Passage of the

Buildings (Recovery of Expenses) (Scotland) Bill

2013

SPPB 204
Passage of the

Buildings (Recovery of Expenses) (Scotland) Bill 2013
(formerly the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill)

SP Bill 39 (Session 4), subsequently 2014 asp 13

SPPB 204
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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
• Introduction, followed by publication of the Bill and its accompanying documents;
• Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The Bill was a Member's Bill. The process by which the Bill was developed is fully explained in the Policy Memorandum included in this volume. The Bill was introduced in the Parliament as the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill. After stage 2 consideration of the Bill, the short title of the Bill was changed to the Buildings (Recovery of Expenses) (Scotland) Bill to reflect amendments made to the Bill at Stage 2.

The oral and written evidence received by the Local Government and Regeneration Committee at Stage 1, including the minutes of the meetings during which the oral evidence was received, were originally published on the web only. That material is included in this volume after the Stage 1 Report.
The Local Government and Regeneration Committee’s Stage 1 Report did not include material relating to the Delegated Powers and Law Reform Committee’s consideration of the delegated powers provisions in the Bill or the Finance Committee’s consideration of the Financial Memorandum. The Delegated Powers and Law Reform Committee’s report at Stage 1 is included in this volume. The Committee did not take oral evidence on the Bill and agreed its report without debate. No extracts from the minutes or the Official Report of the relevant meeting of the Committee are, therefore, included in this volume.

The Finance Committee did not produce a report, but forwarded the submissions it had received to the Local Government and Regeneration Committee. The correspondence from the Finance Committee and the written submissions are included in this volume.

The Delegated Powers and Law Reform Committee considered the delegated powers in the Bill after Stage 2, and agreed its report without debate. No extracts from the minutes or the Official Report of the relevant meeting of the Committee are, therefore, included in this volume.
Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill
[AS INTRODUCED]

CONTENTS

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1 Expenses recoverable using charging orders
2 Commencement
3 Short title
Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to amend the Building (Scotland) Act 2003 to provide for expenses incurred by local authorities in the repair, securing or demolition of defective or dangerous buildings to be recovered by way of charging order.

1 Expenses recoverable using charging orders

The Building (Scotland) Act 2003 (asp 8) is amended as follows—

(a) in section 44—

(i) at the end of subsection (1) insert “or makes a charging order under section 46A”,

(ii) at the end of subsection (2)(b) insert “or the whole of the repayable amount due under the charging order”,

(b) after section 46 insert—

“Charging orders

46A Charging orders

1 A local authority entitled to recover any expenses under section 28(10)(b), 29(2) or (3) or 30(4)(b) that are qualifying expenses may make in favour of itself an order (a “charging order’)—

(a) specifying the building concerned and the repayable amount calculated in accordance with section 46C, and

(b) providing that the building concerned is charged with the repayable amount.
(2) Unless otherwise required by an order made under subsection (3), charging orders, and discharges of charging orders, are to be in such form as the local authority may determine to give effect to, and state the information required by, Schedule 5A.

(3) The Scottish Ministers may by order specify the form which charging orders and discharges of charging orders must be in.

46B Qualifying expenses

(1) Qualifying expenses are expenses recoverable by a local authority under section 28(10)(b), 29(2) or (3) or 30(4)(b) and which relate to—

(a) a defective building notice under section 28(1) or, as the case may be, a dangerous building notice under section 29(6), in either case served after the commencement of this section and section 46A(1), or

(b) notice under section 29(3) or, as the case may be, works under that subsection without notice, in either case given or carried out after such commencement.

(2) Where a charging order is made in respect of expenses incurred by a local authority in demolishing a building, references in this section, sections 46A, 46C, 46D and 46E and Schedule 5A to a building are to be read as references to the site of the demolished building.

46C Repayable amount

(1) The repayable amount is the lower of—

(a) the total of the qualifying expenses and any sum recoverable under subsection (2), and

(b) any amount determined by the local authority.

(2) A local authority may, in addition to any qualifying expenses, recover from the owner of the building concerned—

(a) the amount of any fee payable in respect of registering a charging order or the discharge of a charging order,

(b) any administrative or other expenses incurred by it in connection with the charging order or discharge, and

(c) interest, at such reasonable rate as it may from time to time determine, from the date when a demand for payment is served until the whole amount is paid.

46D Core terms of charging orders, repayment and discharge

(1) A charging order must provide—

(a) for the repayable amount to be paid in 30 annual instalments falling due on the same date, to be specified in the charge, in each calendar year,

(b) that in default of such payment each instalment, together with any amount recoverable in respect of that instalment under section 46C(2)(a) or (b), is to be separately recoverable as a debt, and
(c) that if immediately after the thirtieth instalment falls due any balance of
the repayable amount remains unpaid, that balance is immediately due for repayment and is recoverable as a debt.

(2) The owner of any building subject to a charging order may at any time redeem
the repayable amount early by paying to the local authority the repayable
amount in full or such lower sum—

(a) as the owner may agree with the local authority, or

(b) failing such agreement, as the Scottish Ministers may determine either
generally by order made under subsection (4) or specifically in relation
to that charging order.

(3) The local authority must, on receiving—

(a) payment in full of the repayable amount, or

(b) a sum redeeming the repayable amount under subsection (2),

register a discharge of the charging order in accordance with section 46E(5).

(4) The Scottish Ministers may by order make such further provision as they think
fit about the repayment or early redemption of amounts repayable under a
charging order.

46E Registration

(1) The local authority must register a charging order in the appropriate land
register.

(2) A registered charging order is conclusive evidence that the charge specified in
it has been created in respect of the building specified in it.

(3) A registered charging order is enforceable at the instance of the local authority
against any person deriving title to the charged building.

(4) But it is not enforceable against—

(a) a third party who acquires right to the charged building (whether title has
been completed or not) in good faith and for value before the charging
order is registered, or

(b) any person deriving title from such third party.

(5) The local authority must register a discharge of the charging order in the
appropriate land register as soon as reasonably practicable after a charging
order has been discharged.

(6) A registered discharge of a charging order is conclusive evidence that the
charge concerned has been discharged.”;

(c) in section 47—

(i) at the end of subsection (1) insert—

“(h) any charging order made under section 46A.”,

(ii) in subsection (3)—

(A) after “applies” insert “, or a charging order made under section 46A
or any decision in connection with such a charging order,”,
(B) after “the date of the decision or notice” insert “, or the charging order or connected decision,”,

(iii) after subsection (3) insert—

“(3A) On any appeal made by virtue of subsection (1)(h) no question may be raised which might have been raised on an appeal against the original notice or decision requiring the execution of the works to which the charging order relates.”,

(iv) in subsection (4), after “applies” insert “, or a charging order made under section 46A or any decision in connection with such a charging order.”,

(d) in section 54—

(i) in subsection (5), after “except” insert “section 46D(4),”,

(ii) in subsection (6), after “Act” insert “, or under section 46D(4),”,

(e) after Schedule 5 insert—

“SCHEDULE 5A
(introduced by section 46A)

CONTENTS OF CHARGING ORDERS AND DISCHARGES

Charging orders

1 A charging order must be evidenced by deed.

2 A charging order must contain the following information—

(a) the postal address of the building to be charged and a full description to enable registration in the appropriate land register,

(b) the name and address of the local authority making the charging order,

(c) the repayable amount as at the date of the charging order,

(d) the amount of the annual instalment as at the date of the charging order,

(e) the date (after the date of the charging order) by which the first instalment is to be paid,

(f) a statement that the number of annual instalments is 30,

(g) the rate of interest as at the date of the charging order,

(h) the formula by which the rate of interest is calculated,

(i) any applicable provision for varying the rate of interest, and

(j) any applicable provision for varying the repayable amount to reflect changes in the rate of interest or other alterations in the interest payable.

3 A charging order must state—

(a) that the building is charged with the repayable amount payable in instalments as specified in the information referred to in paragraph 2, and

(b) the action that the local authority may take if any instalment, or any outstanding balance after the thirtieth instalment has been paid, is not paid by the due date.

4 A charging order may include such other minor or incidental provisions as the local authority thinks fit.
Discharges

5 A discharge must be evidenced by deed.

6 A discharge must contain the following information—

(a) the postal address of the building,

(b) the name and address of the local authority,

(c) the date of the charging order, and

(d) the title number and the date of registration in the appropriate land register and the date on which the charging order was registered in that register.”.

2 Commencement

10 (1) Section 1(b), to the extent that it inserts sections 46A(2) and (3) and 46D(4), this section and section 3 come into force on the day after Royal Assent.

(2) The remaining provisions of this Act come into force at the end of the period of 6 months beginning with the day of Royal Assent.

3 Short title

15 The short title of this Act is the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Act 2014.
Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to amend the Building (Scotland) Act 2003 to provide for expenses incurred by local authorities in the repair, securing or demolition of defective or dangerous buildings to be recovered by way of charging order.

Introduced by: David Stewart
On: 30 October 2013
Bill type: Member's Bill
DEFECTIVE AND DANGEROUS BUILDINGS
(RECOVERY OF EXPENSES) (SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill introduced in the Scottish Parliament on 30 October 2013:

- Explanatory Notes;
- a Financial Memorandum;
- David Stewart’s Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 39–PM.
EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Non-Government Bills Unit in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

3. The Bill amends the Building (Scotland) Act 2003 (“the 2003 Act”) to provide the framework for local authorities to make charging orders for recovery of expenses incurred where local authorities have carried out work to defective or dangerous buildings under the 2003 Act.

4. The principal reference points for the amendments to the 2003 Act are sections 28, 29 and 30 of that Act, which deal with matters concerning defective and dangerous buildings. It may therefore be useful, by way of context, to provide some detail on those sections.

5. The term “building” has the meaning given in section 55 of the 2003 Act. Essentially, it comprises any structure or erection, whether temporary or permanent. Further, where reference is made to a building, this includes reference to a part of the building. Section 28 of the 2003 Act enables a local authority to serve on the owner of a building a notice (a “defective building notice”) requiring the owner to rectify such defects in the building as the notice may specify. Where the owner has not carried out the work, then under section 28(10)(b) of the 2003 Act the local authority can do so, and can recover from the owner any expenses reasonably incurred by it in doing so.

6. Where it appears to a local authority under section 29(1) of the 2003 Act that a building (a “dangerous building”) constitutes a danger to persons in or about it or to the public generally or to adjacent buildings or places then the local authority must carry out such work (including, if necessary, demolition) as it considers necessary to prevent access to it and to protect the public (section 29(2)). It can also recover expenses incurred in that regard. Subsection (3) recognises that it may not be possible to give prior notice to the owner, and that the local authority may require to take urgent action. It may also, in that situation, recover expenses incurred from the owner.

7. Section 30 of the 2003 Act sets out what is to be contained within a dangerous building notice. Where an owner has not carried out work by the dates specified for compliance under the notice, subsection (4) enables the local authority to carry out the required work and to recover expenses incurred by it from the owner.
COMMENTARY ON SECTIONS

The structure of the Bill

8. The Bill has three sections. Section 1, which represents the main part, comprises insertions to the 2003 Act, to make provision for charging orders under that Act. Section 2 deals with commencement and section 3 sets out the Bill’s short title.

THE BILL – SECTION BY SECTION

Section 1(a) – limitation on recoverable expenses

9. Section 1(a) amends section 44 of the 2003 Act. While, generally, the 2003 Act provides for a local authority to recover expenses for work carried out to defective or dangerous buildings, section 44(2) restricts liability for expenses in certain circumstances. For example, where the person is not the owner but simply a trustee and where the funds held by the trustee are insufficient to meet the whole demand. Where this twofold test set out in section 44(2) is met, liability is limited to the total amount held by the person concerned.

10. Section 1(a) extends this restriction on the general entitlement to recover expenses to charging orders where the interest of the person involved is limited to that of trustee, or someone acting in any of the other capacities set out at section 44(2)(a). These matters are dealt with at section 1(a)(i) and (ii) of the Bill, by means of adjustments to section 44(1) and 44(2)(b) of the 2003 Act, respectively.

Section 1(b) - charging orders

11. Section 1(b) contains the main provisions of the Bill dealing with charging orders. It takes the form of insertion of several sections at Part 5 (General) of the 2003 Act, immediately after section 46. These sections cover the following matters: 46A (Charging Orders); 46B (Qualifying expenses); 46C (Repayable amount); 46D (Core terms of charging orders, repayment and discharge); and 46E (Registration).

46A – Charging Orders

12. Under section 46A(1), a local authority entitled to recover any expenses under the relevant provisions contained within sections 28, 29 and 30 which represent “qualifying expenses” (as detailed in section 46B) can make a charging order. Section 46A(1) then sets out some of the basic elements of a charging order, namely that it is to specify the building concerned, the repayable amount (as detailed in section 46C), and is to provide that the building is charged with the repayable amount.

13. Section 46A(2) introduces Schedule 5A to the 2003 Act. That deals with the contents of charging orders and discharges of charging orders, which are to be in such form as the local authority determines so as to give effect to Schedule 5A. That requirement is subject however to section 46A(3), which is an order-making power under which the Scottish Ministers can set out the form which charging orders and discharges must take.
46B – Qualifying expenses

14. Section 46B(1) provides that “qualifying expenses” represent the expenses which are recoverable by local authorities for works carried out under sections 28, 29 and 30 of the 2003 Act, and relating to notices or works without notice detailed in the specific subsections concerned. Section 46B(1) further provides that it applies only to notices served or works carried out following commencement of the relevant sections of the Bill, which are brought into force six months after Royal Assent.

15. Section 46B(2) provides that where the Bill refers to a building, then in the event of a charging order being made for expenses incurred in demolishing a building, references in section 46A to 46E, and in Schedule 5A, are to be read as references to the site of the demolished building.

46C – Repayable amount

16. Section 46C(1) provides that the repayable amount under a charging order is the lower of the two amounts set out at paragraphs (a) and (b) of section 46C(1). That is, (a), the total of the qualifying expenses (as provided for at section 46B(1), and relating to the expenses incurred by the local authority in carrying out repairs or demolition work), together with any additional amounts recoverable under section 46C(2), and (b), such amount as the local authority determines.

17. In addition to the qualifying expenses, local authorities may also recover other costs from the owner, as set out at section 46C(2). These cover registration fees on charges and discharges, administration or other expenses incurred in that connection, and interest. The rate of interest can be varied, but must be reasonable.

46D – Core terms of charging orders, repayment and discharge

18. Section 46D(1) sets out certain matters that a charging order must provide for. It contains details of how the repayable amount under a charging order is to be paid, what happens where an instalment payment is missed, and makes provision for dealing with any outstanding balance due at the end of the 30 year instalment period.

19. Section 46D(1)(a) provides for the repayable amount under a charging order to be paid by means of 30 annual instalments, these being due on the same date each year. Section 46D(1)(b) confirms that where an annual instalment is not paid, then normal civil debt recovery procedures can be taken by local authorities to pursue recovery of that instalment, together with charging order fees and connected administrative or other expenses. Any additional interest that arises as a result of non-payment is recoverable by being added to the balance of the repayable amount, provision being made in that regard at paragraph 2(j) of Schedule 5A. Inserted section 46D(1)(c) confirms that any outstanding balance remaining after the final payment falls due is similarly recoverable by means of civil debt recovery procedures.

20. A mechanism for early repayment of the repayable amount is provided for at section 46D(2). Firstly, section 46D(2) confirms that an owner can at any time redeem the repayable amount early by paying to the local authority the repayable amount in full. Further, an owner can redeem the repayable amount early if they are able to reach agreement with the local authority on
an acceptable sum. Where it is not possible to do so, the Scottish Ministers can be asked to
determine a sum. This can be done either generally by means of the order making power set out
at section 46D(4), or specifically in relation to that charging order. Section 46D(3) obliges the
local authority to discharge the charging order where payment in full of the repayable amount is
made, or where payment of some other amount is made following agreement with the local
authority, or after determination by the Scottish Ministers.

21. An order-making power is provided at inserted section 46D(4). This enables the Scottish
Ministers to make further provision about repayment or early redemption of amounts repayable.

46E – Registration

22. Section 46E details the registration process for charging orders and discharges, in
particular the local authority’s obligations in that regard (46E(1) and (5)), the effect of
registration (46E(2),(3) and (6)), and enforceability of charging orders (46E(4)). A charging
order (and discharge of such an order) requires to be registered by the local authority in the
appropriate land register.

23. In regard to enforceability the general position is that a charging order which has been
registered can be enforced by the local authority against anyone who obtains title to the charged
building. An exception is provided in the circumstances described in section 46E((4). That is,
where a third party (or a person deriving title from that third party) has acquired right to the
charged property, whether or not title has been completed, and has done so in good faith and for
market value, before the charging order is registered. In those particular circumstances, a
charging order would not be enforceable against the third party concerned, or anyone whose title
to the charged building derives from that third party.

Section 1(c) – Appeals

24. Section 1(c) of the Bill provides that charging orders can be appealed in certain
circumstances. It does so by way of insertions to the existing appeal provisions in the 2003 Act,
which are set out at section 47. Section 47(1) lists various actions under the 2003 Act (relating to
specified decisions or notices) which under section 47(3) an aggrieved person can appeal. Such
appeals are made to the sheriff, by way of summary application made within 21 days of the
relevant decision or notice. Section 1(c)(i) and (ii) extend this appeal right to charging orders
made under section 46A or any decision in connection with such a charging order. By way of
example, an appeal might arise in circumstances where there has been a recent change of owner,
in the period following repair works being carried out and a charging order being sought. If that
change is not acknowledged by the local authority then an owner may decide to appeal, under
reference to section 46E(4).

25. Section 1(c)(iii) places certain restrictions on the right of appeal against a charging order.
Inserted subsection (3A) provides that questions cannot be raised about matters which might
have been raised earlier, on an appeal against the original notice or the decision requiring the
works to be carried out.
26. Section 1(c)(iv) provides that a charging order or a decision in connection with a charging order does not take effect until the appeal period has elapsed or an appeal which is brought has been concluded.

Section 1(d) – Orders and regulations

27. Section 54 of the 2003 Act provides that any power of the Scottish Ministers to make orders or regulations under that Act is to be exercisable by statutory instrument. Certain specified orders are subject to the affirmative procedure. Otherwise, the negative procedure is to apply to orders or regulations made under the 2003 Act. Section 1(d) amends section 54 so as to provide that an order made under section 46D(4) of the Bill (which makes further provision about the repayment of amounts payable under a charging order), is to be subject to the affirmative procedure.

Section 1(e) – Schedule 5A

28. Schedule 5A, introduced by section 46A, sets out what is to be contained within a charging order and discharge. The essential information to be contained in a charging order is listed at paragraph 2 and, for a discharge, at paragraph 6. A charging order must also state the details set out at paragraph 3. Under paragraph 4 the local authority has some limited discretion to include other provisions within a charging order. These must however be of a minor or incidental nature only.

Section 2 – Commencement

29. This section provides for commencement of the Bill. Section 2 and 3, and section 1(b), so far as it concerns the provisions relating to subordinate legislation, come into force the day after Royal Assent. This is to enable the Scottish Ministers to put any provision under the latter section in place before commencement of the remainder of the Bill six months later.
FINANCIAL MEMORANDUM

INTRODUCTION

1. This document relates to the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill introduced in the Scottish Parliament on 30 October 2013. It has been prepared by the Non-Government Bills Unit (NGBU) on behalf of David Stewart, the member in charge of the Bill, to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

2. The Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill ("the Bill") amends the Building (Scotland) Act 2003 ("the 2003 Act") to provide the framework for local authorities to make charging orders for recovery of expenses incurred where local authorities have carried out work to defective or dangerous buildings under the 2003 Act. The Bill:
   - provides the means for expenses incurred by local authorities in the repair, securing or demolition of defective or dangerous buildings to be recovered by way of charging order;
   - specifies recoverable expenses to include local authorities’ works costs, registration and discharge fees for a charging order and administrative expenses incurred in connection with arranging the registration and discharge of a charging order, and interest;
   - sets out the required contents of a charging order;
   - provides for the registration, repayment (including early redemption), and discharge of charging orders; and
   - provides for a charging order to be appealed in certain circumstances.

BACKGROUND

3. The purpose of this Financial Memorandum is to set out the best estimates of the administrative, compliance and other costs to which the provisions of the Bill will give rise and an indication of the margins of uncertainty in these estimates.

4. The costs associated with the provisions of the Bill can be separated into four broad categories:
   - costs associated with local authorities administering and implementing the charging order scheme;
   - costs incurred by the Scottish Ministers when determining early redemption amounts;
   - costs related to appeals against charging orders;
   - costs resulting from the application of a charging order.
General comment on the financial implications of the Bill provisions

5. The Bill augments the range of cost recovery powers available under the 2003 Act. The new provisions are designed to have minimal ongoing and one-off costs. The Bill is also intended to place no significant new burdens or duties on the Scottish Government or local government. The greater impact will fall on building owners (whether of dwellings or non-domestic premises) who have not paid expenses owed to local authorities for repair work.

6. The primary aim of the Bill is to enhance the ability of local authorities to recover debts they have incurred when repairing defective or dangerous buildings. The new powers are intended to allow authorities greater flexibility and discretion about how to recover their costs, and to increase the proportion of those costs likely to be recovered.

7. Direct costs of implementing the Bill fall primarily upon local authorities administering the scheme, with some marginal costs to be met by the Scottish Government and the Scottish Court Service. There will be some financial impact on individuals and businesses, but only as a result of non-payment of an existing debt. While there is a cost burden on owners, the work carried out will, in some cases, have contributed to the integrity of the fabric or structure of the building and, as a consequence, have had a positive impact on the value of the property.

8. Before the costs associated with the implementation of the Bill are more fully explained, it is helpful to consider the general level of disrepair of Scotland’s built environment. It is also useful to consider which local authority areas are most affected to understand the frequency with which local authorities carry out urgent work at their own hand and where owners have failed to undertake the work specified in a notice.

Number of buildings in Scotland

9. The term “building” incorporates many different structures which can be used for different purposes. The buildings referred to in this memorandum are dwellings, which contain either a single household space or several household spaces sharing some facilities. Dwellings will be recorded on the local authority council tax billing system and non-domestic premises which are used for commercial purposes will have an entry on the local authority Assessors valuation roll.

Housing

10. The estimated number of dwellings in Scotland as at 2012 was 2,515,042. The 2011 figure was 2,500,849. These figures take account of individual dwellings within buildings.

Non-domestic premises

11. It is more difficult to establish the number of non-domestic premises in Scotland, although the Scottish Government’s Building Standards Division conducted research in 2010,

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Mapping the Non-Domestic Building Stock in Scotland, to inform a database of these premises. This research estimated there were around 213,770 non-domestic premises in Scotland at February 2010.\(^3\) This information indicates premises and not the number of actual buildings.

Other buildings

12. Under section 55 of the 2003 Act the definition of a building is wide and includes “any structure or erection, whether temporary or permanent” subject to certain exceptions, such as public or private roads. However, the definition could nonetheless extend to a very diverse range of structures, making it impossible to quantify the number. It should be noted that references under the 2003 Act to a building also include references to a part of the building.

13. A rough estimate of the number of buildings (dwellings and non-domestic premises combined) in Scotland would therefore be 2,729,000. However, it is important to note that some buildings (e.g. tenements, industrial units) contain a number of separate dwellings or premises where one single owner or, a number of owners, might be responsible for the maintenance of the building.

Volume of disrepair and areas most affected

14. All building owners have a general responsibility to maintain their property, although there are a number of different statutes\(^4\) under which local authorities can carry out works to buildings and seek to recover their expenses. The principal pieces of legislation are the 2003 Act, as already mentioned, and the Housing (Scotland) Act 2006 (“the 2006 Act”). It is for local authorities to decide, taking into account the specific circumstances, which legislation is the most appropriate.

15. For the purpose of identifying the level of disrepair and the local authority areas most affected by disrepair it is useful to focus on the number of notices served under the 2003 Act and the 2006 Act, together with the most recent Scottish House Condition Survey.

16. Section 172 of the 2006 Act provides for a form of charging order (known as a “repayment charge”). This provision came into force on 1 April 2009. In response to the member’s Parliamentary Question, the Keeper of the Registers of Scotland advised “Since 1 April 2009, 38 repayment charges have been registered in the Land Register and 12 recorded in the Register of Sasines. As at 14 November 2012, a further 23 repayment charges are the subject of pending applications for registration in the Land Register”\(^5\).

Defective buildings

17. In terms of defective buildings, under section 28 of the 2003 Act the local authority has the power to serve a defective building notice on an owner requiring them to rectify the defects to bring the building into a reasonable state of repair. The local authority may undertake the

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\(^4\) For example, the Civic Government (Scotland) Act 1982 (section 87(3)) or the Town and Country Planning (Scotland) Act 1997 (section 179).

\(^5\) Question S4W-11173: David Stewart, Highlands and Islands, Scottish Labour, Date Lodged: 12/11/2012
work where the owner fails to carry out the work specified in the notice, and can recover from the owner expenses incurred by it in doing so.

18. In response to a Parliamentary Written Question the Scottish Government advised that the number of defective buildings notices served by local authorities during 2010-11 was 96. According to the written answer only nine councils had issued notices. Local authorities for Renfrewshire (25), North Lanarkshire (24), the Scottish Borders (17) and the Highlands (13) accounted for 79 (i.e. 82%) of the notices issued.

19. By 2011-12 the number of defective buildings notices issued had risen to 206 – a 115% increase from the previous year. These 206 notices were issued by 15 local authorities, with the highest number issued by East Renfrewshire (157), followed by North Lanarkshire (14) and the Scottish Borders (12). East Renfrewshire alone accounted for 76% of the notices issued. It is not known why East Renfrewshire issued such a large number of defective building notices.

20. A detailed breakdown of the figures for defective building notices can be found in Table 1 of the Annexe.

Dangerous buildings

21. Local authorities have a statutory obligation to deal with dangerous buildings under sections 29 and 30 of the 2003 Act. Under section 29, where the local authority considers that urgent action is required to reduce or remove any danger to people in or around the building, the general public or to adjacent buildings or places, it can carry out any necessary work. It may then recover expenses incurred in doing so from the owner. Section 30 enables local authorities to serve a notice on owners to undertake work the local authority considers necessary to remove the danger. Where owners fail to carry out the works they may be guilty of an offence and on summary conviction would be liable to a fine not exceeding level 5 on the standard scale (currently £5,000).

22. A recent answer to a Parliamentary Question shows that, in 2010-11, 187 dangerous buildings notices (section 30) were issued by 26 local authorities. Six local authorities, Midlothian (21), Highland (18), West Lothian (18), North Lanarkshire (17) Aberdeenshire (15) and Renfrewshire (10), accounted for just over half (53%) of the notices issued.

23. By 2011-12 the number of dangerous buildings notices issued had risen to 212. These 212 notices were issued by 27 of Scotland’s 32 local authorities. Nine local authorities, North Lanarkshire (29), West Lothian (20) Renfrewshire (18), East Ayrshire (15), Clackmannanshire (14), South Ayrshire (14), Midlothian (10), North Ayrshire (10) and Scottish Borders (10) accounted for nearly two-thirds (66%) of the notices issued.

24. The Building Standards Annual Return 2010-2011 highlights that the largest number of notices served under the 2003 Act was for dealing with dangerous buildings. It states that on

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6 Question S4W-13217: Liz Smith, Mid Scotland and Fife, Scottish Conservative and Unionist Party, Date Lodged: 21/02/2013
7 Question S4W-13217: Liz Smith, Mid Scotland and Fife, Scottish Conservative and Unionist Party, Date Lodged: 21/02/2013
402\textsuperscript{8} occasions local authorities took action at their own hand (section 29), compared to 187 dangerous buildings notices and 96 defective buildings notices issued under the 2003 Act in the same time period. This equates to 59% of all instances (685) under the defective and dangerous buildings regime. Comparable figures for 2011-12 show that there were 992\textsuperscript{9} occasions when local authorities took action at their own hand (section 29), compared to 212 dangerous buildings notices and 206 defective buildings notices. This equates to 70% of all instances (1410) under the defective and dangerous buildings regime, an 11% increase on the previous year.

25. A detailed breakdown of the figures for dangerous building notices can be found in Table 2 of the Annexe.

Dwellings in disrepair

26. According to the Scottish Housing Condition Survey (SHCS) for 2011, it is estimated that 83% of dwellings in Scotland have some disrepair. The Survey also indicated that levels of “any disrepair” in urban and rural areas are about the same.\textsuperscript{10} In just under half the dwellings (48%) with some form of disrepair, that disrepair was urgent.\textsuperscript{11} The definition of an urgent repair in the SHCS is one which, if not carried out, would cause the fabric of the building to deteriorate further and/or place the health and safety of the occupier at risk.

27. It is possible to roughly calculate the number of dwellings in urgent disrepair. Using information available for 2011 on number of dwellings in Scotland, 2,500,849 (see paragraph 10) and the percentage of dwellings with some disrepair in Scotland, 83% (see paragraph 26) it can be estimated that 2,075,705 dwellings have some disrepair. Of those dwellings that have some disrepair, the level of those in urgent disrepair is around 48% (see paragraph 26). It is therefore possible to estimate that approximately one million dwellings in Scotland (996,338) are in urgent disrepair, based upon the SHCS definition of “urgent repair”. This represents 40% of all dwellings in Scotland.

