submitting this response you are indicating consent to the publication of all the material contained in your response. Unless you indicate otherwise this will include your name and address and any other biographical information you have provided about yourself. You should note that personal data referring to third parties included in the
response cannot be accepted without explicit written consent from the third party. This consent should be provided with your response.

I am not entitled to process your personal data by publication without your consent. If therefore you want parts of your response to remain confidential please indicate which parts are not for publication. Similarly, if you wish all of the contents of your response to be treated in confidence and not made public then please indicate so.

All responses will be included in any summary or statistical analysis. However, if you have asked for your response to be treated in confidence, I will not identify you individually in any summary or analysis.

You may also wish to note that your response may be analysed and summarised by the Non-Executive Bills Unit at the Scottish Parliament and therefore the information you have provided may be subject to requests made under the Freedom of Information (Scotland) Act 2002.

Additional copies of the paper or alternative formats can be requested using the contact details above and calls via Typetalk are welcome. An on-line copy is available on the Scottish Parliament website www.scottish.parliament.uk.
Full list of consultation questions

1. What do you believe are the current problems with the enforcement of dangerous and defective buildings legislation?

2. In your opinion, what changes should be made to current legislation to allow for a more effective system of identification and enforcement?

3. What do you see as the benefits of charging orders in enabling local authorities to recover costs from owners of dangerous and defective buildings?

4. What do you see as the disadvantages of charging orders?

5. What do you see as the benefits of charging orders to owners of dangerous and defective buildings?

6. What do you see as the disadvantages of charging orders to owners of dangerous and defective buildings?

7. What would be the benefits or disadvantages of changing the notice period in relation to defective building notices?

8. Do you think this would allow adequate time for owners to carry out repairs to their properties and please give a reason for your response?

9. What do you see as the advantages or disadvantages of the proposal?

10. What do you see as the advantages and disadvantages of an automatic equal shares provision for local authorities in cost recovery for work carried out by them on dangerous and defective buildings?

11. What do you see as the advantages and disadvantages of a certification and inspection regime for buildings?

12. Do you have any comments on the financial implications of the proposals?

13. Do you have any comments on enforcement of the proposals?

14. Are there any equality issues that arise from these proposals?