28. In terms of the most affected areas, there does not seem to be any obvious correlation between the areas most affected by disrepair other than the condition of the built environment. The Scottish Government research report noted that “there are very sharp differences between authorities in levels of activity. For example, South Ayrshire reported 38 instances of action (section 29 action without notice) while North Ayrshire reported one. Levels of action were notably high in Dundee, Renfrewshire and Glasgow. This may reflect the condition of the built environment in those areas”\textsuperscript{12}. The Report went on to state “It is not clear why such sharp differences exist but they do suggest that recording may vary. It was also found in the case studies reported below that in some authorities emergency action on dangerous buildings is frequently undertaken by the Fire Service and is thus not recorded as action by Building

\textsuperscript{8} Building Standards Annual Return 2010-11, Building Services Division, Page 17, paragraph 11.5. Available at: http://www.scotland.gov.uk/Resource/0040/00401521.pdf

\textsuperscript{9} Question S4W-17343: David Stewart, Highlands and Islands, Scottish Labour, Date Lodged: 20/09/2013

\textsuperscript{10}Scottish Housing Conditions Survey – Key findings 2011, paragraph 143, page 44. Available at: http://www.scotland.gov.uk/Resource/0041/00410389.pdf

\textsuperscript{11}Scottish Housing Conditions Survey – Key findings 2011 paragraph 149, page 44, Available at: http://www.scotland.gov.uk/Resource/0041/00410389.pdf

\textsuperscript{12} The Building Scotland Act 2003, para 2.1.5, The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012
Standards”. However, it is also noted from the figures outlined in paragraphs 22 and 23 that the cities of Glasgow, Aberdeen and Dundee do not issue as many section 30 notices as, for example, North Lanarkshire or the Scottish Borders. This could be attributed to the condition of the built environment in those particular areas or the local policies being implemented. It is also worth noting that Edinburgh has its own private legislation so tends not make use of the 2003 Act’s defective and dangerous buildings notices regime.

**Estimated number of charging orders**

29. Defective and dangerous buildings notices under the 2003 Act are served on owners of buildings; so for example, in a tenement building with eight owners, eight notices will be issued. On the other hand, in relation to a block of flats owned by one person, only one notice would be issued. A notice therefore corresponds directly to the owner and not to the number of buildings. Where a local authority takes action at its own hand i.e. does not have time to give notice to the owner before undertaking the work, then this also directly correlates to the number of potential charging orders, as local authorities tend not to issue notices having taken action without notice.

30. Using the most recent dangerous buildings figures for 2011-12, where the number of times a local authority took action at its own hand in relation to a dangerous building on 992 occasions, and a further 212 dangerous building notices were issued, it is possible to estimate the possible number of charging orders relating to dangerous buildings. The maximum number of potential dangerous buildings cases where local authorities might have to recover their costs would be 1204. The Scottish Government – *Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings*, November 2012 estimates cost recovery to be around 50%. On that basis it seems conceivable that around 600 charging orders in respect of dangerous buildings might be registered each year.

31. In relation to defective buildings notices, 206 were served in 2011-12. Local authorities do not tend to undertake work on these buildings as they don’t have a statutory obligation to do so, however, local authorities might be encouraged to be more proactive if charging orders are available to them. Applying the estimated 50% cost recovery rate to this figure it seems conceivable that a further 100 charging orders might be made in relation to defective buildings.

32. Therefore a rough Scotland-wide figure is calculated to be 700 charging orders registered in total annually. This figure might be substantially lower if local authorities decide not to make use of charging orders in all cases where debt is to be recovered or find the notification of an intention to apply a charging order leads to more owners paying. Equally it might increase if local authorities take a more proactive approach to defective buildings.

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13 The Building Scotland Act 2003, para 2.1.6, *The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012*


15 Recommendations for change, para 4.7.3, *The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012*
COSTS ON THE SCOTTISH ADMINISTRATION

33. Under the Bill, inserted section 46D(2)(b) provides for the Scottish Ministers to determine the early settlement sum where an owner is unable to agree a sum with the local authority to redeem the repayable amount. They can do so either generally by order made under the power contained in section 46D(4) of the Bill, or specifically in relation to that charging order. On payment of such a settlement sum a local authority is obliged to register a discharge of the charging order.

34. The Scottish Ministers may make further provision about repayment or early redemption of the repayable amount (inserted 46D(4)). This might conceivably include stipulating the procedure to be followed in determining the early settlement sum such as any timescales or relevant factors to be considered in coming to a decision. In the absence of a specified procedure in the Bill, it is envisaged that, where agreement cannot be reached a referral might be made to the Scottish Ministers for determination. The local authority and the owner would each provide a separate submission detailing its own case, providing sufficient information (including any supporting evidence); to enable the Scottish Ministers to make a decision.

35. The 2006 Act has a comparable provision at section 172 (Repayment Charges). It is understood that to date this provision has not been used; as such there are no actual costings available. In estimating the cost, reference would ordinarily be made to the financial memorandum for that Act; however, as the provision was inserted at Stage 3 of Parliamentary proceedings for the legislation concerned, no estimated costs are available.

36. Therefore in terms of estimating the cost of the determination process this memorandum relies on similar processes. The Directorate for Planning and Environmental Appeals (DPEA) is responsible for the administration of over 20 different types of case work. It determines appeals against decisions made by planning authorities and other bodies in Scotland. Most cases are decided by a Reporter (at civil service grade C1 or C2), with a caseworker (A3 or A4) undertaking the administrative aspects of the case. Another recent legislative example is the Schools (Consultation) (Scotland) Act 2010 which provides for Ministerial call-in of closure proposals.

37. The determination of cases under this Bill is unlikely to be as complex a matter as planning appeals or school closures. The following calculation is the member’s best attempt at estimating the cost of determining a case. This is of course speculative given the lack of base data but has been calculated using acknowledged formulas for working out daily and hourly rates and the maximum on current Scottish Government pay scales. It is therefore estimated that the overall average time required per case would be around three days in total, consisting of a day of C1’s time and two days of an A3’s time. Based on a C1’s annual salary as at August 2013 of £53,121 at an approximate daily rate of £180 (salary divided by 52 weeks, further divided by 42 contracted hours which equals £24.30/hour then multiplied by 7.4 hours gives a daily rate of £180.) A similar calculation based on an A3’s yearly salary of £18,382, yields an hourly rate of £8.40 and a daily rate of £62. The cost per determination is therefore roughly £304.

38. The broadly comparable provision in the 2006 Act came into force on 1 April 2009 and at the time of writing Registers of Scotland advised 125 “repayment charges” have been registered.
These documents relate to the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill (SP Bill 39) as introduced in the Scottish Parliament on 30 October 2013

As previously noted there have been no determinations under section 172 of the 2006 Act during this time (see paragraph 35). This might suggest that certainly in the short term the new role could fairly readily be subsumed within the existing work of the Scottish Government, perhaps within the Building Standards Division which has responsibility for the 2003 Act, if a case arises. There is insufficient historic information to estimate whether the number might be expected to rise over the longer term.

Costs to the Keeper of the Registers of Scotland

39. Registers of Scotland (RoS) is the only Non-Ministerial Department in the Scottish Administration that operates as a trading fund. This means that RoS must operate as a self-funded entity. This funding is derived from the fees charged in respect of the registration or recording of deeds and documents in any register under the management and control of the Keeper, and in the provision of other services such as searches, reports, certificates and the provision of other documents or copies of documents. Current legislation\(^\text{16}\) empowers the Keeper of the RoS to charge fees to recover its operational costs, so RoS would recover its operational costs for registering and discharging charging orders as a fee for the service.

40. It is estimated that the costs to register or discharge a charging order as provided for in the Bill would be £60 in each case (or £50 if the charge is registered using the automated registration system). This is based on the current fees for registering, or discharging, a “repayment charge” in the appropriate land register under the 2006 Act. The fees set by RoS are calculated to cover its costs. It is estimated that the annual registration costs would be £35,000 based on the registration of 700 charging orders (using a figure of £50 per registration or discharge of each charging order).

41. It is understood that of the 125 “repayment charges” registered under the 2006 Act since 2009, there have been 17 discharges. These figures can be interpreted to provide a broad indication of the number of potential discharges which can be expected in the early years of charging orders under this Bill. The percentage of registrations (125) to discharges (17) is approximately 14%. This percentage, applied to the potential 700 charging orders, indicates that roughly 98 discharges would be registered annually.

42. As the practicalities of registering or discharging a charging order are likely to involve the same level of work for RoS as that for “repayment charges”, it is believed that the estimated costs are reasonably accurate.

Costs to the Scottish Court Service

43. As referred to earlier in the Memorandum, the Bill amends section 47 of the 2003 Act to allow an appeal against the making of a charging order. These appeals are restricted to matters which could not have otherwise been raised on an appeal against the original notice or the decision requiring the works to be carried out. An appeal against a charging order on the basis of the cost of the work or the apportionment of costs, if this information was known earlier, would generally be unlikely to be possible.

\(^{16}\) Land Registration etc. (Scotland) Act 2012, section 110. Available at: http://www.legislation.gov.uk/asp/2012/5/section/110/enacted
44. An example of the circumstances which might lead to an appeal would be where a change of ownership has taken place in the period between when the costs were incurred by the former owner and the decision was taken by a local authority to seek a charging order. The new owner might contest a charging order on the basis that they were not aware of any work having been carried out by the local authority or outstanding debts to the local authority when they purchased the property. While section 46E(4) of the Bill takes account of this situation, the local authority might not appreciate what has happened or may not readily accept what is being stated by the new owner. The person might therefore decide to appeal the charging order to allow the court to determine liability. Any appeal would be by summary application to the sheriff and should be made within 21 days of the date of the charging order or any decision in connection with it.

45. The number of appeals to sheriffs principal initiated during 2011-12 decreased by 29% from 441 in 2010-11 to 313. Of the appeals initiated, 69 per cent were appeals of ordinary cause cases, 18 per cent were appeals of summary cause cases and 13 per cent were appeals of small claim cases. The number of appeals to sheriffs principal that were disposed of was almost static between 2010-11 (334) and 2011-12 (330). The original judgment was adhered to in 47 per cent of appeals disposed of in 2011-12 and was recalled or varied in 22 per cent of disposals, a decrease of 10 percentage points compared to 2010-11.  

46. These statistics do not further classify the appeals in relation to the legislation under which the appeal was made. It is therefore not possible to provide any estimate for dangerous and defective buildings. However, it is anticipated that the number of appeals will be low given the overall number of appeals for Scotland annually and the limited circumstances upon which an appeal could be pursued. It is therefore anticipated that there would be minimal costs. As such it is believed that any cost associated with hearing appeals could be absorbed within the Scottish Court Service’s budget.

COSTS ON LOCAL AUTHORITIES

47. Currently local authorities can incur costs in carrying out their statutory duties under sections 28, 29 and 30 of the 2003 Act. These costs could include fees to contractors, for example for the erection of fencing to keep people away from dangerous buildings or contractor costs for roofing or demolition works, and any associated administration charges. If the owner does not pay these costs then, under the 2003 Act, the authority can pursue the debt in the civil courts or, for dangerous buildings where the owner cannot be found, it may seek a compulsory purchase order for the building and the site (section 45).

Current local authorities works expenditure and level of cost recovery

48. The Scottish Government Building Standards Division commissioned Optimal Economics Ltd to undertake a study aimed at identifying ways to improve the recovery by Scottish Local Authorities (LAs) of costs incurred on work to deal with dangerous and defective

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17 Civil Law Statistics in Scotland 2011-12, Sheriff Court Appeals, para 10.5-6. Available at: http://www.scotland.gov.uk/Publications/2012/12/9263/downloads
buildings under the Building (Scotland) Act 2003. The project sought information from eight local authorities about their expenditure on works and the level of recovery of their costs. The most complete information came from Glasgow City Council, Renfrewshire Council and Fife Council:

- **Glasgow City Council** – 6 years’ expenditure, including 2011-12, was approximately £1.3 million, with expenditure for 2012-13 likely to be around £400,000. No indication was provided on the level of cost recovery.

- **Renfrewshire Council** – 5 years’ expenditure (time period unclear) was £618,000. The amount of that cost recovered amounted to £358,000 (58%), £114,800 (19%) was written off and approximately £145,200 (23%) remains outstanding.

- **Fife Council** - 7 years’ expenditure, including 2011-12, was £629,900 with £226,000 (36%) recovered.

49. The project estimated that the total unpaid debts of the eight case study authorities amounted to £1.5 million and that, when calculated pro rata to population, the all-Scotland figure would be £3.9 million, although it acknowledged a high margin of uncertainty given the degree in variation of debt between authorities.

50. In its recommendations, the research project noted current cost recovery procedures “appear to allow as much as 50% of costs to be avoided or evaded by owners of dangerous or derelict buildings” and recommended an “improvement on 50% cost recovery would be desirable”. The local authorities involved in the Scottish Government’s research project advised the main reasons for problems of cost recovery “often arise where there is difficulty in establishing who is liable and for how much. This includes problems of identifying and tracking down owners and determining apportionment. Even when ownership and liability can be established, cost recovery problems arise in terms of what may be characterised as either “can’t pay” or “won’t pay” (or both). In some cases these issues are interrelated: for example disputes over apportionment may fuel unwillingness to pay while hard to identify or absentee owners are using these circumstances to avoid payment”.

18 Dundee City Council, Edinburgh City Council, Fife Council, Glasgow City Council, Highlands Council, Perth and Kinross Council and Renfrewshire Council

19 Extent of cost recovery, para 4.4.2 – 3, The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012

20 Extent of cost recovery, para 4.4.4, The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012

21 Extent of cost recovery, para 4.4.5, The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012

22 Extent of cost recovery, para 4.4.10, The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012

23 Recommendations for change, para 4.7.3, The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012

24 Experience in Cost Recovery, para 4.3. 11, The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012
51. The project also concluded that the estimate of unrecovered costs for the eight local authorities would probably exceed £2 million if written-off debts were included and that these costs would be growing year on year by several hundreds of pounds.\(^{25}\)

*Current civil debt recovery costs*

52. Local authorities’ current costs of pursuing owners through the courts vary depending on whether the owner can be located or whether there are multiple owners which can give rise to disputes over apportionment of the costs. For example, one council is owed around £400,000 by an owner who is believed to be resident in the United States and who shows no intention of paying the debt.\(^{26}\)

53. Problems identifying owners can be tackled through the use of legal searches. Owners who are absent present particular problems in securing payment. However, the costs involved in undertaking extensive tracing can be expensive and can typically cost up to £500\(^{27}\) to engage a firm of professional searchers to track down title.

54. According to the response provided by North Lanarkshire Council to the Scottish Government’s consultation on the proposed Community Empowerment and Renewal Bill, local authorities can spend up to £5,000\(^{28}\) in staff time and legal costs pursuing the debt through the courts. Where multiple owners are involved local authorities’ recovery costs rise, particularly when apportionment disputes arise. These concerns were highlighted in a recent research project, where local authorities criticised the current arrangements because even with so called “normal cases” the administrative costs incurred by the local authority of identifying owners and apportioning costs were high and could rise to very high levels if legal action was required.\(^{29}\)

55. It is also noted that local authorities’ attitude to small debt can vary. Some take the view that, on principle, all debts should be pursued vigorously while others will write off small debts (£100-£300) when the costs of debt collection or legal action appear disproportionate.\(^{30}\)

*Anticipated costs in implementing charging orders*

56. As noted at paragraph 53, the cost of tracing title and ownership, where this cannot readily be established, can cost up to £500. There may be a need to do so when pursuing

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\(^{25}\) Conclusions and recommendations, Key Findings para 5.1. 3, *The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012*

\(^{26}\) The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012


\(^{30}\) Experience in cost recovery, para 4.3.7 *The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012*
payment of the debt by means of civil recovery procedures, and similarly in relation to the process associated with obtaining a charging order.

57. The Bill enables local authorities to register a charging order against the property. The fee for registering or discharging a “repayment charge” in the appropriate land register under the 2006 Act is currently £60 (or £50 if the charge is registered using the automated registration system). It is therefore anticipated that the registration or discharge of a charging order would have a similar cost. A local authority will incur some staff costs as a result of issuing a letter to notify an owner of its intention to make a charging order and from preparing a charging order for registration. It has not been possible to gather specific information on these costs but it is estimated the overall cost of the process would be around £60 as the local authority should already hold the necessary information such as the property address to enable registration. Although the local authority will be responsible for these upfront costs, the Bill provides for these costs to be recovered from the owner through the charging order. Fees and expenses are likely to amount to approximately £110 per charging order. Based on that estimate, the overall annual cost split across the 32 local authorities would be £77,000 (based on an estimated number of 700 charging orders per annum and using a registration fee figure of £50).

58. It is understood that of the 125 “repayment charges” registered under the 2006 Act since 2009 (see paragraph 38), there have been 17 discharges. These figures can be interpreted to provide a broad indication of the number of potential discharges which can be expected in the early years of charging orders under this Bill. The percentage of registrations (125) to discharges (17) is approximately 14%. This percentage, applied to the potential 700 charging orders indicates that roughly 98 discharges annually costing £50 each will be sought across the 32 local authorities, amounting to a total of £4,900.

59. Further costs might arise for local authorities as a result of defending any appeals against the making of a charging order. The Bill amends section 47 of the 2003 Act to allow appeals against the making of a charging order in limited circumstances. Nothing could be raised at an appeal which could have been raised at an earlier stage, for example, in regard to the original notice or decision requiring the work concerned to be carried out. Appeals are therefore expected on a very occasional basis only. It has not been possible to ascertain local authority costs in defending an appeal of a section 28 or 30 notice. It is therefore estimated that costs could be the same or less than those incurred by a local authority pursuing the original debt through the court (up to £5,000 see paragraph 54). This is because it is difficult to assess what complexities might arise during the course of any appeal.

60. By opting to use charging orders to recover costs local authorities could accrue some savings. It is estimated that local authorities collectively lose about £3.9m/year (see paragraph 49) in unrecovered debt, and will be paying a certain amount (not estimated) for attempting debt recovery through the courts. Appeal costs are likely to be minimal, so it is anticipated that the Bill will save local authorities money overall. If, for example, charging orders enable local authorities to get their rate of cost recovery up from about 50% to (say) 75%, this could save them nearly £2m annually, plus whatever they save by making less use of existing methods of debt recovery. There is no information available, other than anecdotal information provided to the member’s consultation, on the use local authorities made of charging orders under the Building (Scotland) Act 1959, which the 2003 Act repealed and replaced. This figure is therefore only illustrative of the savings which could be achieved if cost recovery rates increased.
COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Costs to the Scottish Legal Aid Board (SLAB)

61. Given that the estimated number of appeals under the Bill is very small, it is anticipated that requests for legal assistance will be low. An appellant can opt to conduct their appeal themselves without legal representation. There would only be a cost to SLAB if an appellant wished to instruct legal representation and was eligible for assistance. In these circumstances it is envisaged that there would be minimal costs and therefore should be capable of being absorbed into the budget of the Scottish Legal Aid Board.

Cost on individuals and businesses

62. Owners of domestic or non-domestic buildings who keep their property in good order will not be affected by this legislation.

Number of owners affected

63. Defective and dangerous buildings notices under the 2003 Act are served on owners of buildings; so for example, a tenement building with eight owners would mean eight notices would be issued. Conversely where a block of flats is owned by one person then only one notice would be issued. A notice therefore corresponds directly to the owner and not to the number of buildings. Where a local authority takes action at its own hand i.e. does not have time to give notice to the owner before undertaking the work, then this also directly correlates to the number of potential charging orders, as local authorities tend not to issue notices having taken action without notice.

64. Using the most recent dangerous buildings figures for 2011-12, where the number of times a local authority took action at its own hand in relation to a dangerous building on 992 occasions, and a further 212 dangerous building notices were issued, it is possible to estimate the possible number of charging orders relating to dangerous buildings. The maximum number of potential dangerous buildings cases where local authorities might have to recover their costs would be 1204. The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012 estimates cost recovery to be around 50%. On that basis it is anticipated that around 600 charging orders in respect of dangerous buildings would be registered each year.

65. In relation to defective buildings notices, 206 were served in 2011-12. Local authorities do not tend to undertake work on these buildings as they don’t have a statutory obligation to do so, however, local authorities might be encouraged to be more proactive if charging orders are available to them. Applying the estimated 50% cost recovery rate to this figure means approximately a further 100 charging orders could be made in relation to defective buildings.

66. Therefore potentially 700 owners could be affected by the implementation of the Bill on an annual basis. It is recognised that this figure could decrease or increase depending on whether

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31 Recommendations for change, para 4.7.3, The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012
local authorities choose to use charging orders (the notification of a charging order might aid in negotiating settlement of the debt) or become more proactive in dealing with defective buildings.

67. It is not possible to calculate with any certainty the number of charging orders applied to dwellings and those to non-domestic premises. However as a very rough indication, in 2010 there were 2,488,496 dwellings in Scotland compared to 213,770 non-domestic premises. This represents a ratio of 11:1 which, when applied to 700 charging orders, would mean there would be approximately 636 charging orders on dwellings and 64 in respect of non-domestic premises.

Fees and expenses recoverable

68. Where local authorities undertake work to defective or dangerous buildings when owners can’t or won’t pay, they can make charging orders to recover their costs. An owner will be liable for the registration or discharge fee (approximately £50-60 each) over and above the local authorities’ costs for carrying out the repair.

69. A local authority’s expenses relating to implementing a charging order will also be recoverable. A local authority will incur some staff costs as a result of issuing a letter to notify an owner of its intention to make a charging order and from preparing a charging order for registration. It has not been possible to gather specific information on these costs but it is estimated the overall cost of the process would be around £60 as the local authority should already hold the necessary information such as the property address to enable registration.

70. Interest is accrued on the outstanding debt and this will also be repayable. It is for each individual local authority to set the applicable interest, which must however be a reasonable rate. Various formulations have been used in other circumstances where a local authority is entitled to recover interest: one approach is to set a percentage figure above the base rate, while others may take an average of all the interest rates they apply and review it annually. If a person defaults on an annual instalment, then interest will also be separately accrued on that outstanding amount.

71. Under the appeal provisions in section 47 of the 2003 Act the sheriff can make any order the sheriff thinks fit. The cost of lodging an appeal by summary application is currently £87. An appeal case can be conducted by the appellant without representation. The Law Society does not set guidelines for fees. Each firm charges what it believes is appropriate. Some solicitors charge a fixed fee for the whole job, others charge according to how much time they actually spend doing the work. It is therefore not possible to provide an estimate of the cost of engaging representation. Depending on the appellant’s circumstances they could receive assistance with this cost form the Scottish Legal Aid Board. It is anticipated that costs incurred in relation to an appeal would be dealt with in the usual manner, according to which party is successful.

34 Schedule 2 of the Sheriff Court Fees Amendment Order 2012 SSI 2012 No.293
72. Any provision that enables local authorities to recover more of their costs reduces their net expenditure, and this should have some minor beneficial impact on individual council tax payers.

CONCLUSION

73. The member has set out his best estimates, based on the information available, of the administrative, compliance and other costs to which the provisions of the Bill will give rise. He has also provided an indication of the margins of uncertainty in relation to these estimates.

74. The costs of implementing charging orders are likely to be minimal for the Scottish Government and local authorities. The Bill has an overall positive financial impact for local authorities. The use of charging orders enables local authorities to improve their cost recovery rates to recover more of their outstanding costs, while also providing further savings over the existing cost recovery procedure. There is some impact on owners of dwellings or non-domestic premises where owners have not maintained their building and the local authority has had to step in to undertake the necessary work and recover its costs thereafter.

75. The table below summarises the estimated costs of implementing the Bill.

TOTAL OF ESTIMATED COSTS

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scottish Government</td>
<td>The Scottish Ministers to determine early settlement sum where an owner is</td>
<td>£304 - approximate cost per determination.</td>
</tr>
<tr>
<td></td>
<td>unable to agree a sum with the local authority to redeem the payable amount</td>
<td></td>
</tr>
<tr>
<td></td>
<td>under inserted section 46D(2)(b). Ministers may also make further provision</td>
<td></td>
</tr>
<tr>
<td></td>
<td>about early redemption of the repayable amount (inserted section 46D(4)).</td>
<td></td>
</tr>
<tr>
<td>Keeper of the Registers of Scotland</td>
<td>Costs to register or discharge a charging order.</td>
<td>£35,000 – per annum. This is based on an estimate of 700 charging</td>
</tr>
<tr>
<td></td>
<td></td>
<td>orders being registered per annum at a cost of £50 each.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>£4,900 – per annum based on an estimate of 98 discharges of charging</td>
</tr>
<tr>
<td></td>
<td></td>
<td>orders at a cost of £50 each.</td>
</tr>
<tr>
<td>Scottish Court Service</td>
<td>Anticipated number of appeals to a charging order in</td>
<td>Based on the limited information available it is</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
These documents relate to the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill (SP Bill 39) as introduced in the Scottish Parliament on 30 October 2013

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>relation to sections 28, 29 and 30 of the 2003 Act, which the Scottish Court Service would have to deal with.</td>
<td>anticipated that the number of appeals will be low. As such it is believed that the cost associated with hearing appeals could be absorbed within the Scottish Court Service’s budget.</td>
</tr>
<tr>
<td>Local Authorities</td>
<td>The cost to a local authority of making a charging order against an individual or business.</td>
<td>£77,000 per year across all 32 local authorities. This is based on 700 charging orders issued per annum at a cost of £50 fee per charging order and associated £60 administrative expenses. £4,900 per year across 32 local authorities based on 98 discharges of charging orders.</td>
</tr>
<tr>
<td>Scottish Legal Aid Board</td>
<td>Potential number of applications for legal assistance to lodge an appeal in to a charging order.</td>
<td>As it is estimated that the number of appeals under the Bill is very small, it is anticipated that any requests for legal assistance could be readily absorbed into the budget of the Scottish Legal Aid Board.</td>
</tr>
<tr>
<td>Individuals and businesses</td>
<td>The cost charged to an individual or business by a local authority in relation to the registration of a charging order or discharge order. Lodging an appeal against a charging order.</td>
<td>£50 per charging order registered and associated £60 administrative expenses. £50 per charging order discharged £87 to lodge an appeal.</td>
</tr>
</tbody>
</table>
Table 1: Breakdown of Defective Building Notices

<table>
<thead>
<tr>
<th>Local Authority</th>
<th>No. of Defective Notices Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2010-11</td>
</tr>
<tr>
<td>Aberdeen City</td>
<td>4</td>
</tr>
<tr>
<td>Aberdeenshire</td>
<td>0</td>
</tr>
<tr>
<td>Angus</td>
<td>0</td>
</tr>
<tr>
<td>Argyll and Bute</td>
<td>0</td>
</tr>
<tr>
<td>City of Edinburgh</td>
<td>0</td>
</tr>
<tr>
<td>Clackmannanshire</td>
<td>0</td>
</tr>
<tr>
<td>Comhairle nan Eilean Siar</td>
<td>0</td>
</tr>
<tr>
<td>Dumfries and Galloway</td>
<td>0</td>
</tr>
<tr>
<td>Dundee City</td>
<td>0</td>
</tr>
<tr>
<td>East Ayrshire</td>
<td>0</td>
</tr>
<tr>
<td>East Dunbartonshire</td>
<td>0</td>
</tr>
<tr>
<td>East Lothian</td>
<td>0</td>
</tr>
<tr>
<td>East Renfrewshire</td>
<td>0</td>
</tr>
<tr>
<td>Falkirk</td>
<td>0</td>
</tr>
<tr>
<td>Fife</td>
<td>0</td>
</tr>
<tr>
<td>Glasgow City</td>
<td>0</td>
</tr>
<tr>
<td>Highland</td>
<td>13</td>
</tr>
<tr>
<td>Inverclyde</td>
<td>2</td>
</tr>
<tr>
<td>Midlothian</td>
<td>7</td>
</tr>
<tr>
<td>Moray</td>
<td>0</td>
</tr>
<tr>
<td>North Ayrshire</td>
<td>0</td>
</tr>
<tr>
<td>North Lanarkshire</td>
<td>24</td>
</tr>
<tr>
<td>Orkney</td>
<td>0</td>
</tr>
<tr>
<td>Perth and Kinross</td>
<td>3</td>
</tr>
<tr>
<td>Renfrewshire</td>
<td>25</td>
</tr>
<tr>
<td>Scottish Borders</td>
<td>17</td>
</tr>
<tr>
<td>Shetland Islands</td>
<td>0</td>
</tr>
<tr>
<td>South Ayrshire</td>
<td>0</td>
</tr>
<tr>
<td>South Lanarkshire</td>
<td>0</td>
</tr>
<tr>
<td>Stirling</td>
<td>0</td>
</tr>
<tr>
<td>West Dunbartonshire</td>
<td>0</td>
</tr>
<tr>
<td>West Lothian</td>
<td>1</td>
</tr>
<tr>
<td><strong>Scotland</strong></td>
<td><strong>96</strong></td>
</tr>
</tbody>
</table>
Table 2: Breakdown of Dangerous Building Notices

<table>
<thead>
<tr>
<th>Local Authority</th>
<th>No. of Notices – Dangerous Buildings</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2010-11</td>
</tr>
<tr>
<td>Aberdeen City</td>
<td>6</td>
</tr>
<tr>
<td>Aberdeenshire</td>
<td>15</td>
</tr>
<tr>
<td>Angus</td>
<td>2</td>
</tr>
<tr>
<td>Argyll and Bute</td>
<td>0</td>
</tr>
<tr>
<td>City of Edinburgh</td>
<td>0</td>
</tr>
<tr>
<td>Clackmannashire</td>
<td>5</td>
</tr>
<tr>
<td>Comhairle nan Eilean Siar</td>
<td>2</td>
</tr>
<tr>
<td>Dumfries and Galloway</td>
<td>2</td>
</tr>
<tr>
<td>Dundee City</td>
<td>0</td>
</tr>
<tr>
<td>East Ayrshire</td>
<td>6</td>
</tr>
<tr>
<td>East Dunbartonshire</td>
<td>0</td>
</tr>
<tr>
<td>East Lothian</td>
<td>3</td>
</tr>
<tr>
<td>East Renfrewshire</td>
<td>6</td>
</tr>
<tr>
<td>Falkirk</td>
<td>5</td>
</tr>
<tr>
<td>Fife</td>
<td>8</td>
</tr>
<tr>
<td>Glasgow City</td>
<td>3</td>
</tr>
<tr>
<td>Highland</td>
<td>18</td>
</tr>
<tr>
<td>Inverclyde</td>
<td>4</td>
</tr>
<tr>
<td>Midlothian</td>
<td>21</td>
</tr>
<tr>
<td>Moray</td>
<td>2</td>
</tr>
<tr>
<td>North Ayrshire</td>
<td>6</td>
</tr>
<tr>
<td>North Lanarkshire</td>
<td>17</td>
</tr>
<tr>
<td>Orkney</td>
<td>0</td>
</tr>
<tr>
<td>Perth and Kinross</td>
<td>5</td>
</tr>
<tr>
<td>Renfrewshire</td>
<td>10</td>
</tr>
<tr>
<td>Scottish Borders</td>
<td>9</td>
</tr>
<tr>
<td>Shetland Islands</td>
<td>2</td>
</tr>
<tr>
<td>South Ayrshire</td>
<td>1</td>
</tr>
<tr>
<td>South Lanarkshire</td>
<td>8</td>
</tr>
<tr>
<td>Stirling</td>
<td>3</td>
</tr>
<tr>
<td>West Dunbartonshire</td>
<td>0</td>
</tr>
<tr>
<td>West Lothian</td>
<td>18</td>
</tr>
<tr>
<td><strong>Scotland</strong></td>
<td><strong>187</strong></td>
</tr>
</tbody>
</table>
MEMBER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 30 October 2013, the member in charge of the Bill (David Stewart MSP) made the following statement:

“In my view, the provisions of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 30 October 2013, the Presiding Officer (Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
DEFECTIVE AND DANGEROUS BUILDINGS
(RECOVERY OF EXPENSES) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill introduced in the Scottish Parliament on 30 October 2013. It has been prepared by the Non-Government Bills Unit on behalf of David Stewart, the member in charge of the Bill, to satisfy Rule 9.3.3A of the Parliament’s Standing Orders. The contents are entirely the responsibility of the member and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 39–EN.

POLICY OBJECTIVES OF THE BILL

2. The Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill (“the Bill”) amends the Building (Scotland) Act 2003 (“the 2003 Act”) to allow local authorities to make charging orders for recovery of expenses incurred where they have carried out work to defective or dangerous buildings under sections 28, 29 or 30 of the 2003 Act.

3. The aim of the Bill is to provide local authorities with an additional cost recovery method. The Bill—
   • provides the means for expenses incurred by local authorities in the repair, securing or demolition of defective or dangerous buildings to be recovered by way of charging order;
   • specifies recoverable expenses to include local authorities’ works costs, registration and discharge fees for a charging order and administrative expenses incurred in connection with arranging the registration and discharge of a charging order, and interest;
   • sets out the required contents of a charging order;
   • provides for the registration, repayment (including early redemption), and discharge of charging orders; and
   • provides for a charging order to be appealed in certain circumstances.

4. Currently when a local authority incurs repair costs having served either a defective building notice (under section 28 of the 2003 Act), a dangerous building notice (under section 30), or taken urgent action to deal with a dangerous building (under section 29), and has not been
able to recover these costs from the owners of those buildings, the local authority can pursue the debt through civil debt recovery procedures. However, local authorities can face difficulties in tracing owners, and pursuing owners through the courts can be costly. In some instances local authorities are having to write-off hundreds of thousands of pounds of debt.¹

5. The Bill will provide local authorities with the new option of making a “charging order” in relation to a specified building, for example, where the owner cannot be traced, or there is no likelihood of the owner paying the outstanding sums, whether in consequence of being unwilling or unable to do so. Although potentially a longer-term measure, charging orders, in attaching to the property, will provide local authorities with some greater opportunity to make recovery of outstanding debt when the property is sold. It will also provide for annual instalments so that those who can pay but do not have the funds in the short-term to settle the full repair costs involved can pay over an extended period. The prospect of a charging order secured on their property should in addition encourage those who won’t settle the outstanding debt or enter into negotiation with the local authority to pay the outstanding amount or enter into negotiations with the local authority. A facility to redeem the outstanding amount early and the facility for an owner and local authority to negotiate a reduced amount also feeds into the overarching policies of increasing debt recovery rates and encouragement of early repayment.

6. The Bill could also have some wider effect. Currently local authorities do not utilise their defective building powers under section 28 of the 2003 Act to their full potential. There is a combination of reasons for this, although cost recovery is of primary concern. With more cost recovery powers at their disposal, local authorities may be prepared to be more proactive when tackling defective buildings, as these are potentially tomorrow’s dangerous buildings. Thus the Bill could have a preventative quality, improving public safety and helping to protect Scotland’s built environment.

BACKGROUND

Charging Orders

7. A charging order is a form of statutory charge which attaches to land and property, for example, in relation to the repayment of a loan, recovery of expenses incurred or grants made. Charging orders usually provide for the repayment of a capital sum, often by instalments. The charging order is registered in the Land Register or, where appropriate, the Register of Sasines (gradually being replaced by the Land Register).

8. In practice, under a charging order, a local authority would be able to charge a property with a sum, repayable by annual instalments over a fixed term, normally 30 years. This might be earlier where the owner is in a position to redeem by paying the local authority the full amount or another agreed amount. As with other fixed securities over property, a charge’s ranking will govern priority given to payment out of the proceeds of any sale. Typically, ranking is determined by date of registration, although some securities can be given prior ranking over others. Charging orders will require to be registered in the appropriate land register. Provision is

¹The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012, Experience in cost recovery, paras 4.3.8, 4.3.14 and 4.3.19. Available at: http://www.scotland.gov.uk/Resource/0041/00412487.pdf
made for charging orders to be discharged before the end of fixed term and in those circumstances a discharge would require to be similarly registered. On expiry of the 30-year term the charging order is extinguished, but any outstanding debt which remains can be pursued through the civil debt recovery process.

9. A number of Acts make use of charging orders and they can be found in the housing and building repair contexts\(^2\), and also other areas such as health and social care\(^3\). The precise scope of the power to make a charging order and the processes attached to it vary according to the specific statute concerned.

10. In this context, the Bill amends the 2003 Act to make charging orders available to local authorities as a means of recovering costs, to include works costs and any administrative costs (and interest accrued) incurred under sections 28, 29 or 30 of that Act. In addition, it provides for recovery of any costs resulting from implementing the charging order itself such as the fee for registering the charging order in the appropriate land register.

**Legislative context**

**Building (Scotland) Act 1959**

11. Prior to the current system of building standards provided for by the 2003 Act, the Building (Scotland) Act 1959 ("the 1959 Act") dealt with the setting of building standards, compliance with and enforcement of those standards, and powers in relation to dangerous buildings.

12. Schedule 6 to the 1959 Act provided a framework for charging orders. Local authorities were empowered to make charging orders for the recovery of their expenses where they executed works under section 10 (to remedy contraventions of a building warrant or construction in the absence of a building warrant), 11 (to remedy non-conformity with building standards for certain purposes) or 13 (to deal with dangerous buildings). This entitled the local authority to burden the property with an annuity over a 30-year term, which had priority over existing and future burdens and incumbrances (with some minor exceptions).

13. East Dunbartonshire Council in its response to the Scottish Government’s consultation on the Community Empowerment and Renewal Bill\(^4\) stated, “The Building (Scotland) Act 1959 included provisions allowing authorities to recover costs by way of a Charging Order registered against the property. These provisions were not included within the Building (Scotland) Act 2003 but would be a helpful addition to the means by which authorities can attempt to recover charges”\(^5\).

\(^2\) For example, the Housing (Scotland) Act 2006, section 172, (repayment charges) and the Historic Environment (Amendment) Scotland) Act 2011, section 26, (liability of owner and successors for expenses of urgent works).

\(^3\) Health and Social Services and Social Security Adjudications Act 1983, section 23, (arrears of contributions secured over interest in land in Scotland).

\(^4\) A Consultation on the Proposed Community Empowerment and Renewal Bill. Available at: [http://www.scotland.gov.uk/Publications/2012/06/7786](http://www.scotland.gov.uk/Publications/2012/06/7786)

\(^5\) East Dunbartonshire Council, Response 117, Non-Confidential Responses. Available at: [http://www.scotland.gov.uk/Publications/2013/01/5167/downloads](http://www.scotland.gov.uk/Publications/2013/01/5167/downloads)
14. North Ayrshire Council considered the lack of charging order powers in the 2003 Act “to have been an error and should be quickly addressed by reintroduction of the Charging Orders so that local authorities have recourse to redeeming costs that are spent on properties that fall into a Dangerous Condition Survey”.

Building (Scotland) Act 2003

15. The 2003 Act (Schedule 6, paragraph 1) repealed the 1959 Act in its entirety and replaced it. The Explanatory Notes for the 2003 Act describe the Act as retaining the general framework of the 1959 Act while making changes to procedures for the building standards process to make it simpler, and to reflect existing practice.

16. The main provisions in the 2003 Act to which this Bill relates are sections 28, 29 and 30 of the 2003 Act, although it also amends section 47 of that Act with regard to extending appeals to charging orders. These are described below.

17. Section 28(10) of the 2003 Act makes provision for where a local authority carries out works further to a defective building notice. The local authority “may recover from the owner any expenses reasonably incurred by it in doing so”. Similar provision is made at section 29(2) and 29(3) where a local authority takes urgent action to deal with a dangerous building, and at section 30(4) where works are undertaken further to a dangerous building notice. The local authority may again recover any expenses reasonably incurred by it. Where expenses are not paid the local authority can pursue payment of the outstanding amount by means of established civil debt recovery processes and procedures set out in other legislation.

18. In respect of dangerous buildings, where a local authority has incurred expense but cannot find the owner to recover the costs, the local authority can use section 45 of the 2003 Act to seek authorisation from the Scottish Ministers to compulsorily purchase the building and/or its site.

19. Section 47(3) of the 2003 Act provides for an appeal to be made in relation to a range of decisions and notices which can be taken under the 2003 Act, including a defective or a dangerous building notice. A decision or notice is of no effect until the period allowed for an appeal has elapsed or the appeal is withdrawn or finally determined (section 47(4)).

Level of disrepair in Scotland’s built environment

20. Local authorities have various powers under a range of legislation to take action where an owner has not maintained property.

21. The Built Environment Forum Scotland (BEFS) responded to the member’s consultation in 2011 on Building Repairs. At that time it considered that the scale of the disrepair problem

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6 North Ayrshire Council, Response 145, Non-Confidential Responses. Available at: [http://www.scotland.gov.uk/Publications/2013/01/5167/downloads](http://www.scotland.gov.uk/Publications/2013/01/5167/downloads)

7 Keeping Scotland Safe, the Building Repairs (Scotland) Bill Consultation. Available at: [http://www.davidstewartmsp.org.uk/consultation/](http://www.davidstewartmsp.org.uk/consultation/)
and the potential financial implications were a major disincentive to local authorities. The Forum noted further that the extent of the problem was likely to increase:

“There are estimates from the Scottish House Condition Survey (2009) which indicate that almost eighty percent (78%) of dwellings in Scotland have some disrepair. When it is considered that new built property only adds 1% to the existing stock and that the majority of the current 99% of buildings will still be standing by 2050 then the scale of defective or dangerous buildings is potentially enormous.”

22. The Scottish Housing Condition Surveys for 2009, 2010 and 2011 demonstrates this trend toward increasing disrepair in the housing stock.

<table>
<thead>
<tr>
<th>Year</th>
<th>% of any disrepair</th>
<th>% of urgent disrepair</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>83%</td>
<td>48%</td>
</tr>
<tr>
<td>2010</td>
<td>81%</td>
<td>46%</td>
</tr>
<tr>
<td>2009</td>
<td>78%</td>
<td>44%</td>
</tr>
</tbody>
</table>

23. Another indicator of disrepair in Scotland’s built environment is the number of notices issued in relation to defective or dangerous buildings. Figures provided in response to a Parliamentary Question show that in 2010-11, 187 dangerous buildings notices were issued by 26 local authorities. This increased to 212 during 2011-12 with 27 local authorities making use of the notice procedure. For defective buildings in the same periods a total of 96 notices were issued by nine local authorities, which rose to 206 notices issued by 15 local authorities.

24. Local authorities can also take action without notice in relation to dangerous buildings, and again these figures show an increasing trend with local authorities taking action on 402 occasions in 2010-11 rising to 992 during 2011-12.

**Cost recovery**

**Local authority debt levels**

25. Local Authority Building Standards Scotland (LABSS) is an organisation which represents all 32 Scottish Local Authority Building Standards Services (formerly known as

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8 Building Repairs Consultation Summary, Response 11, Built Environment Forum Scotland. Available at: http://www.davidstewartmsp.org.uk/consultation/
9 Scottish Housing Condition Survey Key Findings 2011, paras 141 and 149. Available at: http://www.scotland.gov.uk/Publications/2012/12/49950
10 Scottish Housing Condition Survey Key Findings 2010, paras 114 and 122. Available at: http://www.scotland.gov.uk/Publications/2011/11/23172215/0
12 Question S4W-13217: Liz Smith, Mid Scotland and Fife, Scottish Conservative and Unionist Party, Date Lodged: 21/02/2013
13 Building Standards Annual Return 2010-11, Building Services Division, Page 17, paragraph 11.5. Available at: http://www.scotland.gov.uk/Resource/0040/00401521.pdf
14 Question S4W-17343: David Stewart, Highlands and Islands, Scottish Labour, Date Lodged: 20/09/2013
SABSM). LABBS contributed to a recent research project commissioned by the Scottish Government aimed at identifying ways to improve the recovery by local authorities of costs incurred on work to deal with dangerous and defective buildings under the 2003 Act. It expressed the view that a relatively weak system of enforcing cost recovery means that a significant burden of unrecovered costs is placed on the public purse by people who allow their buildings to deteriorate to the point at which councils must take action.

26. The research project collected information from eight local authorities on their cost recovery experience when carrying out their duties concerning defective and dangerous buildings. The project estimated the total unpaid debt for the eight authorities amounted to £1.5 million. This figure, when roughly extrapolated, produced an estimated all-Scotland figure of £3.9 million. Also of interest was the varying level of unpaid debts. The case study authorities demonstrated these could range from a few thousand pounds in the case of Highland to several hundreds of thousands in the cases of Fife, Glasgow, Renfrewshire and Borders.

27. The research project estimated the cost recovery rate to be around 50%.

Barriers to cost recovery

28. Responses to the member’s consultation highlighted a number of barriers to cost recovery. Identifying ownership in respect of multiple-ownership properties was highlighted as a particular difficulty. Local authority respondents indicated that searches for this information, and use of data protection legislation, were often protracted and resource-intensive.

29. Scottish Borders Council reported that it currently uses “a range of methods including writing to people at the address of the defective property; legal searches through Registers Direct and through undertaking detailed searches through search companies. Nevertheless, sometimes property owners cannot be traced and even where we are able to secure a lead on the location of any owner, we regularly encounter barriers under the Data Protection Act”.

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15 Available at: The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012
20 Recommendations for change, para 4.7.3, The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012
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30. The Scottish Federation of Housing Associations (SFHA) also confirmed that there could be problems in tracing owners in mixed tenure blocks, especially given the popularity of “buy to let” flats.23

31. In the cases described above, making a charging order would give the local authority some greater assurance that their outstanding costs will be recovered at some point in the future.

32. The introduction of charging orders was supported not only by local authority responses to the member’s consultation, but also in response to the Scottish Government’s more recent consultation on the Community Empowerment and Renewal Bill as the response from Renfrewshire Council illustrates:

“At present, cost recovery is pursued as a civil debt and additional costs are incurred in tracing ownership and pursuing individuals. Should a business or person become bankrupt, then any debt in relation to work under the Act joins the queue with all other creditors and often has a lower priority than those creditors. Additional legal cost can also be incurred where costs have to be pursued through the courts. Public authorities require to have the option of pursuing costs in the most effective manner possible and the reintroduction of charging orders would greatly assist this process. The charging order is placed upon the property rather than the individual and has priority over other debts. The costs are eventually recovered when the property is sold.”24

33. The recent research project also provides evidence that the current cost recovery methods are not sufficient and that charging orders would address some of the issues faced by local authorities. An example below characterises the diverse difficulties faced by local authorities in recovering costs:

“…one council is owed around £400,000 by an owner who is believed to be resident in the United States and who shows no intention of paying the debt.”25

Benefits of charging orders

34. The member’s consultation in 2011 on the proposed Bill sought views on the benefit of charging orders for recovery of local authority expenses. In response to the member’s consultation, the City of Edinburgh Council pointed out:

“This would be an option for owners who may not have sufficient capital at the time to allow them to privately arrange the repairs or fully to meet their

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23 Building Repairs Consultation Summary, Scottish Federation of Housing Associations, Response 26, Built Environment Forum Scotland. Available at: http://www.davidstewartmsp.org.uk/consultation/

24 Proposed Community Empowerment and Renewal Bill Consultation, Renfrewshire Council, Response 239, Non-Confidential Responses. Available at: http://www.scotland.gov.uk/Publications/2013/01/5167/downloads

liability if these are carried out in default. This may be of particular interest to those on low income or pension.”

35. West Dunbartonshire Council concurred with this view:

“Placing of a charging order could be a solution for some owners who are facing short term financial issues…as a charging order would allow them to have the defect remedied now and pay sometime later.”

36. Other advantages over existing cost recovery methods were identified. Some respondents suggested that charging orders would provide comfort to local authorities which would assist greatly in ensuring that defective or dangerous properties received the necessary repairs thereby ensuring public safety. Another attribute highlighted was that the “threat” of charging orders might encourage co-owners to co-operate.

37. The member’s summary set out the main benefits identified by those responding—

- Greater certainty to local authorities that they would ultimately recover their costs;
- Charging orders attach to the property rather than to the owner, therefore providing some security in cases where the owner does not have sufficient funds;
- Avoids the legal costs involved in pursuing the debt through a civil action;
- Would bring the position in line with the Housing (Scotland) Act 2006 which makes provision for the use of Repayment Charges.

38. The Scottish Government’s consultation on the Community Empowerment and Renewal Bill in June 2012 asked “What changes should be made to local authorities’ powers to recover costs for work they have carried out in relation to dangerous and defective buildings under the Building (Scotland) Act 2003?” An interesting response was submitted by Inverclyde Council, which explained the inequality across legislation with not having charging order powers available under the 2003 Act:

“…within Inverclyde Council Environmental Health Officers in addition to Building Standards Officers are authorised under Section 28 of this Act to deal with defective buildings. The vast majority of complaints regarding building defects are already channelled to Environmental Health Officers who utilise a range of legal powers including the Housing (Scotland) Act 2006, Environmental Protection Act 1990 and the Building (Scotland) Act 2003, dependant on circumstances, to deal with those defects. It is therefore

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27 Building Repairs Consultation Summary December 2011, paragraph 60. Available at http://www.davidstewartmsp.org.uk/consultation/
29 Building Repairs Consultation Summary December 2011, paragraph 43. Available at http://www.davidstewartmsp.org.uk/consultation/
30 Proposed Community Empowerment and Renewal Bill Consultation. Available at: http://www.scotland.gov.uk/Publications/2012/06/7786
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... strongly recommended that legislation to permit a charging order arrangement be seriously considered.”

39. Not only does this response pick up on the lack of parity across various pieces of legislation, but it shows that local authorities are having to make use of other legislation to deal with defective or dangerous buildings rather than by making use of the legislation created specifically to address these circumstances.

40. East Ayrshire Council in its response to the Scottish Government consultation advised of a particular problem with absentee owners. It believed charging orders should be reintroduced to allow costs incurred by the local authority to be charged against the land/property because “at present it applies to the owner. This can be a challenge if the owner is not UK resident. Given the number of derelict and vacant buildings with absent landlords a reintroduction of charges will be helpful.” This response also demonstrates the particular issues faced by rural communities where a higher proportion of owners might not live in the area having moved away for economic reasons or are second home owners who are now unable to maintain their property in the economic downturn.

41. Argyll and Bute Council thought the 2003 Act should be amended so that charging orders can be placed on a property where an owner or owners fail to pay for work undertaken by the local authority in default. The Council believed “currently the lack of such power is considered to contribute to a disincentive to become involved with disrepair/danger where the owner cannot be relied on to co-operate”.

42. The Scottish Government research project also identified similar benefits specifically pinpointing: the high probability that cost will be recovered in all or in part at some point, is easy to put in place, and is an incentive for the debtor to pay or negotiate settlement. There was general agreement among the project’s consultees that steps should be taken to improve cost recovery and that powers to “attach” debts to properties would be of major benefit.

43. It would be disingenuous not to acknowledge that there are some weaknesses associated with this cost recovery method because of the potential long-term nature of a charging order. However, much as it is recognised that charging orders are not a cure-all solution, the Bill will provide an additional remedy which will further contribute to the range of cost recovery remedies available to local authorities. Charging orders will be more appropriate in some cases

31 Inverclyde Council, Response 156, Non-Confidential Responses. Available at: http://www.scotland.gov.uk/Publications/2013/01/5167/downloads
32 East Ayrshire Council, Response 297, Non-Confidential Responses. Available at: http://www.scotland.gov.uk/Publications/2013/01/5167/downloads
33 Argyll and Bute Council, Response 317, Non-Confidential Responses. Available at: http://www.scotland.gov.uk/Publications/2013/01/5167/downloads
34 Perth and Kinross, Response 367, Non-Confidential Responses. Available at: http://www.scotland.gov.uk/Publications/2013/01/5167/downloads
35 Recommendations for Change, 4.7.10, The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012
36 Conclusions, 4.8.5, The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012
than others. It is for local authorities to make a decision on the cost recovery method based on their knowledge of the individual circumstances of each case.

**Scottish Government’s position**

44. An official from the Scottish Government, when providing evidence on Dangerous Buildings and Building MOTs on 18 January 2012 to the Local Government and Regeneration Committee, stated:

“We do not necessarily seek to reintroduce charging orders. In our business plan for this year, we have committed to working to secure the best mechanism whereby local authorities can recover their costs” 37.

45. Procedurally, the Scottish Government could have blocked the member’s proposal if, within the same session, it intended to give effect to the final proposal, i.e. provide for charging orders. The Scottish Government did not exercise this right.

46. The Scottish Government recognises local authority cost recovery is an issue and commissioned a research project to assist it in developing its plans for a cost recovery mechanism, which it is understood will be included in its forthcoming Community Empowerment and Renewal Bill.

47. In June 2012 the Scottish Government consulted 38 on the proposed Community Empowerment and Renewal Bill which sought comment on the possible cost recovery mechanism for dangerous and defective buildings.

48. Around a third of respondents provided views on the powers to recover costs with local authorities being the main group of respondents. The majority of these respondents felt that extended powers were required, with the most common suggestion, highlighted by a very significant number of those who responded, calling for the introduction of charging orders. 39

North Lanarkshire Council commented:

“The reintroduction of charging orders for local authorities to recover debt in relation to dangerous and defective buildings under the Building (Scotland) Act 2003 would be a positive move. This should allow authorities the power to recover all costs and associated fees, including interest, through a Charge over the property rather than through the courts (including full recovery on re-sale or transfer). Local authorities have previously expressed concern that the removal of charging orders has significantly affected their ability to...”

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37 Local Government and Regeneration Committee, 18 January 2012, Official Report, Col 544
38 Scottish Government consultation on the Community Empowerment and Renewal Bill. Available at: http://www.scotland.gov.uk/Publications/2012/06/7786
39 Consultation on the proposed Community Empowerment and Renewal Bill – Analysis of Responses, Theme 21 Dangerous and Defective Buildings, para 5.30 http://www.scotland.gov.uk/Publications/2013/01/9545
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recover costs. This is reflected in the amount of debt that is outstanding across all authorities for action taken on dangerous buildings\(^{40}\).

49. It is not known at this time what the Scottish Government proposes in terms of its plans for cost recovery except that it has indicated it will not be legislating for charging orders.

50. The member believes the charging order is a tried and trusted method and should be an integral part of the suite of recovery measures alongside civil debt recovery procedures and the Scottish Government’s proposals.

DETAIL OF THE BILL

51. The intention is that the charging order should operate by means of local authorities placing a formal charge over the building concerned. Section 55 of the 2003 Act gives a wide meaning to “building”, which covers any structure or erection, whether temporary or permanent. It embraces commercial and residential property, and includes where appropriate part of a building. This would be repayable over a fixed 30-year term, through 30 annual instalments, or earlier by negotiation, where the owner is in a position to redeem by paying the local authority an agreed sum. The charge itself would be registered in the Land Register of Scotland or, as appropriate, the Register of Sasines.

Repayable amount

52. The primary costs which are recoverable are those incurred by local authorities carrying out the work to a defective or a dangerous building. It also includes expenses incurred by a local authority in demolishing a building. Expenses extend to work contracted out by the local authority and, for example, any staff time in arranging the repairs. These are called the “qualifying expenses”.

53. In addition to works costs, the local authority can also recover the cost of registering or discharging a charging order, around £50 (see paragraphs 60 and 62), and any administrative costs associated with a charging order. The local authority can also recover interest. It is not considered necessary or appropriate for an interest rate to be specified on the face of the Bill, however, for transparency, a charging order requires that the interest rate is to be specified, together with any formula for calculating it. The rate is otherwise for the local authority to determine on the basis that it must of course be reasonable.

54. The repayable amount is the total of the qualifying expenses, the charging order registration or discharge fee, administrative or other expenses (e.g. cost involved in notifying the owner of the local authority’s intention to make a charging order or the time taken to prepare a charging order for registration) incurred in relation to the charging order, and interest.

55. The Bill does however, at inserted 46C(1), allow the local authority to determine a lower repayable amount. This might be used for example by the local authority to reduce the amount

\(^{40}\) Consultation responses on the proposed Community Empowerment and Renewal Bill – North Lanarkshire Response No. 327 [http://www.scotland.gov.uk/Publications/2013/01/5167/downloads](http://www.scotland.gov.uk/Publications/2013/01/5167/downloads)
to be repaid to encourage settlement of the outstanding debt. This fits also with one of the Bill’s overarching goals, in relation to encouraging early repayment as explained at paragraph 5.

56. Where an owner fails to pay the annual instalment amount the local authority can pursue the debt ultimately by means of civil debt processes. If any amount is outstanding at the end of the 30-year term this amount is immediately payable and, if not repaid, can be recovered in the normal manner through the courts.

**Early redemption**

57. As outlined, an essential part of the policy is the encouragement of early repayment. To this end the Bill provides a mechanism for early redemption. The Bill provides for this at inserted 46D(2). An owner might be encouraged to redeem the repayable amount early because it might result in a reduction in the sum to be paid. A change in an owner’s financial circumstances might prompt them to seek to agree an early settlement figure with the local authority. The local authority would identify an amount, taking account of sums which had been paid by it to third party contractors in carrying out repairs to the property or demolition work. It might decide to round down the total amount due to it or waive in-house administrative costs.

58. Where agreement cannot be reached between the local authority and the owner, the matter could be referred to the Scottish Ministers for determination. Both parties would have to submit information and any evidence to support their case, adhering to any timetable set by the Scottish Government. This information would then be considered by the relevant Scottish Government Division who would make a recommendation to the Minister who in turn would take a decision on the sum to be paid. Reference is made in this regard to section 46D(2)(b) of the Bill, which provides for a determination to be made by the Scottish Ministers, either generally by virtue of the order making power set out at section 46D(4), or specifically in regard to the charging order which is before them.

59. It is not anticipated that this facility would be used regularly and indeed an equivalent provision contained within section 172 of the Housing (Scotland) Act 2006 has not been used to date. The existence of this power of determination perhaps serves to assist the negotiation process and again feed into the policy of early repayment. The Scottish Ministers can make subordinate legislation under section 46D(4) to make further provision in relation to repayment or early redemption. An example of the use of this power could be specifying the factors that must be taken into account when ministers make a decision on the early settlement figure.

**Registration and discharge**

**Registration**

60. A charging order will be registered in the relevant land register. The fee for doing so is to be based on that for a “repayment charge” under the Housing (Scotland) Act 2006. A “repayment charge” under that Act can currently be registered for a fee of £60, however if the automated system is used it costs £50. It is anticipated that a charging order could be registered for the same cost. Fixed securities, such as standard securities, commonly rank according to the date on which they are registered in the relevant property register. Ranking refers to the priority order in which creditors are entitled to receive funds. And, in general terms, fixed securities rank
prior to those which are not fixed, such as floating charges. A charging order under the 2003 Act will rank according to the date of its registration and is a fixed security.

61. A charging order has effect from the date of registration, and attaches to the property over which it is secured. Ordinarily, it can be enforced against anyone who has derived title to the property, for example in consequence of having inherited it (section 46E(3)). However, a limited exception is provided for under the Bill in the case of a third party who acquired right to the property in good faith and at market value before the charging order is registered. Similarly, anyone who obtained title from that third party (section 46E(4)). A charging order cannot be enforced against such persons.

Discharge

62. A local authority is obliged to register a discharge of a charging order on payment of either the repayable amount or the agreed early settlement figure, as soon as is reasonably practicable following discharge of the order. The fee for discharge is anticipated to be the same as the fee for registration, which is £50. On receiving payment of the repayable amount or a sum agreed as redeeming the full amount, the local authority would prepare the discharge. The discharge would include information such as the title number and the date the charging order was registered in the land register. A discharge is effective from the date on which it is formally registered. It provides evidence that the charging order has been “cleared” and the title returned to an unencumbered state.

Appeals

63. The Bill amends section 47 of the 2003 Act in relation to appeals. Appeals are limited to matters which could not have otherwise been raised on an appeal against the original notice or the decision requiring the works to be carried out. It is therefore unlikely that an appeal against a charging order on the basis of the cost of the work or the apportionment of costs would be considered admissible.

64. An example of the circumstances which could conceivably lead to an appeal would be where a change of ownership has taken place in the period between when the costs were incurred by the former owner and the decision was taken by a local authority to seek a charging order. The new owner might, under reference to inserted section 46E(4) of the Bill, appeal on the basis that they were not aware of any work having been carried out by the local authority or outstanding debts to the local authority when they purchased the property.

65. An appeal will be by summary application to the sheriff. In accordance with the appeal procedure set out at section 47 of the 2003 Act, this requires to be made within 21 days of the date of the charging order or related decision concerned with it.

Form of a charging order and discharges

66. Inserted Schedule 5A sets out the form and content of a charging order, which is to cover such matters as the postal address of the building, the repayable amount, the amount of the annual instalments and the date the instalments are to be paid. Local authorities are also allowed to include other minor provisions concerning the charging order; these might concern further
ancillary information which a local authority considers relevant to the effective operation of the charging order.

67. Discharges must set out such matters as the title number and the date of registration in the appropriate land register, and the date the charging order was registered to enable the Keeper of the Registers of Scotland to register the discharge.

Commencement

68. The Bill contains two order making powers. Firstly, the provision set out at inserted 46A(3) allows the Scottish Ministers to make an order specifying the form of a charging order or a discharge. Inserted 46D(4) enables the Scottish Ministers to make further provisions about repayment or early redemption. These sections come into effect immediately after Royal Assent to allow the Scottish Government sufficient time to make any subordinate legislation to assist local authorities in the operation of the Act. Local authorities will be able to use the charging order procedure six months after Royal Assent. That is to say, the charging order mechanism created under the Bill applies to notices or works under the relevant provisions in sections 28, 29 and 30 which are given or carried out, as appropriate, after commencement of the new legislation six months from Royal Assent.

CONSULTATION

69. The member’s original proposal on this topic was lodged on 16 December 2010 (Session 3) and consulted on until 11 March 2011. The consultation, “Keeping Scotland Safe” was concerned principally with a change to cost recovery in respect of building repairs while consulting more widely on other possibilities relating to dangerous and defective buildings. The key change proposed was the reintroduction of charging orders as a means of cost recovery for both dangerous and defective building notices. Additionally it was proposed that there should be a change in the timescale requirement for owners to carry out repairs on defective buildings to ensure that there was adequate time for owners to make arrangements prior to the authority carrying out such work. Other subsidiary issues were also covered in the consultation paper, such as the provision for a licensing and inspection regime (building MOTs) and for an equal-share regime for houses in multiple ownership.

70. A total of 43 responses were received. Of these, 21 responses were from local authorities who implement current housing and building legislation, including the 2003 Act. Other respondents included community councils, Consumer Focus Scotland, housing associations, a property management company, bodies concerned with the built environment, a Member of the UK Parliament, an equality body and individual members of the public. A total of 35 (81%) respondents were in favour of legislation to provide for charging orders.

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71. Fewer than 10% of respondents (four respondents) stated that they did not support the proposals, the principal reason being that they did not consider that further legislation was necessary.\(^43\)

72. Respondents were less certain whether the other changes proposed in the consultation were necessary or deliverable; namely, the proposed extension to twelve weeks for repair works; the automatic apportionment of costs in equal shares in cases of shared ownership and a new certification and registration scheme.

73. The summary stated that the main reason for difficulty in enforcing the defective and dangerous building legislation was identified as financial. For example, respondents pointed to the limited resources available to local authorities in terms of staffing and finances to enforce repairs, as well as the difficulties of cost recovery in cases where the local authority had been obliged to undertake the repair work itself.\(^44\) Highland Council indicated that, “The staff resource most Local Authorities (LAs) have for dealing with defective and dangerous buildings means the LAs can only provide a reactionary level of service”\(^45\).

74. A number of respondents pointed to provisions in the Housing (Scotland) Act 2006 which assisted in the repair and cost recovery in respect of domestic premises and the lack of equivalent powers in relation to commercial properties. City of Edinburgh Council pointed out that, “No single Act currently meets the majority of circumstances and each has significant barriers to their implementation on a regular basis”\(^46\).

75. With regard to what could be done to improve the situation the main suggestions were: rationalisation and simplification of the plethora of legislation relating to defective and dangerous buildings; and a more effective system of costs recovery.\(^47\) Scottish Association of Building Standard Managers (SABSM now known as LABSS) stated:

> “Given the plethora of legislation, it would make sense for a single piece of legislation to apply consistently across all building types unless there were particular aspects relating to dwellings which it thought were worth keeping.”\(^48\)

\(^{44}\) Building Repairs Consultation Summary December 2011, paragraph 19. Available at http://www.davidstewartmsp.org.uk/consultation/
\(^{46}\) Building Repairs Consultation Summary December 2011, paragraph 23. Available at http://www.davidstewartmsp.org.uk/consultation/
\(^{47}\) Building Repairs Consultation Summary December 2011, paragraph 31. Available at http://www.davidstewartmsp.org.uk/consultation/
\(^{48}\) Building Repairs Consultation Summary December 2011, paragraph 32. Available at http://www.davidstewartmsp.org.uk/consultation/
76. However, SABSM was strongly of the view that the re-introduction of charging orders powers into the 2003 Act should be actioned now.49

77. In relation to extending the time limits, eight respondents identified only benefits in respect of this proposal, the key message being that owners should have sufficient time to carry out repairs before a charging order would be placed on a property. Fifteen respondents noted both advantages and disadvantages in respect of this proposal, while a further 10 respondents saw no advantages to this proposal. They argued that the current legislation provides minimum timescales only and that there is sufficient flexibility within statute for the time periods to be extended.50

78. Views were also sought on automatic apportionment of costs of repairs on an equal shares basis in the case of shared ownership and the introduction of a requirement for building owners to submit to a regular certification and regular inspection regime of their property. With regard to automatic apportionment of costs, respondents noted advantages such as: it would remove local authorities from potential litigation, which could be carried out among owners; the process would be much simpler and straightforward; and it should encourage a more strategic approach.51 Disadvantages highlighted were: the system could produce inequity in cases among different sized properties; the mechanism was likely to be of most benefit to commercial properties as these were likely to be larger than the residential properties in the same building; equal shares proportions might be in conflict with existing legislation; such a step was unnecessary as the Tenements (Scotland) Act 2004 made provision for the division of costs.52

79. In relation to the introduction of a requirement for building owners to submit to a regular certification and regular inspection regime of their property, the key message emerging from the responses to this question was that, while it was recognised that a mandatory property “MOT” could improve Scotland’s built environment, further examination and consultation on such a scheme was required before it could be supported or should be taken forward.53

80. The draft proposal fell at the end of Session 3 along with all other member’s bill proposals where legislation had not been introduced. This session, the member lodged a scaled-back draft proposal which focused solely on the introduction of charging orders to enable local authorities to recover their costs under sections 28, 29 or 30 of the 2003 Act. This was lodged on 17 January 2012 and accompanied by a statement of reasons. The Local Government and Regeneration Committee considered the draft proposal and the statement of reasons at its meeting on 8 February 2012.54

52 Building Repairs Consultation Summary December 2011, paragraph 94. Available at http://www.davidstewartmsp.org.uk/consultation/
53 Building Repairs Consultation Summary December 2011, paragraph 100. Available at http://www.davidstewartmsp.org.uk/consultation/
54 Official Report, Local Government and Regeneration Committee, 8 February 2012
81. Following this meeting the Committee wrote to the member asking him to consult Business Improvement Districts (BIDs) (a geographic area of a town where businesses vote to invest collectively in local improvements with the aim of creating an improved business environment and improve economic growth) before proceeding to lodge a final proposal.

82. Responses received from BIDs stated their general support for the introduction of charging orders which would enable local authorities to be in a stronger position to recover expenses incurred in relation to work they had carried out. BIDs believed the introduction of charging orders could encourage local authorities to become more proactive in dealing with the issue of dangerous and defective buildings which can blight a town.55 Business Improvement Districts Scotland wanted to ensure that BIDs were fully consulted and engaged as far as possible in measures concerning the improvement of defective buildings within their respective areas.56

83. The Local Government and Regeneration Committee further considered the draft proposal at its meeting on 21 February 201257 and agreed that it was satisfied with the member’s statement of reasons as to why further consultation was unnecessary. The member lodged his final proposal on 15 March 2012 and secured the necessary support to gain the right to introduce a bill.

ALTERNATIVE APPROACHES

Consideration of other policy approaches

84. Some of the responses to the consultation suggested the legislation in this area required to be streamlined. In particular the response from SABSM stated, “Given the plethora of legislation, it would make sense for a single piece of legislation to apply consistently across all building types unless there were particular aspects relating to dwellings which it thought were worth keeping.”58 The member acknowledged this suggestion but recognised that this was too substantial a task for a member’s bill.

85. The member also accepted the Scottish Government’s view relating to cost recovery on an equal share basis where a building has multiple owners responsible for maintenance. It explained recovery of costs on an automatic shares basis “is a simple concept and may speed up the debt recovery”. However, it was concerned that “title deeds often have provisions for repairs to be divided up based on such criteria as size and therefore it would seem inequitable to ignore

55 Responses to the consultation from Business Improvement Districts. Available at: http://www.davidstewartmsp.org.uk/consultation/
56 Response from Business Improvement Districts Scotland. Available at: http://www.davidstewartmsp.org.uk/consultation/
57 Official Report, Local Government and Regeneration Committee, 21 February 2012
these agreements.\(^59\) Consumer Focus Scotland also pointed out that where there are gaps in the title deeds or they are silent, the Tenement Management Scheme applies.\(^60\)

86. The member noted the majority of responses wanted charging orders to be available under the 2003 Act for defective and dangerous buildings. Therefore no alternative cost recovery means was considered, although a number of issues which arose when developing the Bill were considered and are explained below.

**Ranking of a charging order**

87. The member considered whether charging orders under the 2003 Act should have prior ranking over other charges, as was the case with charging orders under the 1959 Act. The case for and against this approach involves consideration of competing interests. It is recognised that by affording charging orders prior ranking status over existing securities, this would place local authorities in a stronger cost recovery position. However, the position of standard security holders, such as mortgage lenders, is also acknowledged. The position taken by the Bill respects the status of existing fixed security holders.

**Period of a charging order**

88. Another consideration was whether a fixed period should be provided for in terms of the repayment of a charging order or whether the period should be flexible. Most charging order schemes allow for payment to be made over a 30-year term, however the member considered there might be benefits to having a shorter term, to allow local authorities to recoup their costs more quickly. A shorter timescale would increase the annual instalment amount which some owners might be unable to afford therefore might be more likely to default. Equally, lengthening the period for payment for larger outstanding sums would make the payment more manageable for owners to pay but would make charging orders a less effective recovery method. The member therefore appreciates there is a balance to be struck and with no evidence to support changing the often used 30-year term, the member considered it appropriate to follow the established approach.

**Calling-up of a charging order**

89. Another point which arose in developing the policy approach was the calling-up of the charge. Essentially, “calling-up” represents a process in terms of which, in the event of payments not being maintained, the relevant formal agreement can be brought to an end, and an owner can be required to repay immediately the whole amount outstanding. There are limited powers of call-up of charging orders in the residential care context, under the Health and Social Services and Social Security Adjudications Act 1983. These powers are linked to the call-up provisions in the Conveyancing and Feudal Reform (Scotland) Act 1970 as modified in relation to the 1983 Act. Where the owner is alive these call-up powers are exercisable only in limited circumstances: on the homeowner’s insolvency, on the sale or transfer of their interest in land, or on the calling-up of a standard security over the property concerned. The member is aware that

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in today’s circumstances, depending on the precise nature of the calling up power, it might raise significant European Convention on Human Rights (ECHR) consequences. Accordingly the approach taken is deemed to be the most proportionate.

Charging orders continued liability on sale

90. Section 49 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 gives planning authorities the power to undertake urgent works required to preserve listed buildings. Section 26 of the Historic Buildings (Amendment) (Scotland) Act 2011 introduces new provisions (section 50A-G of the 1997 Act) for recovering expenses for works undertaken on buildings under the terms of the Act. These enable a notice of liability for expenses to be registered in the appropriate property register against a listed building. Should the property be sold the new owner will also be liable for the costs, along with the current owner. The member recognises this approach was considered to have been appropriate given the characteristics of the buildings it applies to, and their significance within Scotland’s heritage. The member did not however consider it to be the most appropriate approach for the wider circumstances of repairs to defective or dangerous buildings (most of which are not listed or otherwise of significant heritage value).

Retrospective application of charging orders

91. In evidence to the Local Government and Regeneration Committee on Building MOTs, SABSM, now LABSS, made a plea for charging orders to be attached to properties retrospectively. The member acknowledges the substantial amount of unrecovered debt to date and gave careful consideration to this approach. However, he was concerned that this approach could give rise to significant ECHR implications, with an increased risk of challenge, as owners could not have known at the time the debt was incurred that charging orders would be available. It is of course unusual for legislation to be applied retrospectively, and this tends not to be done other than in quite exceptional circumstances.

Defective and dangerous buildings loan fund

92. The member also took cognisance of the call to establish a loan fund. LABSS has consistently argued that as a priority, because local authorities need resources to meet essential costs and that this should be addressed by the Scottish Government. LABSS preference is for charging orders to be available along with the creation of a national fund on which authorities can draw to meet the costs of work on dangerous buildings. The member has sympathy with the potential benefits of this approach, however it is clear that a member’s bill is not the appropriate vehicle for creation of a loan fund because of the cost implications.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal Opportunities

93. The Bill’s provisions are not discriminatory on the basis of gender, race, age, disability, religion and belief or sexual orientation. Whilst applying a charge to a property might affect the market value of property if selling a property this is mitigated in that the work carried out will
have contributed to the integrity of the fabric or structure of the building and as a consequence will have had a positive impact on the value of the property. Older people and carers as a group are much more likely to have low incomes. The introduction of charging orders, where the debt is secured on the property and not the person, would have a positive impact on equalities as it would enable those on low incomes to pay off the debt at a more manageable rate.

Human Rights

94. Article 1 Protocol 1 (A1P1) of ECHR concerns the protection of property and provides that every natural or legal person is entitled to the peaceful enjoyment of his or her possessions. The right is a qualified one, it being further provided that no one shall be deprived of his or her possessions except in the public interest and subject to conditions. It is considered that the approach which the Bill takes to the use of charging orders is a fair and balanced one, which respects the terms of A1P1.

95. Article 6 concerns the right to a fair hearing. This provides that in the determination of a person’s civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 6 could be invoked in relation to any process for determining someone’s rights and obligations that did not provide any right of appeal. In that regard, it is considered that the Bill contains adequate and appropriate appeal provisions. The right is a restricted one, it not being possible to appeal a matter which could have been raised by means of an appeal against the original notice or decision requiring the execution of the works to which the charging order relates. But it is considered reasonable that an appeal cannot be used in those circumstances, so as to provide a second opportunity to appeal a matter which could have been appealed at an earlier point, and thereby to thwart or disrupt the process.

96. An example of the circumstances which might lead to an appeal would be where a change of ownership has taken place in the period between when the costs were incurred by the former owner and the decision was taken by a local authority to seek a charging order. The new owner might contest a charging order on the basis that they were not aware of any work having been carried out by the local authority or outstanding debts to the local authority when they purchased the property. While section 46E(4) of the Bill takes account of this situation, the local authority might not appreciate what has happened or may not readily accept what is being stated by the new owner. The person might therefore decide to appeal the charging order to allow the court to determine liability.

Island communities

97. The Bill is designed to benefit the whole of Scotland. It does not have specific implications for island communities and there is no reason to suppose that local authorities whose area consists of or includes islands have any different needs compared with mainland authorities in relation to cost recovery for building repairs. Condition of property is an issue for those in urban areas living in older tenements but also for island communities. Properties in island communities can be very old, have absentee owners and be subject to extreme weather conditions giving rise to maintenance issues.
Local Government

98. The Bill is intended to assist local authorities in carrying out their functions in relation to dangerous and defective buildings by providing another cost recovery mechanism without creating significant new regulatory or financial burdens on local authorities. It provides greater certainty that local authorities’ costs can be recovered over the long term and also helps to promote early settlement of outstanding debt by providing flexibility for local authorities to agree a lower sum to be repaid before the expiry of the 30-year period.

Sustainable Development

99. Unmaintained and derelict buildings can have a negative impact on communities, attracting vandalism and other anti-social behaviour. The Bill is expected to assist with sustainable development by enhancing the ability of local authorities to deal with defective and dangerous buildings where owners can’t or won’t, thus contributing to the protection of Scotland’s built environment for future generations.
DEFECTIVE AND DANGEROUS BUILDINGS (RECOVERY OF EXPENSES) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Non-Government Bills Unit on behalf of David Stewart MSP. Its purpose is to assist consideration by the Delegated Powers and Law Reform Committee, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of provisions in the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Bill amends the Building (Scotland) Act 2003 (“the 2003 Act”) to provide the framework for local authorities to make charging orders for recovery of expenses incurred by them where they have carried out work to defective or dangerous buildings under the 2003 Act.

3. The Bill provides for recoverable expenses to include the cost of the work itself, plus fees and administrative expenses incurred in connection with the charging order and discharge of it. Provision is made for the registration, repayment (including early redemption), and discharge of a charging order. The Bill also enables charging orders to be appealed in certain circumstances. Schedule 5A sets out the information which is to be contained within a charging order (and discharge of such an order).

Rationale for subordinate legislation

4. The Bill contains two powers to make subordinate legislation which are delegated to the Scottish Ministers. These powers are new, and no existing powers are amended or repealed. The powers are explained in detail in the following paragraphs, but in considering if and how provision should be set out in subordinate legislation rather than on the face of the Bill the member has had regard to -
This document relates to the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill (SP Bill 39) as introduced in the Scottish Parliament on 30 October 2013

- the need to strike a balance between the importance of ensuring full Parliamentary scrutiny of the core provisions of the Bill and making proper use of Parliamentary time;
- the relatively better position of the Scottish Ministers when compared with an individual member in making decisions on the best use of public resources to meet objectives;
- the possible requirement to make further provision over time, as the new legislation establishes itself, to ensure that where a need is identified to address practical matters of detail, so as to assist the effective operation of the Bill, then these can be readily taken forward.

Delegated powers

Note: the section references which follow are to the sections which are inserted into the 2003 Act by virtue of the Bill.

Section 46A(3) – Form of charging orders and discharges of charging orders
Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative

Provision

5. Section 46A(2) provides that charging orders (and discharges of charging orders) are to be in such form as the local authority determines to give effect to, and state the information required by, Schedule 5A. Section 46A(2) is however effectively subject to section 46A(3), which enables the Scottish Ministers to specify the form which charging orders (and discharges) must be in.

Reason for taking power

6. While Schedule 5A is intended to set out the necessary information to be contained in such orders (and discharges) to enable the new legislation to be operated, it is considered appropriate that the Scottish Ministers should be able to make alternative provision in relation to the details of the form which these are to take, should they so wish. Section 46A(3) therefore allows for that option.

Choice of procedure

7. This power, if exercised, can be used to set out the form which charging orders (and discharges) is to take. It can be used to make provision for their content, and the information to be contained in them. Given the narrow purpose of the power, and its focus on the administrative detail of the form and content of orders (and discharges), it is considered that application of the negative procedure to it will provide an appropriate level of scrutiny so far as any exercise of the power is concerned.
Section 46D(4)- Repayment or early redemption of amounts payable under a charging order
Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative

Provision

8. Under section 46D(2) the owner of a building which is subject to a charging order can seek early redemption of an order, at a reduced level of repayment. This reflects one of the Bill’s underlying policies of encouraging early repayment. In such circumstances, the owner would in the first place require to seek to reach settlement terms with the local authority. If this could not be done, the Bill enables the Scottish Ministers to determine the amount, on a case by case basis. Provision is also made for the Scottish Ministers to do so by reference to any order made by them under the power contained in section 46D(4).

Reason for taking power

9. Such an order may be useful to enable the Scottish Ministers, for example, to set out specific criteria to be taken account of by them in considering early repayment case where the owner and local authority have been unable to reach agreement. The power is expressed in quite wide terms, enabling the Scottish Ministers to make further provision, as they think fit, about the repayment or early redemption of amounts repayable under a charging order.

10. It was not considered appropriate within a member’s Bill to set out on the face of it a list of criteria, for example, which the Scottish Ministers would be obliged to have regard to when dealing with the above matters, and thereby constraining what could be done. At the same time the member recognises that the effective operation of the Bill may be assisted by means of the Scottish Ministers having the ability to make further provision about repayment or early redemption.

Choice of procedure

11. It is recognised that the power set out at section 46D(4), while being concerned with the particular matter of the repayment or early redemption of amounts repayable under a charging order, would enable the Scottish Ministers to make potentially significant further provision. Accordingly, it is considered appropriate that exercise of the order making power under section 46D(4) should be subject to the more rigorous form of Parliamentary scrutiny afforded by the affirmative procedure. This is accordingly provided for, under reference to the insertion which the Bill makes at section 1(d) to the subordinate legislation provisions set out at section 54 of the 2003 Act.
Local Government and Regeneration Committee

4th Report, 2014 (Session 4)

Stage 1 Report on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

Published by the Scottish Parliament on 18 March 2014
Local Government and Regeneration Committee

4th Report, 2014 (Session 4)

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Local Government and Regeneration Committee

Remit and membership

Remit:
To consider and report on a) the financing and delivery of local government and local services, and b) planning, and c) matters relating to regeneration falling within the responsibility of the Cabinet Secretary for Infrastructure and Capital Investment.

Membership:
Cameron Buchanan
Mark McDonald
Stuart McMillan
Anne McTaggart
Alex Rowley (25 February 2014 - present)
Kevin Stewart (Convener)
John Wilson (Deputy Convener)
Richard Baker (4 September 2013 – 25 February 2014)

Committee Clerking Team:

Clerk to the Committee
David Cullum

Senior Assistant Clerk
Fiona Darwin

Assistant Clerk
Seán Wixted

Committee Assistant
Fiona Sinclair
Ben Morton
Local Government and Regeneration Committee

4th Report, 2014 (Session 4)

Stage 1 Report on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. The Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill, (“the Bill”), was introduced to the Parliament on 30 October 2013 by David Stewart MSP, the member in charge of the Bill (“the member in charge”). The Parliament designated the Local Government and Regeneration Committee as the lead committee for the consideration of the Bill.

2. The Bill is a members Bill, as specified under Standing Order Rule 9.14. The Bill is accompanied by both a Policy Memorandum and Explanatory Notes, containing a Financial Memorandum.

3. We issued a call for written evidence on the Bill on 8 November 2013. The call for evidence closed on 31 January 2014 with 30 submissions\(^1\) being received in response.

4. On 19 February 2014 we took oral evidence\(^2\) from Gillian McCarney, East Renfrewshire Council; Dave Sutton, Institute of Historic Building Conservation; John Delamar, Midlothian Council; Alistair MacDonald, North Lanarkshire Council; and Susan Torrance, Scottish Federation of Housing Associations.

5. At its second and final oral evidence session we heard from Derek Mackay MSP, Minister for Local Government and Planning (“the Minister”) and the member in charge of the Bill.

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\(^1\) The written submissions received are available at: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69658.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69658.aspx) [Accessed 13 March 2014]

\(^2\) The Official Reports of each of the evidence sessions together with associated papers are available at: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29854.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29854.aspx) [Accessed 13 March 2014]
Purpose of the Bill

Policy intention

6. The policy objective of the Bill, as stated in the Policy Memorandum, is to amend the Building (Scotland) Act 2003 (“the 2003 Act”) in order to allow local authorities to make charging orders for recovery of expenses incurred where they have carried out work to defective or dangerous buildings under sections 28, 29 or 30 of the 2003 Act.

7. Currently when a local authority incurs repair costs having served either a defective building notice (under section 28 of the 2003 Act), a dangerous building notice (under section 30), or taken urgent action to deal with a dangerous building (under section 29), and has not been able to recover these costs from the owners of those buildings, the local authority can pursue the debt through civil debt recovery procedures. However, local authorities can face difficulties in tracing owners, and pursuing owners through the courts can be costly.

8. The intention is the charging order should operate by means of local authorities attaching a formal charge over the building concerned. Section 55 of the 2003 Act gives a wide meaning to “building”, which covers any structure or erection, whether temporary or permanent. It embraces commercial and residential property, and includes where appropriate part of a building. The charge would be registered in the Land Register of Scotland or, as appropriate, the Register of Sasines.

9. The charge relates to the amount the local authority has incurred in undertaking the repair costs. This would be repayable over a fixed 30-year term, through 30 annual instalments, or earlier by negotiation where the owner is in a position to redeem by paying the local authority an agreed sum.

10. The Bill in summary—

   • provides for costs and expenses incurred by local authorities in the repair, securing or demolition of defective or dangerous buildings to be recovered by way of charging order;

   • specifies recoverable expenses to include local authorities’ works costs, registration and discharge fees for a charging order and administrative expenses incurred in connection with arranging the registration and discharge of a charging order, and interest;

   • sets out the required contents of a charging order;

   • provides for the registration, repayment (including early redemption), and discharge of charging orders; and

   • provides for a charging order to be appealed in certain circumstances.

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3 Dangerous and Defective Buildings (Recovery of Expenses) (Scotland) Bill, Policy Memorandum, paragraph 2.
Background to the Bill

11. Prior to the current system of building standards provided for by the 2003 Act, the Building (Scotland) Act 1959 ("the 1959 Act") dealt with the setting of building standards, compliance with and enforcement of those standards, and powers in relation to dangerous buildings.

12. Schedule 6 to the 1959 Act provided a framework for charging orders. Local authorities were empowered to make charging orders for the recovery of their expenses where they executed works under section 10 (to remedy contraventions of a building warrant or construction in the absence of a building warrant), 11 (to remedy non-conformity with building standards for certain purposes) or 13 (to deal with dangerous buildings). This entitled the local authority to burden the property with an annuity over a 30-year term, which had priority over existing and future burdens and encumbrances (with some minor exceptions).

13. The 2003 Act (Schedule 6, paragraph 1) repealed the 1959 Act in its entirety and replaced it. The Explanatory Notes for the 2003 Act describe the Act as retaining the general framework of the Building (Scotland) Act 1959 while making changes to procedures for the building standards process to make it simpler, and to reflect existing practice.

14. Local authorities have a statutory obligation to deal with dangerous buildings under sections 29 and 30 of the 2003 Act. Under section 29, where the local authority considers that urgent action is required to reduce or remove any danger to people in or around the building, the general public or to adjacent buildings or places, it can carry out any necessary work. It may then recover expenses incurred in doing so from the owner. Section 30 enables local authorities to serve a notice on owners to undertake work the local authority considers necessary to remove the danger. Where owners fail to carry out the works they may be guilty of an offence and on summary conviction would be liable to a fine not exceeding level 5 on the standard scale (currently £5,000).

15. According to the Scottish Housing Condition Survey (SHCS) for 2011, it is estimated that 83% of dwellings in Scotland have some disrepair. The Survey also indicated that levels of "any disrepair" in urban and rural areas are about the same.\(^4\) In just under half the dwellings (48%) with some form of disrepair, that disrepair was urgent.\(^5\) The definition of an urgent repair in the SHCS is one which, if not carried out, would cause the fabric of the building to deteriorate further and/or place the health and safety of the occupier at risk.

16. According to the member in charge a rough Scotland-wide figure is calculated to be 700 charging orders that might be registered annually should the Bill be enacted. This figure might be substantially lower if local authorities decide not to make use of charging orders in all cases where debt is to be recovered or find the notification of an intention to apply a charging order leads to more owners


paying. Equally it might increase if local authorities take a more proactive approach to defective buildings.

17. The Scottish Government commissioned research to identify ways of improving recovery of costs that local authorities incurred on work to deal with dangerous and defective buildings under the 2003 Act.

18. The research project collected information from eight local authorities on their cost recovery experience when carrying out their duties concerning defective and dangerous buildings. The project estimated the total unpaid debt for the eight authorities amounted to £1.5 million. This figure, when roughly extrapolated, produced an estimated all-Scotland figure of £3.9 million. Also of interest was the varying level of unpaid debts. The case study authorities demonstrated these could range from a few thousand pounds in the case of Highland to several hundreds of thousands in the cases of Fife, Glasgow, Renfrewshire and Borders.

19. In Session 3 David Stewart MSP consulted on a proposal that was principally concerned with changes to cost recovery in respect of building repairs. The consultation received 43 responses with the majority agreeing that legislation for defective and dangerous buildings required reviewing and supported the proposed introduction of charging orders, or similar cost recovery mechanism.

20. The key change proposed was the reintroduction of charging orders as a means of cost recovery for both dangerous and defective buildings. The draft proposal fell at the end of Session 3.

21. The member in charge of the Bill lodged the current proposal which focused solely on the introduction of charging orders. This was lodged on 17 January 2012 accompanied by a statement of reasons.

22. The Local Government and Regeneration Committee considered the draft proposal and statement of reasons at its meetings on 8 February 2012 and 22 February 2012. The Committee agreed it was satisfied with the member’s statement of reasons as to why further consultation was not required. As a result the member in charge became entitled to introduce a members’ bill.

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Charging Orders

23. A charging order is a form of statutory charge which attaches to land and property, for example, in relation to the repayment of a loan, recovery of expenses incurred or grants made.

24. The member’s consultation summary set out the main benefits of charging orders identified by those responding—

- Greater certainty to local authorities that they would ultimately recover their costs;
- Charging orders attach to the property rather than to the owner, therefore providing some security in cases where the owner does not have sufficient funds;
- Avoids the legal costs involved in pursuing the debt through a civil action;
- Would bring the position in line with the Housing (Scotland) Act 2006 which makes provision for the use of Repayment Charges.\(^\text{10}\)

25. Charging orders are used in a number of enactments including the Building (Scotland) Act 1959; the Health and Social Services and Social Security Adjudications Act 1983; and the Legal Aid (Scotland) Act 1986.

26. The Registers of Scotland told us that as of November 2013, 4,426 orders had been registered in the Land Register and 7163 in the register of Sasines. The fee charged for charging orders and discharges in both the Land Register and the Register of Sasines is £60.\(^\text{11}\)

GENERAL PRINCIPLES OF THE BILL

27. The Bill provides an additional means by which local authorities can recover costs and expenses they incur in carrying out their statutory duties in relation to dangerous and defective buildings.

28. Provisions are also made for defining what constitutes recoverable expenses; content of a charging order; registration, repayment and discharging of a charging order; and appeal against a charging order.

29. The Scottish Government agree that cost recovery powers in the Building (Scotland) Act 2003 need to be improved.\(^\text{12}\) The Scottish Government indicated in evidence they would be prepared to support the Bill subject to key attributes for improved cost recovery powers being addressed to allow the improved powers to be activated by local authorities sooner.


\(^{11}\) Correspondence from Registers of Scotland, Keepers Office http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/General%20Documents/20131211-Keeper_of_the_Registers_letter_of_reply.pdf [Accessed 13 March 2014]

\(^{12}\) Scottish Government. Written submission.
30. The following part of our report considers the evidence received on the Bill and sets out our conclusions and recommendations thereon.

Cost Recovery

31. Section 46D(1)(a) provides for the repayable amount under a charging order to be paid by means of 30 annual instalments, these being due on the same date each year. Section 46D(1)(b) confirms that where an annual instalment is not paid, then normal civil debt recovery procedures can be taken by local authorities to pursue recovery of that instalment, together with charging order fees and connected administrative or other expenses.

Timescale

32. Most written and oral evidence commented on the timescale of recovery of expenses incurred by the local authority. As drafted the Bill is extremely prescriptive and the charging order must provide for the repayable amount to be paid in 30 annual instalments.

33. Evidence gave the general consensus that 30 years was too long a period of time for the recovery of expenses, particularly where smaller amounts were concerned.

34. It was suggested in oral evidence to us that the average cost spent by a local authority to make a dangerous and defective building safe was between £2k and £3k.

35. John Delamar from Midlothian Council told us—

“We do the minimum works under section 29 of the Building (Scotland) Act 2003 to make the building safe. A debt that was recovered would generally be for the cost of Heras fencing, scaffolding and contracts for cherry pickers, for example. The figures that we deal with are probably around about £100 to £3,000.”  

36. Mr Delamar went on to say—

“We suggest that the time [for repayment] should be relative to the person’s means to pay and the costs involved, rather than just a standard 30-year period.”

37. Dave Sutton from the Institute of Historic Building Conservation (IHBC) recognised that although £3k is the average amount quoted for a one-off repair to make a building safe, the same building could have further interventions over a period of years thereby accruing further costs.

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“…£3,000 might be the cost for a one-off incident, but such buildings tend to have a number of incidents over a period of years rather than having the problems solved in a one-off.”\(^{15}\)

38. In written evidence Argyll and Bute Council stated—

“Where works for the repair or securing of a building are undertaken by this Council costs claimed from an individual owner of a building, or part thereof, are rarely in excess of £10,000.00. Where a building is demolished the costs claimed by this Council are rarely in excess of £40,000.00. As the majority of works undertaken are for the repair or securing of a building it is considered that a 30 year annuity period for a debt of less than £10,000.00 is excessive and that it may therefore be beneficial to provide differing annuity periods for different levels of debt.”\(^{16}\)

39. Perth and Kinross Council were of similar view noting—

“Whilst it is understood why the 30 year payback is being introduced, this seems too long to work as an incentive to the local authority to do work in default. Perhaps the wording should stipulate a maximum payback period of 30 years with flexibility for shorter periods where sums outstanding are not excessive.”\(^{17}\)

Views of the Scottish Government

40. The Scottish Government agreed that cost recovery powers need to be improved and recognised the proposals suggested in the Bill are an improvement to the current situation.\(^{18}\)

41. With regards to the timescale for the recovery of costs, the Minister stated—

“I think that, if the 30-year period was the standard, it would be too rigid for every circumstance. Having greater flexibility and different options would be very welcome. Some of the repairs might not warrant a 30-year payback period, of course, so greater flexibility should be considered at this stage.”\(^{19}\)

Views of the member in charge

42. The member in charge of the Bill concurred that the timescale posed for cost recovery was perhaps too restrictive and went on to state—

“I take on board the point that the period should vary according to the level of the debt. If the debt is only £5,000 or £6,000, five years would be a better period.”\(^{20}\)


\(^{16}\) Argyll and Bute Council. Written submission, page 3.

\(^{17}\) Perth and Kinross Council. Written submission, page 1.

\(^{18}\) Scottish Government. Written submission.


Flexibility of payment

43. Repayment of costs is required under the Bill to be by annual payments until all costs have been recovered. This method of cost recovery was deemed in some evidence as being too rigid and may hinder people paying back costs in an annual lump sum.

44. Dave Sutton from IHBC told us—

“If someone receives a monthly salary, it may be more helpful for them to have a monthly charge than to have a lump sum requested once a year. I think that most councils will apply a degree of flexibility provided that they get the money back within a reasonable period.”

45. East Lothian Council agreed, stating—

“A LA [local authority] might prefer to choose payment by bi-annual instalments or even instalments as agreed with a landowner that suits parties better. Thereby ensuring the debt is repaid at a suitable pace and amount for the LA and/or landowner.”

46. We consider the current drafting to be overly inflexible and would welcome amendments at Stage 2 allowing local authorities to recover expenses over a suitable timescale related to the amount incurred, and the debtors ability to pay.

Retrospective Costs

47. Given there is approximately £4 million worth of debt due to local authorities, as a consequence of their undertaking of this work, representations were received to authorise retrospective notices relating to the outstanding debt.

48. COSLA suggested in written evidence that it would be of great financial assistance to local authorities if the provisions to recover outstanding debt could be applied retrospectively.

49. A number of local authorities suggested such a move, although in oral evidence others were more cautious.

50. Alistair MacDonald from North Lanarkshire Council stated—

“I do not think that having the ability to backdate charging orders would be a great benefit. Finding out when a building had changed hands would involve administration and legal costs.”

51. Derek Mackay, Minister for Local Government and Planning, noted legal and technical issues with introducing legislation that was retrospective and indicated he was continuing to explore the competency of a retrospective provision.

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22 COSLA. Written submission, paragraph 6.
52. **We do not support the addition of retrospective powers to the Bill.**

**Funding**

53. Local Authorities indicated they have limited capital and revenue immediately available to undertake this work pending repayments.

54. Many local authorities who responded to our call for evidence suggested the Scottish Government set up a national fund from which they could access funds to undertake their statutory duties in relation to urgent repairs to dangerous and defective buildings.

55. Fife Council stated—

   "Unless monies can be provided via a funding mechanism such as a central capital fund allocation or accessed from a national loan fund for these purposes, capital can only come from other budgets to the detriment of other Council priorities."\(^{25}\)

56. Glasgow City Council stated that if necessary they would intend approaching the Scottish Government to seek capital resources.\(^{26}\)

57. In response, Derek Mackay, the Minister, told us—

   "...we as a Government are not attracted by creating a new ring-fenced pot of money that local authorities can draw on. [...] If we were to create a specific fund for this bill, it would be a form of re-ring fencing local authority resources, which is not a road that we would choose to go down."\(^{27}\)

58. **We consider the issue of a national fund to be a matter for the Scottish Government and local authorities, and not one for the Bill to legislate upon.**

**Other issues**

**Listed buildings**

59. In written and oral evidence provided by the IHBC, issues were raised about potential legislative conflicts between the defective and dangerous buildings regime in the 2003 Act and other legislation concerned with conservation of buildings. The IHBC sought a more joined-up method across the relevant pieces of legislation to create a more effective approach.

60. **The Committee acknowledge these concerns but note the member in charge’s position that the provisions of his Bill are focused and narrow, and could not address such an issue.**


\(^{26}\) Glasgow City Council. Written submission, page 1.

Housing Associations

61. The Scottish Federation of Housing Associations (SFHA) told the Committee that currently housing associations must rely on the provisions of the title deeds of each tenement, or rely on provisions of the Tenements (Scotland) Act 2004 and a tenement management scheme in order to legally undertake common repairs with or without the consent of all owners.

62. Giving oral evidence from the SFHA, Susan Torrance stated—

“A parallel power to the charging order, or co-operation or collaboration with local authorities so that they use their charging order powers to recover costs, would be extremely useful.”

63. Questions were raised around increasing the flexibility of charging orders allowing housing associations to pay building repair costs upfront and having these costs recovered through local authorities on their behalf thereby avoiding taking cases through the court system.

64. Gillian McCarney from East Renfrewshire Council commented—

“…that would mean taxpayers' money being used to recover the costs for a housing association as opposed to the housing association recovering the costs for itself. My concern would be about the administration and additional costs for the council.”

65. John Delamar from Midlothian Council was of the same opinion stating—

“…legal implications for local authorities taking on the burden of private sector debt through a charging order would have to be looked at.”

66. Acknowledging the concerns raised by the Scottish Federation of Housing Associations, the member in charge explained the limitations of the proposed Bill in this area stating—

“…if there could be internal arrangements between local authorities and housing associations to resolve the problems that Susan Torrance raised last week, I would be more than happy to extend the scope of the bill. However, I feel that that is beyond the competence of the bill.”

67. We note the concerns raised around this issue. We would encourage local authorities to work closely with housing associations and take as flexible as possible an approach to assist them when circumstances permit.

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Prescription and limitation

68. The Law Society of Scotland, and others, suggested that by providing in the charging order for payment by instalments each instalment could be interpreted as becoming, in effect, an annuity. These then become subject to section 6 of the Prescription and Limitation (Scotland) Act 1973 which provides that the instalment prescribes after a period of five years. This prevents the local authority from taking any further action to recover the instalment 5 years after it falls due. The member in charge of the Bill accepts that position although contends that this does not affect the totality of the sum covered by the charging order. We note the members suggestions that at the end of the 30 year period the entire unpaid sum becomes due for payment as a consequence of the provision of the inserted section 46D(1)(c).

Appeals mechanism

69. The Policy Memorandum states the Bill amends section 47 of the 2003 Act in relation to appeals. Appeals are limited to matters which could not have otherwise been raised on an appeal against the original notice or the decision requiring the works to be carried out. It is therefore unlikely, the Policy Memorandum contends, that an appeal against a charging order on the basis of the cost of the work or the apportionment of costs would be considered admissible.

70. An example of the circumstances which could conceivably lead to an appeal would be where a change of ownership has taken place in the period between when costs were incurred by the former owner and the decision was taken by a local authority to seek a charging order. The new owner might appeal on the basis they were not aware of any work having been carried out by the local authority or the existence of outstanding debts to the local authority when they purchased the property.

71. Concerns were voiced by local authorities around the appeals process with Fife Council raising the issue of resource implications for local authorities, and potential abuse of the process by persons wishing to avoid or delay payments.

72. Moray Council stated in written evidence—

“The charging order is subject to appeal this could delay the process or have implications to the recovery of costs.”

73. The Scottish Government advised that charging orders can be appealed by summary application to the sheriff which could be used as a stalling tactic. The Scottish Government also suggested that any appeals mechanism must be defined to prevent it being used to stall or prevent registration in the appropriate property register.

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32 Correspondence from David Stewart MSP, Member in charge of the Bill
http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/Inquiries/LGR-S4-14-6-5_Member_in_Charge_of_the_DD_Buildings_Bill_Letter.pdf [Accessed 13 March 2014]
33 Explanatory Notes, paragraph 19.
36 Scottish Government. Written submission.
74. In oral evidence the Minister added—

“...I am not attracted to an appeals mechanism in which the Government or reporters make determinations or decisions around costs…”

75. The member in charge further explained the appeals mechanism contained within the Bill.

“In the appeal process that I am providing, I am not giving owners an opportunity to say that the work should not be done or that the cost should not be apportioned in that way. The process in the bill will cover purely technical issues, such as whether ownership was transferred in good faith at market value, which might give the owner an opportunity to appeal.”

76. **We are content with the proposed appeal provision as currently provided.**

**Calling-up**

77. Calling-up of a charging order, as detailed in the Policy Memorandum, represents a process in terms of which, in the event of payments not being maintained, the relevant formal agreement can be brought to an end, and an owner can be required to repay immediately the whole amount outstanding.

78. COSLA, while appreciating that allowing charging orders to be called-up had been rejected as part of this Bill owing to the human rights issues, felt there was potential for a balance to be struck where a property is unoccupied.

“In those circumstances there is a significant disincentive upon a LA to utilise its powers under s28, notwithstanding that the property may form part of a tenement with other properties being adversely impacted. Therefore perhaps something like a two tier system could be introduced whereby a charging order placed on an occupied building could not be called up, but one placed on a building which is unoccupied (or at least one placed on an abandoned building) was able to be called up.”

79. The Law Society of Scotland were of similar view stating—

“...the Society believes that local authorities will be discouraged to invoke the terms of Section 28 of the Building (Scotland) Act 2003 notwithstanding that the property may form part of a tenement with other properties being adversely impacted. The Society therefore believes that some consideration be given to a two tier system where a charging order placed on an occupied building could not be called up, but one placed on a building that is

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39 Policy Memorandum, paragraph 89.
40 COSLA. Written submission, paragraph 12.
unoccupied (or at least one placed on an abandoned building) was able to be
called-up.”

80. The member in charge indicated that a power, such as calling-up of charging
orders, was contained in the residential care context under the Health and Social
Services and Social Security Adjudications Act 1983 and those powers are
understood to be exercisable under that Act in limited circumstances only.

81. The member in charge went on to state—

“I believe my approach, not to attach a similar power is proportionate for the
particular circumstances of my Bill, which is concerned with a quite different
subject matter. I believe providing a calling-up power would be likely to raise
a number of issues, including some of a potentially significant nature with
respect to European Convention on Human Rights considerations relating to
property rights.”

82. We note the arguments put to us and accept the member in charges’
position in relation to proportionality.

Interim orders/Registering liability for costs
83. We heard about “people chopping and changing ownership to try to evade
repayment” and that power to make an interim order or a liability order would
help address such a situation. It was suggested by Fife Council—

“An intermediate mechanism to register a “notice of potential liability for
costs” should be considered, which does not require an amount to be
specified at the point of registration (similar to that available under the
Tenements (S) Act 2004).”

84. We have sympathy with this suggestion and are keen to minimise
avoidance opportunities. We recommend consideration be given to
providing appropriate powers in this regard, which we understand are under
consideration by the Scottish Government.

Financial Memorandum

Finance Committee Report
85. The Finance Committee considered responses to their call for evidence and
wrote to us on 5 February 2014. Much of what they covered is addressed earlier
in this report.

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41 Law Society of Scotland. Written submission, page 5.
42 Correspondence from David Stewart MSP, Member in charge of the Bill
http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/Inquiries/LGR-
S4-14-6-5_Member_in_Charge_of_the_DD_Buildings_Bill_Letter.pdf [Accessed 13 March 2014]
February 2014, Col 3112.
45 Correspondence from Finance Committee Convener
http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/General%20D
ocuments/Letter_from_Finance_Committee.pdf [Accessed 13 March 2014]
86. On the general question of the costs in the memorandum respondents to the Finance Committee’s call for evidence on the Financial Memorandum of the Bill were broadly content that administrative costs which would apply were captured with Angus Council predicting them as being “minimal.” 46 The City of Edinburgh Council stated that “the expense of invoking the charging order is more than offset by the gain of debt recovery.” 47

87. It was noted some reservations lay around the savings claimed as set out in the Financial Memorandum.

88. Fife Council stated—

“The reference to “savings” in para 60 [of the FM] is potentially misleading. An improved cost recovery rate would reduce losses but would not achieve savings. In fact, if the view in para. 31 is correct and local authorities do become more proactive in issuing defective buildings notices and taking action into their own hands, it is more likely that local authorities will incur additional expenditure than make savings.” 48

89. Whilst it was noted local authorities were already required by statute to take appropriate action with regard to dangerous buildings, it was suggested the fact that the Bill would also apply to defective buildings might result in increased expenditure. COSLA, for example, stated—

“Care needs to be taken with the assumption of ‘savings’ as a result of the DBB Bill. Firstly, an improved cost recovery rate would reduce losses but would not achieve savings, and secondly, such an assumption about savings needs to be tempered by the likelihood that the level of work (and therefore bad debt) will increase if a cost recovery mechanism is put in place.” 49

Delegated Powers

Delegated Powers and Law Reform Committee Report

90. There are provisions in the Bill which will confer delegated powers to make regulations. As with all bills containing such powers, the Delegated Powers and Law Reform Committee (“DPLR Committee”) considered the provisions and reported to this Committee.

91. The DPLR Committee report on the provisions was published on 22 January 2014.\(^{50}\)

92. The Committee drew the proposed power to section 46A(3) of the Building (Scotland) Act 2003 inserted by section 1 of the Bill to the attention of the Parliament on the basis that the Committee considered the power should be amended to provide a power to amend new schedule 5A to the 2003 Act, as inserted by section 1 of the Bill.

93. The member in charge of the bill confirmed to the Local Government and Regeneration Committee in oral evidence that—

> “I will amend the bill at stage 2 to take account of the Delegated Powers and Law Reform Committee’s suggestion that the Scottish ministers should be able to amend directly schedule 5A to alter the form and content of a charging order, rather than there being the prospect of its being amended by subordinate legislation.”\(^{51}\)

**CONCLUSIONS ON THE GENERAL PRINCIPLES OF THE BILL**

94. In conclusion, the Committee reports to the Parliament it is content with the general principles of the Bill and recommends that the Bill be agreed at Stage 1.

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\(^{50}\) Scottish Parliament Delegated Powers and Law Reform Committee. 6th Report, 2014 (Session 4). *Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill.* (SP Paper 457)

Present:
Sarah Boyack (Committee Substitute) Cameron Buchanan
Stuart McMillan Mark McDonald
John Wilson (Deputy Convener) Anne McTaggart
Kevin Stewart (Convener)

Also present: David Stewart

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill:
The Committee took evidence on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill from—

Gillian McCarney, Planning and Building Standards Manager, East Renfrewshire Council;
John Delamar, Building Standards Manager, Midlothian Council;
Alistair MacDonald, Assistant Business Manager (Building Standards Operations), North Lanarkshire Council;
Susan Torrance, Policy Manager, Scottish Federation of Housing Associations;
Dave Sutton, Publicity Officer and Committee Member, Institute of Historic Building Conservation.

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill (in private): The Committee considered the evidence received.
Scottish Parliament
Local Government and Regeneration Committee

Wednesday 19 February 2014

[The Convener opened the meeting at 10:03]

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill: Stage 1

The Convener (Kevin Stewart): Good morning and welcome to the fifth meeting in 2014 of the Local Government and Regeneration Committee. I ask everyone to ensure that they have switched off all mobile phones and other electronic equipment, please. We have received apologies from Richard Baker, who is unable to attend today's meeting, and I welcome Sarah Boyack in his place.

I also welcome David Stewart, who is attending in his capacity as the member in charge of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill. For the benefit of the witnesses, I will outline our approach to questions: committee members will ask their questions first and David Stewart will then come in with his questions.

Unfortunately, one panellist is still trying to get here. Gillian McCarney, the planning and building standards manager at East Renfrewshire Council will join us later. I welcome John Delamar, the building standards manager at Midlothian Council; Alistair MacDonald, the assistant business manager of building standards operations at North Lanarkshire Council; Susan Torrance, the policy manager at the Scottish Federation of Housing Associations; and Dave Sutton, the publicity officer and a committee member at the Institute of Historic Building Conservation.

Does anyone wish to make an opening statement?

Susan Torrance (Scottish Federation of Housing Associations): I will say a few words. The other witnesses are from local authorities, and the Scottish Federation of Housing Associations comes to the bill from a slightly different perspective.

Roughly 90 per cent of the 277,000 homes that housing associations own in Scotland are up to the Scottish housing quality standard and are in good repair. However, there is an issue relating to older tenements that are owned jointly. Although housing associations have the power to intervene and make common repairs to ensure that their tenants and the fabric of the building are safeguarded, the cost recovery mechanisms are civil remedies against individuals, which can be long winded and in many cases result in the costs being written off as an expense that the association has to bear. A parallel power to the charging order, or co-operation or collaboration with local authorities so that they use their charging order powers to recover costs, would be extremely useful.

The Convener: Is that a particular difficulty for smaller housing associations?

Susan Torrance: Absolutely. For a lot of community-based associations, mainly in Glasgow and Edinburgh, it is a drain on resources in terms of both staff time, if owner-occupiers have to be pursued for any liability, and the capital that must be expended in the first instance and then written off. If the cost could remain as a liability, through a charging order, that would be extremely useful; having it written off is obviously not useful.

The Convener: Mr Sutton, we received from your organisation a pretty lengthy submission that mentions quite a lot about the existing legislation, some of which seems to be untested. Would you like to comment on that?

Dave Sutton (Institute of Historic Building Conservation): I will make three quick points. First, we recognise the importance of tackling the issue of vacant and derelict buildings, but we are concerned that the bill looks rather narrowly at notices under the Building (Scotland) Act 2003. I work in a council that uses a repairs notice, or an urgent works notice, whether the subject is a listed building, an unlisted building or in a conservation area, or an amenity notice that can be used under the planning legislation. We would like to see a bit more joined-up thinking across those bits of legislation to create a more effective approach. For example, the Historic Environment (Amendment) (Scotland) Act 2011, on which we made representations, introduces a liability order that is being picked up in other legislation that is going through the Parliament now.

Why do we need the bill? The one bit of data that we have on the heritage side is the buildings at risk survey that is carried out every two years in Scotland, where 8 per cent of buildings are at risk. Those are category A or top-notch buildings, and the figure has fallen over the past few years from around 8.3 per cent. In England, the figure is 4 per cent. When we have our six-monthly meetings with Historic Scotland, we ask why there is such a difference in Scotland and why the future of twice as many buildings in broadly the same categories is threatened. That is the key reason why we need the bill.
We also need to develop a more robust preventative approach through a range of measures including VAT, fiscal incentives and so on. That is not the role of a member’s bill, but it is an issue for the minister and the Parliament to consider. Do we value and protect Scotland’s heritage? If we do, why do we not have a more robust protection and preservation approach?

**The Convener:** I do not want to stray too much off the bill, but you just referred to differences between England and Scotland. Is that because there is more planning flexibility in England than there is here? From my local authority experience, it seems to me that some planners and heritage bodies are unwilling to see certain things going into a building and on some occasions would rather that a building went to wrack and ruin than had a change of use.

**Dave Sutton:** Data is collected in Scotland only every two years. We have been lobbying Historic Scotland to have it done annually, working with local authorities, as is done in England, where all the councils complete an electronic survey to gather the data annually.

**The Convener:** I am trying to get at why this seems to be different in England. Is its planning regime much more flexible in terms of allowing changes of use for buildings?

**Dave Sutton:** I think that there have been recent changes in that direction. For derelict buildings, however, the planning system will generally be fairly flexible as to uses if they are consistent with the building.

**The Convener:** It has to be said that that is not my experience.

**Dave Sutton:** I am just giving you my experience. In England we have seen specific action, particularly by the Big Lottery Fund, to target buildings at risk. I am not saying that that accounts for the whole of the difference between the figures of 4 and 8 per cent of buildings at risk in England and Scotland respectively, but I think that repeated targeting of funding to address what is identified as a problem makes a good contribution. As I said, we are struggling to get the data in Scotland, rather than moving on to think about how we target the problems.

**The Convener:** I will go back to the bill. Folks were asked for their views on the proposed 30-year repayment period and your organisation said that that is far too long a period and it suggested a 10-year maximum repayment period. Would you expand on that, Mr Sutton?

**Dave Sutton:** I have been talking to building control colleagues on that point. The 30-year period would mean that, in effect, we would be giving a free loan to the owner of the building. We must remember that the cost of urgent repair work to buildings is in the range of £6,000 to £10,000, if the work is done effectively at an early stage. I am not saying that there are not costs that go above that range, but the administrative costs of a 30-year repayment period would far outweigh a relatively small sum of repair costs.

I am happy, though, to accept the view of my building standards colleagues, who have to deal with the matter day to day. My experience is of the civil proceedings that we go through. At the moment, we have a case involving an amenity notice. The case has taken 15 months and the sum is being treated as negotiable, so we will not get back the full costs that we spent in undertaking the works in default. There are also the costs of going through the courts for 15 months.

**The Convener:** Mr MacDonald, would you like to comment on the 30-year repayment period?

**Alistair Macdonald (North Lanarkshire Council):** The 30-year repayment period would be fine if it was for a substantial sum of money. The average debt in North Lanarkshire Council is £3,000. If a charging order was split over 30 annual instalments, that would equate to only £100 per year. If the repayment was a low sum of money per annum and was defaulted on, the council would have to chase that sum and it might think that it would not be effective to do so.

At the moment, the council would probably use the usual debt recovery mechanism to pursue a sum such as £3,000, but £3,000 repaid over 30 years is a low amount per annum. If the person who owed it was not able or willing to pay and defaulted, I do not know whether we would chase such low individual payments. A 30-year repayment period would be valid for substantial amounts of money.

**John Wilson (Central Scotland) (SNP):** Mr Macdonald said that the average debt was £3,000. Is that the average debt for repairs to defective buildings?

**Alistair Macdonald:** Basically, in North Lanarkshire, the defective and dangerous buildings debt that we try to recover averages £3,000, which is at the low end.

10:15

**John Wilson:** Do the other witnesses relate to that figure of £3,000? It seems low in relation to the issues that are being raised in the bill.

**John Delamar (Midlothian Council):** The works that we normally get involved in are usually a couple of hundred pounds for making the building safe or carrying out the minimum amount of works. Midlothian Council does not tend to go in and repair a building. We do the minimum works
under section 29 of the Building (Scotland) Act 2003 to make the building safe. A debt that was recovered would generally be for the cost of Heras fencing, scaffolding and contracts for cherry pickers, for example. The figures that we deal with are probably around about £100 to £3,000.

The Convener: Is 30 years a fair amount of time?

John Delamar: We suggest that the time should be relative to the person’s means to pay and the costs involved, rather than just a standard 30-year period.

John Wilson: Does Susan Torrance have any figures?

Susan Torrance: I do not have any figures, but I suspect that the sum that the associations will expend on other people’s property is significantly higher, because they would probably take a more proactive approach to the works that they would want to do. Rather than making just the minimum repairs, an association would think about what would bring the building up to standard so that it had a reasonable life expectancy from its point of view. However, as I say, I have no data on that as such.

The Convener: What are your feelings on the 30-year period?

Susan Torrance: The key is that the charging order attaches to the title of the property and, although people might default on paying the annual sum of money that they have agreed to pay, when the property is sold the whole sum will be recovered. Therefore, we would support anything that is flexible and enables us not to write off the debt, which is the issue. I agree that the period should be relative to the debt and to the individual’s ability to pay, if there is flexibility.

The Convener: What are your feelings on the 30-year period?

Gillian McCarney (East Renfrewshire Council): I concur with my building standards manager colleagues that £2,000 to £3,000 is normal. However, abnormal costs occur fairly frequently. Four or five years ago, we had to do substantial work to a substantial listed building, which incurred abnormal costs. Also, in a couple of weeks’ time, we are demolishing a property under the dangerous building notice and the costs of that will be reasonably substantial. If we are talking about substantial costs such as those, 30 years is reasonable, but East Renfrewshire Council would like a shorter period for smaller amounts.

The Convener: Mr Sutton, you have been sat there and are desperate to get in.

Dave Sutton: The £3,000 figure has been quoted for an individual, one-off set of works to make a building safe. Over five years, there have been about five interventions at the Blairhill Dundiyvan parish church on the outskirts of Coatbridge, which add up to about £15,000 to £18,000 and for which we are pursuing the costs.

Yes, £3,000 might be the cost for a one-off incident, but such buildings tend to have a number of incidents over a period of years rather than having the problems solved in a one-off.

John Wilson: Thank you for reminding us about Blairhill Dundiyvan parish church. From my memory, people have been trying to get something resolved in that building for a lot longer than five years.

I ask for clarification whether the £3,000 that has been quoted is just to make the building safe rather than carry out repairs. My understanding is that the member’s bill before us contains the 30-year period because of some of the substantial costs that have been identified. Susan Torrance referred to the experience of SFHA members. In Glasgow, individual tenants of properties in the high street are being hit with bills of £36,000 to make good defective older sandstone buildings.

Is the £3,000 to carry out the repairs or is it just to make the building safe?

Alistair MacDonald: It is to make the building safe. The money is basically for the minimum works that John Delamar described: fencing off, boarding up and using a cherry picker.

The Convener: Is your response similar, Ms McCarney?

Gillian McCarney: Yes, it is exactly the same: we do the minimum amount of work under the 2003 act to make the building safe.

The Convener: Is your response similar, Ms McCarney?

Gillian McCarney: Yes, it is exactly the same: we do the minimum amount of work to make the building safe and to exclude the public.

The Convener: That might include substantial demolition, as you stated a few minutes ago.

Gillian McCarney: Some of the work does; the case that I mentioned was exceptional, but it involved substantial demolition to make the building safe.

Mark MacDonald (Aberdeen Donside) (SNP): We have got to the point anyway, but the witnesses seem to be indicating that a change in
the wording of the bill to specify a period of up to 30 years would provide local authorities with the flexibility to set their own time limits. Do the witnesses see some benefit in that?

The Convener: Does the panel agree with that?

Witnesses: Yes.

Mark McDonald: Ms Torrance rightly identified that the debt attaches to the title of the building, so it is therefore recoverable when the building is sold. Obviously, however, some buildings would not be sold or be eligible for sale. Where does the bill fit in with regard to debt that is attached to that kind of property?

Susan Torrance: That would be the exception. The other benefit, which we were discussing before the meeting, is where local authorities or housing associations cannot identify the owner, in which case pursuing a civil debt is not possible. The expectation would be that, if there was a charge on the title and it extended for 30 years, there would be a reasonable chance that somebody would want to do something with the property within that period. It is about reasonableness. It would be possible to extend the scope if the period was 50 years.

Stuart McMillan (West Scotland) (SNP): This question is for Mr Delamar and Ms Torrance. You agreed on a point regarding the means to pay. Would additional administration costs not be incurred in dealing with each individual case on its own merits?

John Delamar: That would be done through discussion with the relevant people involved. If a block of flats with multiple owners were involved, the scale of costs would come down in relation to each person. If we were dealing with a substantial building under one ownership, taking into account the person’s means to pay, there would be negotiation about how much we would expect to have on a yearly basis. Through discussion with the building owner, we could agree a suitable repayment scheme, rather than just assuming a 30-year period.

Susan Torrance: I concur. It is a matter of providing flexibility. If an owner genuinely wants to pay but simply cannot do so because of resources, we would enter into negotiation. On the other hand, in circumstances in which it is not possible to find the owner or the owner is clearly not co-operating, applying a charge over 30 years would at least provide some remedy in order to get the cash back within that time.

Stuart McMillan: Everyone has used the phrase “substantial costs”. What is your interpretation of a substantial cost?

Susan Torrance: Mr Wilson spoke about a bill of £36,000 being attributable to an owner. Where roof repairs or substantial stonework repairs are concerned, we could be talking about a bill of £200,000, perhaps shared between six proprietors. Three of the properties might be owned by the housing association, and it will be more than willing to bear its share—and it will undertake the works—but it is then possibly left in a position of having to write off £100,000.

Alistair MacDonald: I agree; £30,000 and upwards is probably substantial.

The Convener: Does everybody agree with that figure?

Gillian McCarney: Yes.

The Convener: Mr Sutton, you do not seem to be quite in agreement on that.

Dave Sutton: It depends how much the person has and what the value of the property is. I keep coming back to the need to consider the charging order against the liability order. I refer to paper companies with minimum value. I have had experience—albeit not in Scotland—of people chopping and changing ownership to try to evade repayment.

When a council has to give warning and serve notice and the owner keeps changing, we have to check weekly at Registers of Scotland to see whether there has been any change. One of the issues with the charging order is that a gap must not be created between the giving of notice to the owner that the council may do the works in default and the point at which the charging order is registered, which could otherwise be a three or four-month period. In my experience, people will consider £10,000 to be a substantial amount and they will change ownership to another £100 paper company to evade responsibility.

Sarah Boyack (Lothian) (Lab): I want to follow up on two issues—the 30-year period and when people pay the money back. The bill assumes annual payments, but Mr Sutton suggested that it would be helpful to have more flexibility. Where people want to pay off the debt, I presume that there will be capacity to negotiate, set terms and agree that there will be monthly or quarterly payments over the year rather than annual payments, which could be much more difficult for people to pay. I note that there is a trade-off, given the administration of that. What are your views on the alternatives for how people might pay back the money?

The Convener: Mr Sutton, do you want to answer first?

Dave Sutton: My experience is that councils will be as flexible as possible in order to get back as much as possible. The issue with the bill is that it suggests that the sum is flexible from the council’s point of view. We have to pay out the money, and
provided that what is done is legally defensible, I do not see why the sum should be negotiable.

I have discussed the matter with my building standards colleagues and it appears that the approach is that the sum is negotiable, but given that the council has had to spend taxpayers’ money to undertake the works in the bigger public interest, the sum should not be negotiable, provided that we ensure that we have the cheapest tender, give due notice and so on.

Sarah Boyack: That is not the point that I was asking you about. My question was about flexibility in repayment schedules.

Dave Sutton: If someone receives a monthly salary, it may be more helpful for them to have a monthly charge than to have a lump sum requested once a year. I think that most councils will apply a degree of flexibility provided that they get the money back within a reasonable period.

The Convener: I ask the building standards colleagues to comment. Is it your experience that there is that flexibility of repayment?

Gillian McCarney: It would be appropriate for councils to allow that level of flexibility, depending on the circumstances. For example, in the case of a block of tenement flats with different owners, we would probably want flexibility for people to pay in monthly or quarterly instalments, but that might not be appropriate in the case of a large company or landowner. We would want flexibility to consider the issue with people.

John Delamar: As I said earlier, anything that helps with the recovery of costs is good, and that is the case even if some people in a multiple ownership building want to pay monthly and others wish to pay annually. As long as we can be seen to be recovering the money, we would probably accommodate that.

Alistair MacDonald: The current position on debt recovery is that North Lanarkshire Council provides negotiated expenses and flexible payment periods depending on people’s individual circumstances. We also offer a discount if somebody is willing to come to us and talk to us about the situation. The bill proposes that, if someone is willing to pay the sum, they may get a discount with the local authority’s agreement where the period is less than 30 years. We already do something like that.

Sarah Boyack: The other issue is the length of time. Mr Sutton, you state in your written submission that there could be issues with longer-term payments, which could create legal problems. I refer to paragraph 6A, in which you talk about

"legal property issues"

and

"retention documents having a maximum 5 or 10 year life."

Are you worried that a 30-year repayment period is too long because people will be able to get out of repayment through other legal mechanisms?

10:30

Dave Sutton: The question is, how do you ensure that that is consistently the case over a period of time? If a site is flattened and has its lowest possible value at that point, in due course there will be a question of whether there is a new positive use that will add value to it and attract someone to develop it. In my experience, sites can remain empty for perhaps 10 years. I think that 30 years is on the long side. We have seen a downturn in the market, but it has gone up again. In areas such as North Lanarkshire, for example, it is difficult to get schemes to stack up. Even on blank sites which were handed over or bought for £1, it can still be difficult to ensure that the end value will cover the development costs.

Sarah Boyack: With regard to the bill, will the council be at the front of the queue to get money back if are other debtors?

Dave Sutton: My colleagues from North Lanarkshire might have another view, but my understanding is that there is a £70,000 budget and, if we do not chase up repayments from that, there will be no budget to tackle new work. That is the constant pressure that councils’ budgets are under. There are general responsibilities to the general public good, but those cost money and, unless the costs can be recovered, the council is out of pocket.

The Convener: North Lanarkshire has been mentioned. Does Mr MacDonald have a comment to make?

Alistair MacDonald: I agree with something that Dave Sutton said. The recovery of expenses at the end of a sale or whatever is a good thing, especially if the owner cannot be found or the owner is overseas or something. In North Lanarkshire, there can be the negative equity factor, where the site is functionally worthless. That means that people may not have the same degree of confidence that they will get back the money that they laid out initially. That is a problem.

At the stage of the sale of the property, again, people want to have a degree of confidence that they will get back any money that they have laid out. There might be political pressure to drop the debt so that the site or the property can be developed. Sometimes, we need to think about the overall community. Depending on what the building or the site is, if a burden is put on that site, a prospective buyer or developer might be
unwilling to do what they were proposing to do, because of the debt that has been attached to it. In that case, the council might decide that it is better to write off the debt in order to enable the development to progress. That might have been overlooked.

The Convener: So, you do not think that there is flexibility in the bill to do that.

Alistair MacDonald: No.

John Wilson: Are you saying that the council would write off the debt accrued because of the work that it had carried out if it thought that the land or the building would be used productively, rather than chasing the money that was owed?

Alistair MacDonald: In relation to building standards, we would go through legal and financial routes to pursue the debt. However, if we were dealing with a building or a property that was causing the problem to the community, and a prospective developer who proposed to do some work came to the council and said, “I want to improve this site, but I have to pay £30,000 initially because of the burden on that property,” the council might think that it would get a greater benefit by letting that £30,000 go, in order to let the proposal go forward. Obviously, the situation would vary on a case-by-case basis. Individual cases would have to be examined, rather than there being a general rule.

Sarah Boyack: The SFHA submission talks about the tenement management scheme that was established by the Tenements (Scotland) Act 2004. It says:

“Housing associations currently have to rely on the provisions of the title deeds of each tenement”.

To what extent does the bill give you opportunities to recover money and get work done? Has the tenement management scheme worked with regard to major works that need to be done in order to make a building safe? Under the scheme, there must be 50 per cent agreement among owners. Will the provision in the bill fill the gap when people cannot get things going?

Susan Torrance: I do not think that it will solve some of the issues to do with the Tenements (Scotland) Act 2004, particularly those that involve non-housing association factors who manage some tenement stairs, which happens in Glasgow. It is all about getting the power to carry out the works legally. Obviously the 2004 act provides one route, but that does not apply if the association owns less than 50 per cent of the properties—only two out of six properties, say. There are issues to do with that that the bill will not rectify.

However, given a fair wind the title deeds supply the power to act. There can be a tenant management arrangement in place whereby the majority of owners want the work to be done. However, one or two owners may be recalcitrant in paying their share, so if the ability existed to work with local authorities and find some way of using the charging order route, our members would whoop with joy.

This is a huge issue for our members: as responsible landlords, they have a duty to carry out repairs, ensure that their tenants are living in safe environments and follow through the Scottish housing quality standard and all the other standards that are imposed on housing association ownership. The issue is how to fairly recoup from owners who for various reasons cannot or will not comply. That has a substantial cost to and burden on our members.

Sarah Boyack: I am trying to test whether you think that the bill will deal with that. I have lots of casework in which the majority of people want works to be carried out, but unless builders are paid up front, nothing will happen. Will the bill enable owners who want work to be done to get on and get it done under the management of the local authority?

Susan Torrance: I am not sure that it will at the moment, which is why we asked for some way of ensuring in guidance, secondary legislation or whatever that that could happen. Guidance notes would probably be the best way of addressing the issue. We would like some way of linking collaboration with housing associations.

I would suggest that we would provide the money up front to carry out the works. We had a discussion about liabilities resting on local authorities to put the capital up front to help works progress. Housing associations would more than pay their liability to undertake that. However, at the moment local authorities have a recovery mechanism that housing associations do not. We would like some way, through guidance or legislation, to link into that.

The Convener: We all know that housing associations and most other public housing owners would willingly pay money up front. However, although others in the building might want the repairs to be done, if one flat in a block of six belongs to a housing association and they do not pay up front, the repairs are not likely to happen. I think that that is Ms Boyack’s point.

Susan Torrance: My point is that housing associations would and do step into the breach at that point. I discussed the bill with our members a few weeks ago. That is the practice because, as responsible landlords who own four or six properties in a close—or even one out of six—they have a responsibility to ensure their tenants’ safety.
If an association owned one out of six properties and there was a £500,000 repair, it might make a slightly different decision in terms of having the resources to carry out that repair, but that would be very extreme. They would move in, carry out all the works and then attempt to recover costs—as they do—from individual owners on whose behalf they have carried out works through the powers in the 2004 act, the title deeds or whatever.

**The Convener:** Does anyone else wish to respond on Ms Boyack’s point? No.

**Sarah Boyack:** I have seen the other side, where even the housing associations will not put the money up front. I am trying to see what difference the bill would make. I presume that the local authority would still have to agree to pick up and manage the issue, so I suppose that we need a response from local authority colleagues.

**Susan Torrance:** Yes; I think that that would be good.

**Sarah Boyack:** Do local authority colleagues see the bill leading to more pieces of work being initiated by you? How do you view that?

**Gillian McCarney:** For clarification, is Susan Torrance saying that, in certain instances, a housing association would pay all the repair money up front then ask the council to recover the costs on its behalf?

**Susan Torrance:** Yes. We would like to have the flexibility of charging orders rather than having to go through the courts as at present, where, in many cases, there is a lot of expense and we do not recover anything, so the sum is written off.

**Gillian McCarney:** My only comment on that, as a representative of a public authority, is that that would mean taxpayers’ money being used to recover the costs for a housing association as opposed to the housing association recovering the costs for itself. My concern would be about the administration and additional costs for the council. It would certainly be worth thinking about that further. I am not so sure that the bill covers that.

**John Delamar:** I am of the same opinion. It sounds like a good idea and a benefit, but the legal implications for local authorities taking on the burden of private sector debt through a charging order would have to be looked at.

**Alistair MacDonald:** My answer is the same.

**Sarah Boyack:** Mr Sutton, your submission talks about whether the bill will lead to people being more prevention oriented. Will the bill change the way in which people make decisions? You talk about exploring whether the council tax could be applied at a different rate. We did that in the Parliament last year when we passed legislation that covered empty properties. Has that had any impact on your thoughts about the bill?

**Dave Sutton:** Not particularly. I am not sure that the bill will do that by itself. A more concerted approach is needed across all the relevant legislation. Councils are getting better at having housing, building standards and planning all working together. We are looking for a solution.

I apologise for returning to the Dundyvan example. Four or five years ago, we were able to work with the local housing association to get a scheme that stacked up and left a residual value on that property so that the paper company that had acquired it for £10,000 would have walked away with about £35,000 of profit. When we reran that costing with the housing association two or three years ago, and again a year ago, we suddenly had a deficit of £100,000 to £200,000.

Schemes that used to stack up because of joint working no longer stack up. There has been a general overall tightening of the lottery conditions, for example, so that if a trust takes on an old building and makes a profit on it, that profit goes back to the trust rather than into a rotating fund. There has been a general tightening up. Most trusts or bodies that try to take on and resolve such problems will get 80 to 90 per cent of the capital, but getting that last 5 to 10 per cent of the capital is the issue.

One of the concerns about the proposed community empowerment (Scotland) bill is that although the building can be sorted as a one-off capital cost, the running costs will also have to be covered. There are examples in which communities have taken on buildings with all the best intentions and interest, but the scheme has fallen flat on its face because the revenue plans were too optimistic or whatever.

There are difficulties that need to be thought through about bodies that are working together with tenants or residents or whoever, and how they can unlock some of the difficult sites. That is the situation that exists in North Lanarkshire. Even working together with housing or the lottery or whatever, we are still struggling with finding a solution for some sites.

**Sarah Boyack:** The other side of that is that there are areas in which land is phenomenally expensive, such as bits of Aberdeen, Dundee, Glasgow and Edinburgh, but where there is a problem with defective buildings and the costs are much more extreme. In that context, the bill would play a different role when people have deep enough pockets to pay for their repairs but are not prepared to do it. I am interested in seeing the extent to which the bill would help to meet some of those gaps.
The Convener: Will the bill help in that regard?

Alistair MacDonald: Yes. If a substantial sum of money is involved, I think that the bill will help. That said, if the person who owns the property, land or whatever has deep pockets, it is perhaps a disadvantage to give them 30 years to pay off the debt. Perhaps that should be sooner, depending on the amount of debt that there is.

The Convener: Certain folk with deep pockets often have a poacher's pocket that they can slip money into without anybody knowing. How do we get around that?

Alistair MacDonald: I do not know, but I think that that could be done by putting the burden on the property. If a person has property, land or a building that is attractive, it is more likely that a sale will take place in the future, and I think that the bill will help with that.

John Delamar: I agree that, where there is confidence that the people who are being pursued for repairs have the money to pay, there will be more confidence to go ahead with the notice to repair and there will be a better chance of recovering the cost of any work that the local authority undertakes.

The Convener: Are you currently pursuing folk whom you know are likely to have more than enough to pay for the work that you are doing, but you are unable to get that? Will the bill overcome that situation?

John Delamar: I am not sure whether this person has the money, but we are dealing with a property with two owners. There was a gable deterioration of a chimney stack that is directly above a neighbouring single-storey property and above a public footpath right beside a bus stop, so there was a requirement to go in there straight away to fix the chimney by putting up scaffolding. The owner on the first floor is more than happy to pay and has been doing so, but the person who was on the ground floor has not paid. We are now in difficulties because the person on the ground floor, who had a business and other property, died, unfortunately. Therefore, we can no longer pursue the costs involved under our civil debt recovery methods. In that instance, we could serve a charging order on the property, knowing that the building will be sold or whatever at some point and we will be in a position to recover costs.

Gillian McCarney: We have a site with an absentee owner—I believe that he lives in Antigua. The council has incurred substantial costs in keeping the building safe. We understand that the owner is in discussions with several people to buy the site, and we have to continually check to see whether it has been sold. In such circumstances, a charging order would be ideal for us, because we would then, I hope, be able to recoup the costs on the sale of the land.

The land values in areas of East Renfrewshire are three times higher than those in other towns in the area. In some instances, the regeneration aspects are more important for the selling of the site for development so that it stops being a blight on the community. We know that we do not necessarily need to get involved in other areas because the land will sell itself and the land values of the development on completion will outweigh any charges on the site.

The Convener: I am aware that time is wearing on and that we have to take in Mr Stewart at the end. If possible, questions and answers should therefore be brief.

Sarah Boyack: In the “Disadvantages” section of its submission, East Renfrewshire Council asked for clarification on what local authorities could include in the final charging order.

Gillian McCarney: Yes.

Sarah Boyack: Is that because of how the bill is written? Could that be dealt with in guidance? For example, East Renfrewshire Council asked whether it would be possible to include the costs of council staff putting together work to come up with survey work, any work that had to be done in the council and, I presume, negotiations on what is reasonable as payback. Should that be set out explicitly in the bill or should it be in guidance from the Scottish Government?

Gillian McCarney: I think that we would be happy with that being in guidance. If clarification was required, I would be happy with that being in guidance, as long as it was clear what the council could recharge.

David Stewart (Highlands and Islands) (Lab): Thank you for inviting me along, convener.

I have a couple of questions to put to the witnesses. It has been a very interesting question-and-answer session, but we must set the bill in context—as a member’s bill, it cannot sort out every problem that the witnesses rightly raise. The bill is about cost recovery for repairs to dangerous and defective buildings. Given the statistic that, according to the Scottish Government, there is £3.9 million of outstanding debt, we know that we have a real problem.

I am interested in the witnesses’ points about charging orders, which are the main issue here. I am quite relaxed about changing the 30-year period to a five-year period at stage 2, or having a variable period or something that is technically competent. I take on board the point that the period should vary according to the level of the...
debt. If the debt is only £5,000 or £6,000, five years would be a better period.

As you well know, the 30-year period was not invented by me. It echoes other legislation—it echoes what happened from 1959 until 2003. The bill lifted from existing, well-used legislation. How would panel members feel about such a variation at stage 2?

Dave Sutton: I would be supportive of it.

Gillian McCarney: We would be very supportive of those proposals.

John Delamar: We welcome them.

Alistair MacDonald: We fully support them, as the 30-year period is one of the things that has cropped up as being a disadvantage. Introducing flexibility would be an improvement.

Susan Torrance: Flexibility would be welcome.

David Stewart: I am conscious of the time.

As you know, a notice of liability has been developed as part of the proposed community empowerment (Scotland) bill. How would the panel feel if, at stage 2, I incorporated the notice of liability in my bill, in a hybrid form or as a separate aspect?

Dave Sutton: I would very much support that. We have made the point that the liability order applies to the individual and that ignorance is no excuse. I am sorry that I keep coming back to paper companies, but there are some people who are involved in such companies.

The Convener: In Antigua and other places.

Dave Sutton: No, not quite—in Leicester. Would the fact that one of the directors was in Leicester rather than Scotland mean that English law would have to be used to recover the money? That can be an issue.

A liability order removes any excuse. It is a case of telling someone that they are liable and going through the proper procedures. The proposal that is in the community empowerment bill is already a provision in the Historic Environment (Amendment) (Scotland) Act 2011. As far as I am aware from conservation officers, there is no experience yet of it being used in Scotland, but it is certainly a useful tool in our negotiations with such companies. We would welcome having that choice.

Gillian McCarney: I would be quite happy with that.

John Delamar: I agree. The more tools that we have in our belt, the better.

The Convener: Does anyone disagree? No one does.

David Stewart: I have met local authorities extensively over the past year and I have had some representations that there should be an element of backdating of the charging order, which lost its life in 2003. There would have to be a time limit of some sort—perhaps two years. Given that we are talking about nearly £4 million-worth of debt across Scotland, what does the panel think about having a short period of backdating of charging orders for work on dangerous and defective buildings, if it were legally and technically possible to do that?

Dave Sutton: That is a difficult one, because I am always mindful of what the legal defences are to the use of the listed building legislation. Part of that is that the owner has been given an opportunity to undertake the works directly themselves. If there is clear evidence that they have been given that opportunity, that it is the most cost-effective solution and so on, one might be prepared to consider that, but I am more concerned about getting legislation that is good for the future. I think that the backdating of charging orders raises all sorts of other issues.

Gillian McCarney: From a personal point of view, I might have some concerns about that, just because of the procedures involved and how the process would be administered. Would it be for everyone on whom we have ever served a notice? That could involve quite a number of people and quite a lot of administration. I would be happy if we brought in legislation that allowed charging orders from a fixed point in time and moved forward on that basis.

The Convener: A building could have a number of owners over quite a short period of time. Have you had experience of that?

Gillian McCarney: Off the top of my head—no.

John Delamar: I know that there are authorities that have requested such a provision because of the amount of money that has been laid out on single properties, and I recognise the argument for it.

If it can be proved through documentation that a single owner is involved and that a clear audit process has been followed, I do not see why, if a charging order could be backdated, that could not be utilised on specific jobs on which it was considered beneficial to do so.

The Convener: Have you had experience of defective buildings changing hands quite quickly?

John Delamar: That is the fear that we have in the case that I mentioned earlier. We are worried that the building might be sold from under our feet without our being able to recover the costs.

Alistair MacDonald: I do not think that having the ability to backdate charging orders would be a
great benefit. Finding out when a building had changed hands would involve administration and legal costs. Sometimes, the ownership of properties is moved unscrupulously from the husband’s name to the wife’s name, or from one company to another. I think that we would end up tying ourselves in knots, so I do not think that that would be beneficial.

The Convener: You have had similar experiences to those that I had as a councillor.

Susan Torrance: What was I going to say? My mind has gone blank. I concur with everyone else.

Dave Sutton: Something that is extremely important is having the ability to pre-register a charging order with Registers of Scotland. If there is a period of three or four months between the point at which notice is given and the building work is committed to and the point at which registration takes place, that provides a gap for the unscrupulous. In my view, allowing a charging order to be pre-registered so that that cannot happen is a much more important gap to plug than allowing charging orders to be applied retrospectively.

David Stewart: That is a reasonable point, which is why it would be advantageous to have a hybrid creature that would be partly a notice of liability and partly a charging order. That would fill the gap.

I know that I am preaching to the converted, but if the bill is successful, there will not be an element of compulsion on local authorities. A risk assessment will be carried out by building control and legal officers to decide whether such action is appropriate. Most people pay for repairs, but cost recovery has always been an option. It is a case of giving authorities another tool in their armoury. I have no more questions.

The Convener: Do the witnesses have any comments on that final statement by Mr Stewart?

Dave Sutton: We now have planning performance indicators. If what is proposed were identified as a performance indicator, we would be able to gather data not only on whether it was being used, but on whether councils were applying the legislation in practice.

The Convener: The committee has done a lot of work on performance indicators. If you would like changes to be made to performance indicators, you might need to talk to the Convention of Scottish Local Authorities, which has done a huge amount of work on that lately.

I thank all the witnesses very much for their evidence.

10:58

Meeting continued in private until 11:23.
LOCAL GOVERNMENT AND REGENERATION COMMITTEE

EXTRACT FROM THE MINUTES

6th Meeting, 2014 (Session 4)

Wednesday 26 February 2014

Present:
Cameron Buchanan
Anne McTaggart
Stewart Stevenson (Committee Substitute)
John Wilson (Deputy Convener)

Mark McDonald
Alex Rowley
Kevin Stewart (Convener)

Apologies were received from Stuart McMillan

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill:
The Committee took evidence from—

Derek Mackay, Minister for Local Government and Planning, Scottish Government;
Bill Dodds, Head of Building Standards, Scottish Government Built Environment Directorate;

and then from—

David Stewart, Member in Charge of the Bill;
Claire Menzies-Smith, Senior Assistant Clerk, Non Government Bills Unit, Scottish Parliament; and
Neil Ross, Principal Legal Officer, Scottish Parliament.

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill (in private): The Committee considered the evidence received.
The Convener: Our main item of business is item 2, which is an oral evidence-taking session on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill.

I welcome our first panel. Derek Mackay is Minister for Local Government and Planning and Bill Dodds is head of building standards in the Scottish Government. Would you like to make any opening remarks, minister?

The Minister for Local Government and Planning (Derek Mackay): Thank you, convener. I will make some brief remarks.

I thank the committee for inviting me to give evidence on Mr David Stewart’s Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill. I believe that Mr Stewart has worked on his member’s bill over the past four years to get it to this stage.

Local authorities have a range of powers to deal with buildings that have fallen into disrepair. The current powers in the Building (Scotland) Act 2003 require them to take action on buildings that they consider to be dangerous. In some cases, that may mean undertaking emergency work to secure the building and surrounding area or carrying out remedial work. Local authorities can decide to demolish all or part of the building. They can also take action on defective buildings. When the owner has not carried out the necessary remedial works, they can undertake those works themselves.

Those powers cover all building types. They are important to ensure the safety of people in and outside buildings and help to protect buildings for the future.

Currently, when local authorities need to carry out such work themselves, they can recover their costs from the building owner through normal debt recovery methods but, unfortunately, that has not always been successful. That local authority work is at the core of protecting the existing built environment, but it requires local authorities to invest their time and resources. The Scottish Government therefore acknowledges that the cost-recovery aspect of the legislation should be improved. I believe that linking the local authority costs to the property would be a welcome improvement that would, in turn, give local
authorities more certainty about getting their expenses back.

The Convener: Thank you very much, minister.

Many of us around the table have had dealings with such buildings at one point or another. In the evidence-taking session last week, there were numerous discussions about the length of time in which folk could pay back charges. Mr Stewart suggested 30 years. Do you have any view on the timescales, as set out in the bill?

Derek Mackay: That is a good question. I think that, if the 30-year period was the standard, it would be too rigid for every circumstance. Having greater flexibility and different options would be very welcome. Some of the repairs might not warrant a 30-year payback period, of course, so greater flexibility should be considered at this stage.

It would be prudent to inform the committee that, in discussions that I have had with Mr Stewart—I will have further discussions with Government colleagues—I have said that we are minded to support the bill. I have progressed work through the community empowerment (Scotland) bill, because removing these powers was something of a mistake. We should support restoring that which already existed and improving the powers to reflect circumstances. Mr Stewart’s bill has been introduced ahead of the community empowerment (Scotland) bill, because removing these powers was something of a mistake. We should support restoring that which already existed and improving the powers to reflect circumstances. Mr Stewart’s bill has been introduced ahead of the community empowerment (Scotland) bill. For timing reasons, if he can accommodate some of our proposed amendments, the Government is quite content to support the bill. It is important to share that with the committee at the outset.

The Convener: That is very useful, minister.

Last week, there was also a discussion about retrospective actions. Would you like to comment on that aspect?

Derek Mackay: There have been a great number of legacy cases in which local authorities have taken action and debt is outstanding. That said, we would want to ensure that we complied with European and domestic legislation. There might be issues with introducing legislation that was retrospective, and we will be carrying out further work on that matter.

We will discuss with Mr Stewart what can be accommodated in the bill but, as I have said, we might not be able to make it retrospective with regard to monies owed, because of certain legal and technical issues. The measures in question will be implemented once the bill is passed, but we are continuing to explore with solicitors whether a retrospective function would be competent.

The Convener: Last week, housing association representatives told us about difficulties with cost recovery, and Mr Stewart has indicated that he was quite sympathetic to their comments. How can we help housing associations deal with the cost-recovery difficulties that they often have to face?

Derek Mackay: The bill’s quite narrow focus is on dangerous and defective buildings and you would expect a housing association to be proactive in dealing with one of its properties that was in such a state. However, the bill itself does not negate local authorities’ power to take action.

The bill does not deal with the wider issue of factoring. I am not saying that that is not important, but it is a completely separate matter. This quite narrow and specific bill focuses on dangerous and defective buildings. Irrespective of the ownership issue, the local authority would still be able to take action.

The Convener: The difficulty for housing associations arises when they own a certain number of properties in a building. Because they might not have the majority shareholding in that building, they have difficulties with cost recovery. The groups that gave evidence discussed how councils might co-operate with housing associations in that respect, and I wonder whether you have any specific views on that matter.

Derek Mackay: The housing minister and other colleagues such as Roseanna Cunningham, who has ministerial responsibility for property law, might want to explore that issue further, but we would certainly want to be proactive about debt management and the commissioning of work under the existing factoring and ownership legislation. However, all of that is separate to this bill, which focuses on defective and dangerous buildings, not on all the other aspects of tenemental and shared properties, liability notices or, indeed, factoring itself. Although we are sympathetic to some of the challenges that housing associations face, this bill has a much more narrow focus.

Of course, housing associations that own properties in a defective and dangerous building will benefit from this legislation because local authorities will be empowered to recover costs. That in itself will incentivise local authorities to take action through their building standards function where previously they might have been a bit more nervous about doing so.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I will preface my couple of short questions with the case that drives me to ask them. In a particular village in the north-east of Scotland, there is a derelict building on the main street. Initially, the building’s ownership was quite uncertain but, after five years’ work, we found that it was owned by a registered company in Panama that would deal with us and the community only
through correspondence in Spanish. As a result, it cost quite a lot of money to deal with the company, because everything had to be translated and so on. My first question, therefore, is whether anything in the proposed bill will help us to deal with remote, inaccessible and de facto unfindable owners who, in practical terms, are never going to cough up any money whatever.

Secondly, and linked to that, given that this building is approaching the point where it will simply be a clear site with some stones on it, will the bill apply to buildings in such a state of dereliction that people might debate whether there is actually a property there?

**Derek Mackay:** I want to be careful that I do not trespass on areas such as property law that I am not quite as familiar with, but I understand that, under certain legislation, someone who occupies unchallenged for a period of time a property that is lying abandoned and untouched and to which there is no existing title might well acquire the rights to it. That might be a way for Mr Stevenson to expand his property portfolio in some parts of Scotland but, of course, it is not for me to give him advice on such a matter.

In all seriousness, and in addition to the normal routes of debt recovery—which we still encourage local authorities to pursue—where there is a title, it seems a sensible way forward to attach the debt and the liability to the title. That is an incentive for the owner, where there is one, to pay their share and take earlier action, thus avoiding the need for the local authority to move in in the first place.

There is an issue around definitions when it comes to dangerous and defective property but, because local authorities already have the power and are already carrying out functions in this area to a great extent, we know how to tackle such issues.

We are trying to create a culture of proactivity whereby, even if there is a lack of an owner, a local authority can take action. In more cases than not, there will be an identifiable owner. As I said in my earlier, more flippant, remarks, if there is no title and there is no owner or no identifiable owner, we can adopt a different approach.

**Stewart Stevenson:** My memory is imperfect on this, but I believe that the minister is referring to something called the bona vacantia provisions—I am getting a nod from your officials, minister, so I must be right. However, that requires occupation for a period of 10 years, which is not terribly easy for people in many of our communities. I say that merely to inform.

**The Convener:** We have heard previously—and some of us have experienced relevant situations—how buildings can change hands on numerous occasions over very short periods of time. Do the proposed measures halt that kind of practice, and should they lead to a better chance of cost recovery without going to title?

**Derek Mackay:** That is a good question. As far as occupancy is concerned, the tenant or occupant may change, but if the owner of the property changes, that must be reflected in the title. Attaching the debt to the title—as a last resort—feels like a pretty strong safeguard, even if there is a very frequent turnover of ownership of the property.

**Stewart Stevenson:** I understand what the minister is saying. One of the difficulties with corporate ownership is that the ownership of the corporate body that owns the property is what changes, rather than the registration of the property. It is that indirect but de facto ownership that causes many difficulties in many parts of Scotland, particularly in the north-east, where there is the further complication of leaseholding of the land on which properties may reside. Therefore, the rights of the leaseholder may preempt those of the owner. I suspect that the minister might tell us that that is a substantially more difficult issue than what is being dealt with in the bill.

**Derek Mackay:** It really is unlike Mr Stevenson to ask a difficult question. I would say that we are in a far better position to have the proposed new powers, which are very similar to those that I proposed under the forthcoming community empowerment (Scotland) bill and to those that we had before. They are an improvement on simple methods of debt recovery for previous work carried out.

Will the proposals resolve every single case? Unfortunately, I do not think that they will. However, if there are any other mechanisms that could improve the situation, we are certainly interested. The proposals are a step forward, rather than a step back—which is perhaps what we had when the powers were inadvertently removed.

**John Wilson (Central Scotland) (SNP):** I would not joke too much about the raiders of the lost titles, as there have been many problems in many areas, particularly in my area, where somebody went through the records, identified pieces of land with no title claim, took on their ownership and sold them off. That causes problems, so we have to be careful about the raiders of the lost titles.

Last week, we heard evidence from the Scottish Federation of Housing Associations. The federation was asking for the same power to make charging orders that is being conferred under the bill. What is your view about extending the scope.
of organisations that could be empowered to make charging orders?

Derek Mackay: The bill is about defective and dangerous buildings. The member mentioned widening it out from that, but that would have ramifications. The Government is happy to explore that but, at the moment, the bill is specifically about dangerous and defective buildings. If people want charging orders to be introduced for other matters, we will give that some thought, so the answer is not a no in principle, but the bill is fairly tight for good reason. This matter has not been progressed before, and then two bills came along at once. The Government, gracious as it is, is supporting the member in taking his bill forward. We are happy to explore the point that the member raises, but it would have to be in the context of dangerous and defective buildings.

10:15

John Wilson: The request was in respect of dangerous and defective buildings. The SFHA argues that, when its members try to carry out remedial work on properties, they find things difficult as they have the same problem with identifying owners, particularly in tenemental properties. They carry out work to deal with defects in buildings, but they have to do so without the powers that they need and they cannot recover costs in the same way that a local authority can. Their argument is that, if they had the same powers as local authorities, they would be able to pursue the owners of properties to recoup any costs that arise in making good the defects in buildings.

Derek Mackay: It remains a local authority power because of the functions that local authorities have in relation to public safety and the building standards function that we execute in partnership with local authorities. We do not have proposals to change that, although work is being done with the Housing (Scotland) Bill, which covers some wider ownership issues.

I am mindful that the bill is focused on dangerous and defective buildings and is not intended to cover the wider issues of ownership, factoring and general improvements. Of course we want to encourage improvements, but the bill has a tight framework. The Government is not opposed to exploring the matter, but it is really one for the member in charge of the bill. I also refer Mr Wilson to the Housing (Scotland) Bill, which is making its way through the Parliament.

John Wilson: I accept that, minister. It is just that there is crossover in relation to the powers to recover costs that are being sought by organisations other than local authorities.

Another issue that arose last week is the average cost of making buildings safe. We were given a figure by the local authority representatives who were here, who said that the average cost of making a building safe is £3,000. We also heard an extreme example, as one of the witnesses from North Lanarkshire alluded to a £70,000 cost to make a building secure. We will speak later to the member who is promoting the bill, but is the Government’s intention just to make buildings safe or to try to bring buildings back into full use?

Derek Mackay: The purpose of the bill and the existing legislation on defective and dangerous buildings is to bring buildings back into a safe condition.

I will give an example from the constituency that I represent. I am sure that Bill Dodds will correct me if I get it wrong. A corner tenement building in mixed ownership had been neglected and the stonework was coming off. It was clearly a threat to the surrounding public. Orders were issued, but no action was taken. The local authority carried out work to make the property safe. It might not have made the flats in the building habitable, but it made the building safe and kept the public safe from falling masonry. What was missing was the ability to attach costs to ensure that the money was returned to the council.

The answer to your question is that the bill is not about bringing all properties up to a standard of occupation. It is about making them safe and compliant with the existing legislation.

John Wilson: Thank you.

Alex Rowley: Good morning, minister. Consensus has broken out in my first meeting of the committee. I hope that that is the way in which we will move forward.

Local authorities across the country will certainly welcome the fact that you are minded to support and take forward the bill. I know from experience in Fife that, where the council has taken action, recovering the moneys has been really difficult. Local authorities are very reluctant to take action; they would have to be absolutely convinced that a building was really dangerous before taking action. That has often left members of the public rather baffled as to what constitutes a dangerous or defective building.

I welcome the bill and I want to see it happen. Local authorities have also responded fairly positively to the bill, but Fife Council raises a question about the funding. As you know better than most, local authorities do not have masses of capital or revenue just sitting there waiting for a dangerous building to come along. Fife Council has suggested exploring the options for funding to see whether, for example, local authorities could
tap into a national loan fund to access funding. Are you prepared to look further at that suggestion?

Derek Mackay: I welcome Alex Rowley to the Parliament. The experience of the budget process and now this bill has been that the Labour Party and the Scottish National Party have worked closely together. Of course, that is the norm in the Scottish Parliament; we very rarely depart from that position. It is, dare I say it, just like Fife Council.

In all seriousness, the bill’s progress has been consensual, because everyone recognises and wants to tackle the issue, although there are nuances in how we want to approach it. Finance is at the heart of this. Local authorities should be able to recoup the expenditure of carrying out this necessary work.

This is Dave Stewart’s bill, but we as a Government are not attracted by creating a new ring-fenced pot of money that local authorities can draw on. As Mr Rowley is aware, the Government has tried to reduce ring-fenced pots of money for local government. We have reduced ring-fenced money from a substantial figure of more than £2 billion to less than £200 million. If we were to create a specific fund for this bill, it would be a form of re-ring fencing local authority resources, which is not a road that we would choose to go down.

On capital costs, there are pressures, as a consequence of the Westminster Government’s reductions in funding to Scotland. That said, local government’s share of the pot has largely been maintained. Specifically, the capital resources are there. Only a few weeks ago, we approved funding of more than £10 billion to local authorities. I am not saying that local authorities are not under pressure—they are, just like us—but I believe that there are resources available to tackle this issue, should the bill progress.

It is fair to say that, given that the profile of local authorities’ power in this regard would be raised by this bill, there would perhaps be greater expectation and greater demands on them, but it will be for them to decide how much of a priority the issue is for them and how much of their capital resources they wish to make available.

Mark McDonald (Aberdeen Donside) (SNP): I have a couple of questions. At the previous evidence session there was discussion about the 30-year repayment period. The witnesses took the view that there should, rather than a set repayment period of 30 years, be a repayment period of up to 30 years to allow local authorities flexibility, particularly in cases where they might be gathering a small sum of money and would want to avoid having that spread out over a long period.

Does the Government have a position on the repayment period?

Derek Mackay: We concur with that: a 30-year period would be too rigid, if it was the standard, the norm or the expectation. The repayment period should be far more flexible, so that local authorities can deploy whichever financial mechanism they want to use to recoup costs.

In supporting the bill, the Government has highlighted to Mr Stewart a number of areas that we want to address, one of which is the repayment period. We think there should be greater flexibility, for the reasons that Mr McDonald gave.

Mark McDonald: I know that Mr Stewart is aware of this, but another issue is the potential conflict in respect of a building’s being dangerous and defective and its also being listed or having heritage status. Does the Government have a view on how that potential conflict might be overcome?

Derek Mackay: I am happy to explore that further. I have asked colleagues in the building standards division to support Mr Stewart. If there are issues and if there is such a conflict, I am sure that we will explore them and assist to resolve them before the end of the bill process. If that requires an amendment, we will certainly assist in that.

Mark McDonald: Okay.

Anne McTaggart (Glasgow) (Lab): I think that nearly all my questions have been asked. On greater flexibility, you said that the 30-year period is one of the provisions that you would like to be amended. Can you describe the other amendments that you would like?

Derek Mackay: Yes. We certainly want to amend the 30-year period in order to have flexibility on repayment terms. Other areas that we want to address include the time between the local authority incurring the expenditure and registration. We want to ensure that local authorities can move quickly and keep the time delay at an absolute minimum so that people cannot use time as a reason for not being able to use the notice.

We also want a bit more work to be done on the appeals mechanism. As a minister, I am not attracted to an appeals mechanism in which the Government or reporters make determinations or decisions around costs, so we need further work on that. We also need to explore a bit more whether some provisions could also apply to all enforcement powers under the Building (Scotland) Act 2003 and not just to those for defective and dangerous buildings or areas. We want to explore that in good time for stages 2 and 3.

The Convener: I thank you for your evidence this morning, minister.
10:26

Meeting suspended.

10:27

On resuming—

The Convener: We move on to this morning’s second panel of witnesses. I welcome David Stewart MSP, who is the member in charge of the bill; Claire Menzies-Smith, who is a senior assistant clerk in the non-Government bills unit of the Scottish Parliament; and Neil Ross, who is a principal legal officer at the Scottish Parliament. Good morning, Mr Stewart. Would you like to make opening remarks?

David Stewart (Highlands and Islands) (Lab): I would appreciate it if I could put some technical points on the record.

First, convener and members, I thank you for inviting me to give evidence on my bill this morning. As you know, it has been a long and winding road since my friend Councillor Jimmy Gray, the convener of Highland Council, asked me to take action over dangerous buildings nearly four years ago. However, one of the great strengths of this Parliament is the member’s bill procedure, which allows ordinary members the opportunity to make a difference in policy areas of their choice. I record my thanks to all the officials in the non-Government bills unit, legal services and the legislative drafting teams for their help. Of course, any errors are my responsibility alone.

As you will be aware, I have been working towards this point since the previous session when I consulted on my initial much wider proposal, which included areas such as building MOTs and, importantly, charging orders. As you know, convener, many local authorities responded to my consultation, and over 80 per cent expressed support. As I said to the committee back in 2012, my view is that a member’s bill stands the best chance of success if it is measured and focused, and the member is prepared to be flexible and adaptable. Although I could not go as far as I would have ideally liked, I believe that the bill has the potential to make a significant difference to local authorities. However, it is of course not a magic bullet to cure all ills.

10:30

As you will all know, charging orders will give local authorities greater flexibility and discretion about how to recover their costs when they have carried out work on defective or dangerous buildings under sections 28, 29 or 30 of the Building (Scotland) Act 2003. The mechanism will also increase the proportion of the costs that can be recovered.

It is important to note that the problem that I seek to address applies more widely than just to residential property; it extends to buildings more generally, including commercial, farming and historic properties. That is why it is essential that local authorities once more have access to the mechanism of charging orders to deal with the varied circumstances of owners and the different types of building that are dealt with under the 2003 act. Members will know that charging orders relate back to 1959, so they have been a trusted, tried and tested technique.

To put the bill in context, according to the Scottish house condition survey in 2011, 83 per cent of Scotland’s dwellings were in some state of disrepair and, more worryingly, 48 per cent were in an urgent state of disrepair.

Another indicator of disrepair in Scotland’s built environment is the number of notices that have been issued in relation to defective or dangerous buildings, which stands at 212 notices for dangerous buildings and 206 notices for defective buildings during 2011-12. Action without notice—which, as members will know, is the most urgent action—has more than doubled from 402 cases in 2010-11 to 992 in 2011-12. Sadly, the figures do not demonstrate an improving picture; instead, they signal an increasing burden on local authorities.

The Scottish Government research project worked “to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings” in November 2012 and collected information from eight local authorities. The project estimated that the total unpaid debt for those authorities amounted to £1.5 million. That figure, when roughly extrapolated, produces an estimated figure for the whole of Scotland of £3.9 million. It is unclear how much local authorities have had to write off completely, but from my extensive contact with building standards managers across the country, I have picked up that the estimated figure is about £700,000 since 2005.

The research also showed that local authorities currently recover about 50 per cent of their costs. That cannot be a satisfactory outcome for any local authority, particularly when they have a statutory duty to act, as is the case with dangerous buildings. I firmly believe that my bill will strengthen local authorities’ cost recovery position.

I make it clear that the power to make a charging order would be discretionary; charging orders will be appropriate in some cases but not in others. The local authority is best placed to take the decision in the light of the facts and circumstances of each and every individual case. I have listened to local authorities’ views about the
30-year term of a charging order being too long when, for example, the outstanding sum is small. That is why I intend to lodge an amendment to give local authorities greater control over setting the term of a charging order.

One of the main advantages of registering a charging order against the title of the property has to be that, if the property is sold, the local authority should be repaid through the proceeds of the sale. In addition, as the order is secured against the property, the approach avoids the need to pursue an individual through the civil courts. That can be the case at present when an authority might have to take court action to recover the sums that are due to it, in the absence of its being able to rely upon a charging order. That can be both time consuming and costly and—depending on the sums and whether the owner can be traced in the first place—may not be a viable option. As the up-front cost of registering a charging order is very low—it is likely to be in the region of £50—it will not add to local authorities’ burden of costs. Of course, the £50 could be added to the charging order, along with any administrative costs.

Charging orders would also benefit owners who cannot access funding because of their low income. A charging order would allow them to pay by instalments over a manageable term. If, during that time, an owner’s financial circumstances were to improve, the bill provides for an early settlement mechanism that will enable them to pay the repayment amount, or a lower sum, if that is agreed by the local authority.

Some responses to the Finance Committee and the Local Government and Regeneration Committee raised an issue about whether there may be circumstances under the bill when a property could be sold or transferred before a charging order could be registered. Of course, local authorities are the experts in that area and I hope that, as such, they will welcome the news that I intend to lodge an amendment to provide the mechanism that will enable them to register liability for costs without having to specify the costs at the time, which takes account of the precedent that was suggested by local authorities under the Tenements (Scotland) Act 2004, thereby further safeguarding the local authority’s position.

I confirm that I will amend the bill at stage 2 to take account of the Delegated Powers and Law Reform Committee’s suggestion that the Scottish ministers should be able to amend directly schedule 5A to alter the form and content of a charging order, rather than there being the prospect of its being amended by subordinate legislation.

That brings me on to the amiable discussions that I have had with the Minister for Local Government and Planning, Derek Mackay, and his officials. It has always been accepted that the Scottish Government and I share the same goal—to improve local authorities’ ability to recover costs—although we have taken slightly different approaches to addressing the problem. I thank the minister for recognising that this is a non-contentious and non-political area, in which agreement and consensual working will be key to timorous resolution of the plight of local authorities.

I hope that the minister and the committee will be reassured by my commitment to make those important changes to the bill—not just to meet the needs of local authorities, but to resolve any concerns that the Scottish Government may have about the approach that is taken in my bill.

I acknowledge the Scottish Government’s further observations in its memorandum, which I saw late yesterday afternoon and which covers, in paragraph 35(c), debts incurred prior to implementation, in paragraph 35(d), the details of the appeal mechanism, and in paragraph 35(e), extending the bill to compliance and enforcement provisions in part 3 of the 2003 act. I am content to work with the Scottish Government to explore the detail of what would be involved, and how best those matters could be addressed in the bill. I am happy to answer any questions.

**The Convener:** Thank you, Mr Stewart. I am glad to hear that there is co-operation between yourself and the Government and that you are flexible, as you said in your opening remarks.

In your letter to the committee, you touch on the question of extending charging orders to social landlords and you say that that is not within the scope of your bill. Could you elaborate on that?

**David Stewart:** I appreciated the committee’s inviting me along last week, when you heard good evidence from Susan Torrance. I am sympathetic to the position that housing associations are in. I had to look carefully at a number of things. First of all, it is not a Government bill, in which there would be a wider range of solutions and tools to help local authorities and others. Because I had not consulted specifically on that point, I felt that the best way forward was to have a specific, simple and straightforward solution. That is why I focused on charging orders for dangerous and defective properties. Notwithstanding that, the minister made some interesting points earlier, and I am happy to incorporate his suggestions.

The feeling that I expressed in the letter was that if there could be internal arrangements between local authorities and housing associations to resolve the problems that Susan Torrance raised last week, I would be more than happy to extend the scope of the bill. However, I feel that that is beyond the competence of the bill.

The other issue is that I did not want to make the bill overly elaborate, or to open up other fronts
that could invite criticism from people who would say that because we had not consulted on an issue we were not competent to take it forward. I hope that that gives a clear answer on why I feel that it is beyond the terms of the bill to extend the charging orders to social landlords. However, if the Government wishes to lodge an amendment to that effect at stage 2, I would look at that in great detail.

The Convener: You have also commented on the oral and written evidence that was given by Dave Sutton of the Institute of Historic Building Conservation, who indicated a willingness to extend the remit of the bill. You say in your letter that, although you are sympathetic, you do not think that that is the way forward. Could you comment on that?

David Stewart: Although I thought that Mr Sutton’s evidence was excellent—I am sure that the committee would agree that he gave a comprehensive presentation that included technical approaches to the problems that we face in Scotland—and although I did not disagree with his evidence in any way, I felt that most of what he was suggesting last week was well outside the frame of what my bill is trying to achieve. That is the only concern that I had about the evidence that was heard and the suggestions that were made; I do not think that it is technically possible to expand my bill.

If it was a bill that was being started from scratch with the minister, it could well be the case that all the extra difficulties and issues that were raised in consultation could be incorporated. However, the advice that I have been given, as an ordinary member, is that I have to keep it pretty specific and pretty much within the terms on which the consultation touched. For those reasons, I do not feel that I could extend the bill.

The Convener: If you were to extend the bill to include historic buildings and buildings with some heritage, could there be a conflict with existing legislation?

David Stewart: Neil Ross can keep me right on this, but my understanding is that the bill and the 2003 act will apply to all buildings, including farming, commercial, residential and historic buildings. As you rightly suggest, there is already quite a lot of legislation in relation to historic and listed buildings, and it may be that some sort of conflict would arise between new legislation and existing legislation. That is not something on which I consulted and—sadly—it is not something that I can incorporate within the bill.

I would like to provide a lot more solutions than I am providing, but I go back to my original point: this is a member’s bill, and it is not possible to include things that are clearly outwith the frame of the bill’s original concept.

The Convener: Your argument is that you have focused on the areas that have been brought to your attention, and you do not want to muddy the waters by coming into conflict with other legislation.

David Stewart: That is correct. One caveat is that the issues that the minister has raised are in some ways logical extensions of the bill. They still relate to dangerous and defective buildings and some of the issues, such as the length of the charging order, are to do with the bill, so I am comfortable with the points that the minister has raised. I am glad that he has offered the support of his officials, and I will work with them on Government amendments on the points on which the minister touched.

Beyond that, I have no intention of lodging amendments that are outwith the frame of the bill. If the Scottish Government wants to amend the bill at stage 2, I will take advice from officials here in Parliament regarding the next step. However, I would not seek to extend the provisions in the ways that you were describing earlier.

Stewart Stevenson: I wish to pick up on what Mr Stewart said in his letter to the committee about the prior ranking of a charging order over other securities. Given that organisations that have standard securities over properties will generally place duties on borrowers to maintain buildings to standards, thereby ensuring that they have assets that are worth something, is there any mechanism that the member in charge—or the Government, for that matter—could consider such that, when and if the holder of a standard security gets their money back, some of it is entailed to go to the local authority, which might be out of pocket and has thereby protected the value that is attributable to the holder of the standard security?

I understand the substantial complexities around placing the local government order at a higher ranking than standard securities, taking into account the potential legal challenges if we were to approach things in that way, but I would like to be confident that, where public money is being spent to protect what are essentially private or corporate interests, we have explored every opportunity to ensure that the public purse gets back the money that it has spent.

David Stewart: That is a very good point. Mr Stevenson spent many years in banking and has a lot of expertise in this area.

Members will know that the original legislation—the 1959 act—provided for prior ranking. I have looked into the matter carefully. Local authorities are keen on prior ranking, because it means that
they are further up the pecking order than a building society or bank loan.

I had to consider a couple of things. First, some of the legal advice that I received suggested that I would have to be careful with European convention on human rights considerations. I will give an example. Let us assume that there is a charging order on a property and that there is collateral on the property. Let us say that it is a £200,000 property, with a building society loan of £100,000 and no other securities. Any work that is done by the council would be attached to the title. There would therefore be plenty of collateral for the council to get its money back in that situation. That is a beauty in the charging order.

I know that the money is taken over a 30-year period. As you know, many properties are sold within that time. Normally, we would expect the new owner to have a clean title. In other words, the charging order would be discharged and the money would be paid back to the local authority. That is why there is a beauty about the charging order.

There is one caveat that I would make, having spoken to people in local authorities across the country. Judgments about whether or not to have a charging order are normally made between the building control expert who has been carrying out the work and the legal team. If there is a clean title and there is collateral on the building—people can get that information in any searches—we would normally expect the charging order to be used. If that is not the case, the legal team would normally advise the officers not to go ahead with the charging order. That is the key point.

I am not going for prior ranking. On most occasions, if someone does the proper preparation, a charging order will work well. Although that does not rank as highly as a building society or bank security, it may well be the only other security. That is done purely by date of recording.

I am not sure whether Mr Ross wishes to come in at this point on any of those aspects.

10:45

Neil Ross (Scottish Parliament): No—that is the position: it ranks according to the point of registration.

Stewart Stevenson: You may not know the answer to it, but it might be good to put this question on the record. Given that the charging order will be attached to the title, that Registers of Scotland will therefore be aware of it and that anyone who does a search will see it, would notice be given to the institution that placed the charging order if the disposal of the property was contemplated, so that such interests as the council might have could be protected at the point at which there might be some financial value to the asset?

David Stewart: I will get Mr Ross to answer that.

Neil Ross: I am not sure whether you are indicating that the Registers of Scotland should have some active role in intimating—

Stewart Stevenson: To be clear, I am merely posing a question without having a predetermined answer. As you will be well aware, some complicated sets of interests can be registered against title—some financial and some of other character. The important thing is that, where there is a financial interest such as a charging order, that becomes capable of delivering money back to the council at the point at which some value is realised by the sale of the property concerned or by its transfer to another person.

I accept that this may be outwith the scope of the bill, but I was simply wondering whether it would be possible for the local council to be advised that the property was about to be sold. Clearly, the purchaser would be aware of the charging order, but there is not necessarily an obligation on the purchaser to do anything about that.

David Stewart: That is a very interesting point, and I had not considered it. We will take that away and look into it. We will perhaps drop you a line about it. If there is any need for amendments, we will take that on board for stage 2.

Stewart Stevenson: With the convener’s consent, I will suggest that you might wish to write to the committee as a whole.

The Convener: It would be extremely useful if it were possible for you to drop us a note after exploring that issue, Mr Stewart.

Cameron Buchanan (Lothian) (Con): So far, Mr Stewart, you have commented mostly on town and city areas. What is your policy on rural areas, where barns and buildings might be defective, but without threatening anybody, unless they are by a roadside? What is your opinion about such situations?

David Stewart: That is a good point. Coming from the Highlands and Islands, I have an eye to rural areas and farmland, too. The main thing that I would ask the committee to consider is something that it will be familiar with. Apart from the cost recovery power, I am not really touching the dangerous and defective building legislation. All that my bill will do is add an extra tool to the armoury of local authorities that incur costs in relation to any dangerous or defective building. That could be a residential property, a commercial...
building or a farm building. It could be an historic building or a listed building.

All the provisions of the 2003 legislation are still there; all that I am doing is providing local authorities with an extra tool for getting back costs that they have already incurred.

Say that a council—Highland, for example—has spent money ensuring that a farm building has been made safe or has done work around defective buildings, but has been unable to get the funds back by co-operation. If the council felt that a charging order was better, it could use one for a farm building. That is exactly the same as for a building in a city such as Edinburgh or Glasgow. There is no difference at all with regard to using the charging order. It does not matter whether the building is rural or urban, or agricultural or historic.

Cameron Buchanan: The titles in rural areas are often very vague and there might be no titles at all. What happens in cases in which it is not possible to find out who owns the property?

David Stewart: I go back to my reply to Mr Stevenson. It is not compulsory for local authorities to use charging orders. The judgment must be made by the people who are best placed to make it: the legal and building control teams in each of the 32 local authorities of Scotland. It is those individuals who will make the judgment.

Most of the time, the liability is that of the owner, and nothing in the bill suggests other than that. Most of the time, local authorities get funds back from the owner. Some of the time, owners do not or will not pay. In such cases, it is possible to use a normal cost recovery procedure. As members well know, the average legal costs are £5,000. Attempts to get costs back through civil cost recovery are not always successful. If there is a clean, distinct title, the advice would be to use a charging order. In respect of the example that you gave, if there was any doubt about the title, my advice would be not to use a charging order.

Cameron Buchanan: You mentioned registering liability for costs. What sort of register would you have for costs? Some people might have repaired the building and made it good and safe and others might have done more to it.

David Stewart: Perhaps I can raise a wider issue, convener. The key point is that any legitimate costs that a local authority incurs can be added to the charging order. The first charge is of course the £50, or thereabouts. If you do it online it is cheaper: you do not go to court and it is just done through the land register. Then there are any administrative costs that you incur in setting up the charging order. Then there are costs for building control work. Often, the private sector carries out the repairs and then charges the council. There are a whole lot of costs outlined in the bill: administrative, financial and legal costs and the costs for staff time, which can be allocated in the standard way. Whatever the costs, you would add them to the total cost of the charging order and set it for the required time. As I hinted earlier, for larger sums there is likely to be a longer repayment period, but for smaller sums such as £5,000 or £6,000 you would not want to wait 30 years, so clearly there would need to be a shorter repayment period. The council should not be out of pocket. To use the technical term, you would have a full cost recovery approach to this, which would cover staff time, actual costs and the cost of the repairs.

Alex Rowley: Congratulations on all the hard work that you have done to get the bill to this stage. It certainly seems to have been welcomed by local authorities, although they have raised concerns, particularly about the proposal for the inclusion of an appeal process. Will you say something about that, given that there is a view that people could use the appeal process to try to avoid paying?

David Stewart: That is a good point and I am glad that I have the opportunity to cover it. I spoke to one of my Highland Council building control officers earlier to run through the day-to-day procedure. I will give a slightly longer answer to explain where the appeal would come in.

In the normal course of events, if there is a dangerous building, councils go immediately to the owners and, most of the time, it is in the owners’ interest to do the work informally and there is no requirement to have an order of any sort.

If the individual does not want to do that, the council can apply a dangerous buildings notice. It does not need to go to court for that; officers have powers to take that action. There would be an immediate health and safety procedure to ensure that masonry was not falling, the road was closed and all the emergency work was carried out. If at that stage the owner thought that the work should not be done because it would cost £10,000, or that the cost was not apportioned correctly, they could go to the sheriff court and appeal under the terms of the 2003 act.

In the appeal process that I am providing, I am not giving owners an opportunity to say that the work should not be done or that the cost should not be apportioned in that way. The process in the bill will cover purely technical issues, such as whether ownership was transferred in good faith at market value, which might give the owner an opportunity to appeal.

I do not expect the process to be used very often, but I understand the Government’s concerns and I am prepared to look at it again. I return to the point that I made earlier: I was
advised that, in any new legislation, one must usually have some element addressing the European convention on human rights in terms of giving people a right of appeal.

I reassure local authorities that I do not see the appeal process as a viable delaying tactic, because it cannot be used to argue about the need for the work or the apportionment of the costs; that could be done at a previous stage under the dangerous buildings order.

**Alex Rowley:** There are concerns in communities that councils do not seem to have the powers to be able to act on what are described as derelict buildings, which blight local communities. In Cowdenbeath High Street in my constituency, there is a former hotel that was set on fire. It sits there looking derelict and horrible, right at the main entrance to the town. When asked about it, the council’s answer tends to be that the building is not unsafe. This bill and the community empowerment (Scotland) bill have been referred to time and again in the local papers as measures that will allow councils to address that issue. Having listened to what has been said this morning, my concern is that perhaps the bill will not address that issue. Have local authorities simply been reluctant to take the next step unless they absolutely had to, because it has been difficult to recover the money?

**David Stewart:** That is a very good point. Your view reflects what I have heard recently from local authorities throughout the country in my various conversations with them. If you are asking me whether there is a gap in the market for legislation for the scenarios that you paint, there probably is. I have asked local authorities what they would do with a derelict building that is not dangerous—perhaps it is orphaned and its ownership cannot be determined, and the council wants it for affordable housing. The councils tell me, as you will know, that there are some powers under planning legislation for compulsory purchase, but that there has to be a dedicated plan in place for that. I think that there probably are some gaps.

I would not want to overegg the extra work that councils may do if they get a charging order. I do, however, feel that for high-level defective and lower-level dangerous buildings, where there is a sort of blurred area about whether councils should act, councils would be more encouraged to act in future because they will be confident, if it is a charging order, that they will get the money back. However, as I said earlier, the charging order would not be used in every situation.

If the bill is passed, my expectation is that, in future, the profile of the outstanding debt that councils have will be reduced. I think that we will probably see councils carrying out more work on buildings that are on the boundary between high-level defective and lower-level dangerous. That is my prediction, based on having spoken to officials throughout the country.

I stress to the committee that I am not suggesting that every time a slate falls off a roof or a ronepipe is broken, suddenly councils have a magic bullet to go and do the work. They have clear financial issues and will probably not get involved in that type of work. However, they will definitely take a much more positive view on dealing with clear, straightforward, dangerous building work.

**Stewart Stevenson:** The question occurred to me, as I listened to Alex Rowley’s quite reasonable point about the hotel in Cowdenbeath, whether one of the ways in which an unsafe building could be dealt with would be to demolish it. In certain circumstances, although it could be a rather unhelpful outcome, demolition would make a building safe. We would probably all be more interested in such a building being moved towards a positive reinstatement of its previous condition rather than demolished, even though that might make it safe.

**The Convener:** It depends on the building.

**David Stewart:** That is a good point. In fact, in my consultation in the previous session, I published a picture of a disco in—I think—North Ayrshire that had completely burned down. What was left was dangerous and the council demolished the building at a cost, I think, of between £200,000 and £300,000. Unfortunately the owner disappeared; I understand that they now have a disco in Glasgow—allegedly, I should say. The council was out of pocket because it could not get the money back. On some occasions, building control will demolish, but there is a wider issue. I have examples in my patch, such as the old youth hostel near the castle in Inverness. It is probably not dangerous but it is really unsightly. The downside, of course, is that the neighbours’ property values go downhill.

The other point that I have not pushed but that I can perhaps insert into the record is that most local authorities tell me that they use the private sector to do their dangerous building work. I think that Midlothian Council said last week that it uses its direct labour organisation. Obviously, if there is an increase in the work carried out, that will be a boost to the construction sector in Scotland, which I am sure that we would all welcome.

Demolition does happen and can be very expensive, but at least it leaves opportunities, where there is orphan ownership, for new developments, such as affordable housing, to be built in place of the scarred building that was there before.
John Wilson: We have covered the issues in great detail, but you made a couple of comments in your opening statement that I would like to examine further. One remark was about the number of dangerous and defective buildings: you mentioned 402 rising to 992. Are those figures that you have gathered from local authorities? Have you had any indication of the average cost of carrying out the works to make those buildings safe? Last week, as you heard in evidence, local authorities gave us an average figure of £3,000, but you mentioned a figure of more than £200,000 to make good a dangerous building in North Ayrshire. What is your experience of the average cost in relation to these charges?

11:00

David Stewart: Thank you for your question. The figures that I quoted came from the answer to a parliamentary question that I lodged and I think that they are the most up to date. They are actual, real-life figures.

I have the breakdown per local authority and I do not think that the committee has that information. If the convener agrees, I would be happy to send it—[Interruption.] I am sorry; I have just been shown that the information is in the explanatory notes, so it is already available to the committee.

Your point about costs is a good one, although I cannot answer it specifically because it varies from area to area. The speaker from Midlothian who was before the committee last week told me that Midlothian has a very clear risk assessment for any dangerous building. For example, they will go in and do the basic work, such as boarding up windows and making sure that things are not falling off the roof, before they have discussions with the owner, if the owner can be found, about any further work that might be required. Quite rightly, along with a responsibility for a dangerous building, a council has responsibility to taxpayers not to spend excessive funds that it cannot get back. That is a big issue.

The Midlothian representative told me the tragic story of how it boarded up upstairs windows in a house in Dalkeith, I think it was, but three young children got in and started a fire in which, unfortunately, they died. As a result, the council does not board up first-floor windows so that there is a form of escape from the house.

Councils have health and safety, legal, and financial responsibilities. They vary according to the situation, but most local authorities will take the approach of doing the minimum until they can negotiate with the owner. Most local authorities hope that the owner will pay. The nightmare situation is if dangerous work has to be done on a huge building and the owner cannot be traced, but the building has to be made safe. That is when huge costs can be incurred, such as the case in North Ayrshire. That is adding to the burden of local authorities not getting the almost £4 million that is outstanding across Scotland.

John Wilson: I think that you said that the figure was £3.9 million.

David Stewart: Yes.

John Wilson: That was extrapolated from the local authorities’ calculations. Could you put that into perspective, taking into account the overall charges that are being laid by local authorities against owners of buildings as a percentage? Where does that £3.9 million come into the equation?

David Stewart: Claire Menzies-Smith might want to answer that.

Claire Menzies-Smith (Scottish Parliament): The figure came from the Scottish Government's commissioned research report. There are gaps in the figures for local authorities that were included in the project. The figure is, as I say, extrapolated from those eight local authorities up to 32. I would not say, therefore, that it was a sound basis for coming up with an average figure.

John Wilson: It is just that you have used that figure in evidence and our role is to examine the evidence that is provided to us.

The second part of my question is how that compares with the overall regime in terms of recovery of costs that are incurred by local authorities in making good dangerous and defective buildings.

David Stewart: Neil?

Neil Ross: I am not sure that I can really add anything to that. It is a question of statistical information to a certain extent.

Claire Menzies-Smith: The information that is available and in the public domain is from the Scottish Government’s commissioned research report, the parliamentary questions and the number of notices. We do not have financial figures that are associated with that information; we have numbers rather than pounds.

David Stewart: To help the member, I would be happy to lodge another parliamentary question asking for the actual cost per local authority, as those figures are not in the public domain. I would then write to the convener with the information.

John Wilson: I have been doing some calculations based on the evidence that we have heard this morning. There are 992 empty buildings that need to be made good, so, based on the average cost that we heard from local authorities
We all know the problems with there is therefore a charging order would be a great route forward. We need to remember that it is not just an imposition and that there might well be negotiations with the owner about whether such a route is appropriate. That is the proposal's great power.

David Stewart: I think that I touched on that matter in response to Mr Buchanan.

The key partnership in this respect is between building control officers and the legal teams in their local authorities, who will make a joint decision about situations in which a charging order will be useful. A charging order would not be used, first, if the title was unclear and, secondly, if there was negative equity in the building. Mr Ross might wish to confirm this, but I believe that one might be able to determine whether there was negative equity through a search. If you knew what the outstanding security was, you could work out the property's value with council officials.

Those are a couple of situations in which I would recommend that a charging order should not be used; I do not know whether Mr Ross has any further comments.

Neil Ross: I should repeat that the use of a charging order would be at the local authority's discretion; indeed, the member has emphasised that this is a discretionary power. As has been said, any judgment on whether a charging order is the appropriate course of action in a particular situation will take into account all relevant factors and involve the relevant officials. I am not sure that I can expand beyond that.

David Stewart: The key point is that it is very cheap—only £50—to register a charging order; people will register the order in the land register instead of going to court; and, until the debt is paid off, they will have a hold on the building's title. Most new owners do not want a cluttered title—they want to ensure that any debt has been cleared.

We all know examples of elderly men or women in big houses whose families have left and who now have a very low income. In such circumstances, charging orders might be a good way forward. We need to remember that it is not just an imposition and that there might well be negotiations with the owner about whether such a route is appropriate. That is the proposal's great strength.

I believe that I am right in saying that, in most cases, the title is pretty clear and that only a marginal number are unclear. On most occasions, therefore, a charging order would be a great route forward. We all know the problems with conventional cost recovery, which is expensive and does not always achieve the goal of getting funds back to local authorities.

John Wilson: It is fine to say that decisions about charging orders will be taken by legal teams and building control officers but, in your investigations leading up to the introduction of the bill, did you consider what discussions council officers would have with building owners? As I said, I hope that these orders would be imposed only when officers have exhausted the possibility of discussing the matter with owners.

David Stewart: That is a very good point, but I must stress that owners are responsible for repairing buildings and making them safe. On most occasions and in all local authority areas in Scotland, the owners will pay any funds up front to the council. At a recent meeting with the chief executive of Glasgow City Council, his officers told me that part and parcel of any negotiation before even thinking of applying any other form of cost control would be to negotiate a repayment. If that can be done on a voluntary basis, you will not need to go near the courts or charging orders. The funds can be retrieved through negotiation, and it is obviously in the council's interests to do that.

You are also right to suggest that a charging order would be part of a negotiation. That is certainly my hope. After all, it is always better for the council to take the owner with it instead of making this kind of imposition.

John Wilson: Thank you very much.

The Convener: Stewart Stevenson has a supplementary question.

Stewart Stevenson: The member made an oblique reference to equity release that the elderly owners of large properties might indulge in and which would lead to a security being attached to the property. However, given that these owners have low incomes, will the bill's provisions or its practical operation allow the charging order or any debt to the council that might arise to be deferred until the owner's death, as would be the case with equity release schemes?

David Stewart: I make it totally clear that I was not talking about any formal equity release scheme. I was simply using as an analogy the case of an elderly person who lives in a large house but has a low income. We all know of such examples and, in those cases, a charging order would be useful as it would ensure that the property is safe, which would be in the interests of the owner, the neighbour and the council. On such occasions, the local authority might have more discretion over the period of the charging order, which is an issue that I am hoping to cover in the bill, and it would then decide on an appropriate period. In any event, one would expect the
outstanding debt to be cleared on the death of the owner—

Stewart Stevenson: Just to cut to the chase, I simply wanted to find out whether the charge could be started at a distant date or whether it had to start at once.

David Stewart: Mr Ross will respond on the technical point but the point that I want to put on record is that if the elderly person dies and the house passes to a son or daughter, they will be responsible because they will have the title of the building. The council does not need to do anything else because the charging order puts a hold on the title.

The Convener: Do you have anything to add, Mr Ross?

Neil Ross: On the technical issue, it would be for the local authority to determine the point at which to proceed to formally registering the charge.

Stewart Stevenson: Thank you. That is sufficient.

Anne McTaggart: Although this used to be a tool in the toolbox, it was removed. Why did that happen? Had any negative issues been raised or concerns expressed about it?

David Stewart: The member raises a very good point. That is one of life’s great mysteries and I have spent a lot of time and effort talking to the Scottish Parliament information centre, ex-ministers, NGBU and others to find out why this excellent tool was taken out of the toolbox in 2002-03. There was a suggestion that European legislation was going to be introduced that might have had an impact, but none came.

We should certainly call what happened an error. I am not blaming anyone or any political party for it; it is just the way it was. At the very least, I am simply making good a mistake that was made in 2002-03. As you know, the approach worked very well from 1959 to 2002 and all the parties supported it. I am not claiming that it was perfect, but it was a good additional tool in the toolbox. If someone can explain why this error happened, I will be very grateful because I have had zero intelligence on the matter.

Anne McTaggart: Thank you.

The Convener: I thank Mr Stewart very much for his evidence—[Interruption.] I beg your pardon, Mr McDonald. I did not see you indicate that you wanted to ask a question.

Mark McDonald: I have just a couple of questions, convener.

In our evidence taking, we have spent a lot of time talking about private ownership of properties. Have any problems or even potential problems been encountered where a property is owned by another council department—for example, a derelict school building that is owned by an education department—or another public body? After all, we are talking about local authorities recouping costs, but what if they are recouping those costs internally? Have you encountered any difficulties in that respect?

David Stewart: That is a good point. I have to say that I have not considered the situation in which the property in question is owned by another local authority department, but I suppose that the fundamental issue is that if a building is dangerous and defective and the local authority cannot get its funds back, it can use a charging order against anyone as long as there is a clear title. It might cause local embarrassment if another public body is involved, but the good thing is that the local authority would know that it would get its money back. We all know of examples of public bodies taking each other to court—indeed, I have some examples of that in my own area. It might seem daft from a taxpayer’s point of view, given the amount of legal costs that they would be incurring in the process, but there is no debarment to the use of a charging order no matter whether the property in question is owned by a public body, another local authority department or whatever. As long as there is a clear title, the measure is competent.

I do not know whether Mr Ross has anything to add.

Neil Ross: I do not think so. Clearly a local authority could not take action against itself but beyond that a charging order would be an option.

Mark McDonald: That is fine. It was important to get that on the record, given how much we have discussed the issue of private ownership.

My second question is about the point raised by the convener in the previous evidence session about whether the bill might have a retrospective element. Have you taken a further look at the detail of that? Complexities could arise if you tried to apply a charging order retrospectively, particularly given that ownership might have repeatedly changed hands.

David Stewart: I understand that local authorities are quite keen for the provisions to go back in time. Given the level of debt that Mr Wilson highlighted, clearly it would be good if they could use this tool retrospectively.

However, the general advice that I have had is that it is not normal to backdate legislation and, again, there are ECHR issues to take into account. My legal advice is that it would be best if we did not do that. If it were to go through, the bill would be effective six months after royal assent.
I listened to what the minister said and am obviously happy to discuss some of these points with the team from the Scottish Government. However, I note that last week’s witnesses were not very keen on retrospectivity, and the position that I have taken is that the bill should not go back in time. I will, as always, keep my options open just in case a compelling amendment is lodged but, as I have said, the legal advice that I have received is that trying to include a retrospective element might breach human rights.

The Convener: Thank you, Mr Stewart. You said that you would write to the committee to clarify a couple of matters. If you could do so by the end of the week, we would be grateful, because certain processes need to be gone through.

I suspend the meeting for a couple of minutes to allow the witnesses to leave.

11:15

Meeting suspended.
Written submissions to the Local Government and Regeneration Committee

Federation of City Farms and Community Gardens
Perth and Kinross Council
SFHA
Simpson & Marwick
North Ayrshire Council
West Dunbartonshire Council
South Lanarkshire Council
East Renfrewshire Council
Moray Council
Glasgow City Council
Law Society of Scotland
Comhairle nan Eilean Siar
Aberdeenshire Council
Dumfries and Galloway Council
Local Authority Building Standards Scotland (LABSS)
Argyll and Bute Council
Clackmannanshire Council
Stirling Council
Highland Council
City of Edinburgh Council
COSLA
East Ayrshire Council
Scottish Building Federation
Fife Council
South Ayrshire Council
East Lothian Council
Midlothian Council
Institute of Historic Building Conservation
North Lanarkshire Council
Scottish Government Building Standards Division
Scottish Government Memorandum
Response to Call for Evidence on Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill from the Federation of City Farms and Community Gardens

From more than 30 years’ experience, we know that communities can also be affected not just by buildings, but also by land which has fallen into disrepair. Unused land can be dangerous, especially if contaminated or full of fly tipped material, and it certainly has a negative impact on community spirit, encouraging anti-social behaviour and reducing local morale. The FCFCG receives enquiries every month from community groups who want to use land that is currently neglected for community growing, but who are prevented from doing so because of contamination. The community group cannot afford to remediate the land, and the owner can often not be traced.

Therefore, we suggest extending the cost recovery powers in relation to defective and dangerous buildings to cover dangerous and defective land as well. We would like local authorities to be able to place charging orders on contaminated land, so that remediation work can be done and the land can be put to good use by communities. The local authority could then recoup the cost of the work when the land is sold. As well as benefitting local communities, improving neglected land would reduce maintenance costs and increase the chance of being able to sell the land, both of which would benefit the landowner in the long run.
Local Government and Regeneration Committee
Scrutiny of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

Local Government & Regeneration Committee’s Call for Evidence
Response from Perth and Kinross Council

The Committee invites all interested parties to submit written evidence on the Bill, setting out your views on the provisions of the Bill. It would be helpful if written submissions could address the following questions:

1. What are the advantages and disadvantages of the proposed Bill?

   From our recent experience, the advantages are seen as being:
   - That it includes provision for recovery of expenses incurred over and above the basic cost of undertaking the work.
   - That it gives the Local Authority another tool in securing recovery of costs it may incur in tackling defective and dangerous buildings.
   - As the order is against the property it avoids the need to pursue an individual in the civil courts. This is both time consuming and costly which depending on the sums involved may not be viable.
   - Although the payback period is potentially long, there is a greater guarantee of the costs being recovered.
   - It may prove an incentive to make those liable pay rather than incur the additional costs.

   The disadvantages are seen as being:
   - That this alone is unlikely to encourage Local Authorities to take a more pro-active approach to undertaking work in default. The powers to be introduced merely reinstate those that were available under the 1957 Act.
   - The Bill does not take the opportunity of widening cost recovery powers for example by introducing powers available under Housing legislation whereby the Local Authority can act for missing owners rather than having to take on the entire job. If such a proposal were to be included in the Bill, it may encourage more owners in tenemental properties to be pro-active in dealing with defects secure in the knowledge they would be supported by the Local Authority. Having control of the project may alleviate concerns expressed by some residents of Local Authorities carrying out unnecessary or overly expensive works.
   - Whilst it is understood why the 30 year payback is being introduced, this seems too long to work as an incentive to the local authority to do work in default. Perhaps the wording should stipulate a maximum payback period of 30 years with flexibility for shorter periods where sums outstanding are not excessive.
   - Ultimately the default appears to remain that if payment is not forthcoming then the normal debt recovery procedures apply.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

   As noted in the answer to Q1, it is not considered that the Bill will greatly improve the likelihood of Local Authorities undertaking the work in default. It is however to be hoped that having this additional power will encourage more
owners to undertake the work on their own behalf as the threat of a charging order may act as a deterrent.

3. Where could the initial capital, required by local authorities to undertake this work, be found?

Local Authorities budgets are being stretched and it is unlikely additional funding will be available. Given however that in theory this should be a self-evolving fund, being replenished once payments are made by owners, it could be argued this should be self-financing if a fund from capital budget can be set aside for this purpose. The extensive payback period of 30 years will however seriously reduce the fund balance leaving authorities unable to carry out future works.

4. Where the owner of a building is not known how, will the Bill improve on the current situation?

The Bill will be an improvement as the proposed introduction of Section 46B now permits the Local Authority to charge for all costs incurred in tracing owners. It would be even better if the Bill included a change to the Data Protection Act to allow information on ownership held by Council Tax purposes to be released to other council services for enforcement purposes.

5. Are there any equality issues arising from the proposed Bill?

No

6. What are your views on a fixed period of 30 years for repayment?

The fixed period of 30 years will most certainly not be an incentive to encourage proactive work by Local Authorities. As noted in the answer given to Q2 it is considered that the 30 year period should be included as a maximum payback period with the option for shorter payback period for more manageable amounts.

Comments submitted by
Gordon Lindsay
Building Standards Manager
Perth & Kinross Council
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35 Kinnoull Street
PERTH
PH1 1HR
21st January 2014

Clerk to the Local Government and Regeneration Committee
Committee Office
Room T3.40
Scottish Parliament
Edinburgh
EH99 1SP

Dear Sir/Madam

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

I am writing on behalf of the Scottish Federation of Housing Associations, the membership body representing 116 housing associations and co-operatives which own stock in the country. In total there are over 277,000 housing association homes in Scotland housing over 10% of the population.

Many of these homes are in traditional tenement buildings in cities, acquired in the 80’s and 90’s and many incorporate stairs with a mix of housing association properties and private owners where the association provides factoring services. It is therefore of paramount interest to the housing association that the whole building is kept in good repair, even though some of the cost of repairs falls on private owners.

Housing associations currently have to rely on the provisions of the titles deeds of each tenement, or rely on the provisions of the Tenements (Scotland) Act 2004 and a tenement management scheme in order to legally carry out common repairs with or without the consent of all of the owners.

Housing associations have generally either, undertaken repairs with the agreement of owners and arranged for time to pay etc if necessary, or in some instances just borne the cost in order to ensure the safety and security of their assets. While there are civil remedies for the recovery of costs, these can be long winded and fruitless in some instances.

The draft Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill covers different circumstances – that where a Local Authority is required for public safety reasons to intervene and repair a building which is in an urgent state of disrepair. We can see that the re-introduction of charging orders is a very sensible measure given that in straightened times, local authorities should have access to resources to ensure the safety, security and integrity of the build environment. The cost should be met by those who are liable for the maintenance and repair, and the payment options suggested are sensible and fair, depending on an individuals circumstances.

It would be extremely desirable for a similar power to be available to housing associations – perhaps through intervention in collaboration with local authorities – to ensure speedy
action is taken to restore mixed tenure buildings to a safe standard, where the likelihood of recovery of costs through civil law means is limited.

This could mean the local authority imposing the charging order and remitting any funds obtained back to the housing association in recompense for works carried out. Whether this requires statutory authority or not is unclear and must go back to the powers to local authorities to rectify defective and dangerous buildings – ie if a charging order only comes on the back of a defective and dangerous buildings notice, the property would need to be in significant disrepair, rather than at a stage where some preventative spend could lengthen building life and assist early intervention.

Some consideration of when action can be taken to repair a dangerous and defective building would also be useful.

In conclusion, the Bill is a reasonable sensible step to restore the position pre the Building (Scotland) Act 2003 and we support it.

Any extension to cover registered social landlords which require to undertake preventative repairs to mixed tenure blocks, by either collaborating with local authorities or even issuing charging orders directly would be extremely desirable from our membership’s point of view. It would enable housing associations to be much more proactive and confident about proceeding with significant and urgent repairs in the knowledge that there is a easy route to recovering costs.

I hope this is useful and I would be very pleased to expand on the comments made herein if you feel this would add to the debate.

Yours faithfully

Susan Torrance
Policy Manager, Investment, Asset Management and Development

Scottish Federation of Housing Associations
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149 St Vincent Street
Glasgow G2 5NW
Response to Call for Evidence on Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill from Simpson & Marwick

Edinburgh Conveyancers’ Forum (ECF) is a group representing most of the main solicitors’ firms carrying out residential property transactions in and around Edinburgh. Members and their clients have been heavily impacted by the withdrawal by City of Edinburgh Council of their statutory notice service following a well-publicised investigation into its operation.

The current law in Scotland does not afford an effective practical mechanism for co-owners of properties in multiple ownership – typically tenement flats – to carry out necessary repairs to the common fabric of their building unless they are prepared to meet, and seek to recover after, the share of costs of any co-owner who does not agree to meet a share or is unable to do so.

For many decades in Edinburgh, and other parts of the country, this situation has been alleviated by the use of statutory repair notices allowing the council to have the work carried out and then to recover costs from the owners. The council (s) have in many cases been left to pick up the cost for any owners against whom the debt could not be recovered.

Charging orders would be a distinct advantage in that their existence is easier to establish from the Land Register and the sums charged by the order would be readily identifiable from within the Order itself. This would make the mechanism of recovery of such sums smoother and less time consuming. It was also substantially reduce the risk of default to the Council as ultimately sums due would be recovered from eventual sale or transfer of the property.

They may also facilitate the Council in looking at schemes where they can obtain funds for repair costs from willing co-owners and Charge the properties of the recalcitrant. This could make a fundamental difference to the willing of Councils to become involved in enforcing repairs again where the costs are substantially less than meeting the full cost of the project up front.

Whilst the charging orders proposed are not a full answer to these specific issues in themselves, they would hopefully offer a welcome first step to developing a system that can protect our built environment to the advantage both of the population at large and also to individual owners whilst shifting the financial burden back to the owners themselves. It is clear that Councils’ roles should be to facilitate such repairs wherever possible but with the threat of compulsion in the background.

New schemes must be devised to assist here but whatever these are the element of compulsion in the last instance is an essential feature. In the current financial climate, it does seem important also that central government provides financial assistance to allow Councils to develop such schemes and ensure that many of the buildings which are part of our everyday life are not allowed to deteriorate to the stage where they could be lost to our townscapes. For many reasons that would be a disaster.
ECF commends and supports this Bill and further action which can improve this situation.
North Ayrshire Council’s response is set out below:

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<th>Consultation</th>
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<tr>
<td>1. Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?</td>
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<tr>
<td><strong>Response:</strong> Building Standards were involved in consultation during 2011 on the Building Repairs (Scotland) Bill, which addressed some of the aspects in this Bill. Finance officers have not been involved in any previous consultation exercise.</td>
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<td>2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum (FM)?</td>
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<td><strong>Response:</strong> Not applicable.</td>
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<td>3. Did you have sufficient time to contribute to the consultation exercise?</td>
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<td><strong>Response:</strong> Yes</td>
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<th>Costs</th>
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<td>4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?</td>
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<td><strong>Response:</strong> The financial implications as they arise from the introduction of charging orders have been accurately reflected in the FM. While the re-introduction of charging orders is another tool that can be used to improve the recovery of the cost of making safe dangerous or defective buildings, they do not provide a complete solution which may allow a continued exposure to financial risk arising from the Bill. For example if an owner of a property does not have funds to repay the Council, a charging order may assist the local authority in recovering costs incurred at the point of future sale but not before. Also in situations where the cost of the work is greater than the value of the property then a charging order will not assist the local authority in recovering its costs in full. The FM does not appear to cover how council’s will fund the up front capital costs where they have to carry out the repairs and then recover the costs. Section 33 of the FM states that Scottish ministers will determine the early settlement sum where the owner is unable to agree a sum with the local authority. This would appear to indicate there is a chance that the sum agreed would be less than the costs incurred by the authority and therefore putting an additional risk on the authority being unable to recover its costs.</td>
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<td>5. Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?</td>
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<td><strong>Response:</strong> Given the circumstances and nature of the work involved it is impossible to estimate and costs or otherwise.</td>
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<td>6. If relevant, are you content with that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?</td>
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<tr>
<td><strong>Response:</strong> NAC can meet the costs in relation to the process of issuing charging orders. However the increased scope of the Bill to cover defective buildings may encourage greater activity, leading to a potential increase in costs incurred to deal with the actual</td>
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situation. Although the bill will hopefully lead to the majority of costs being recovered at some point in the future, where the Council has to carry out the repair there may be a significant cost incurred which may not be recovered until many years later. If there is an expectation that more defective buildings repairs should be carried out then significant funding may be required to meet this up front cost.

7. Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

*Response:*
It is almost impossible to estimate the costs involved in in such situations

#### Wider Issues

8. Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

*Response:*
The FM reasonably captures costs directly associated with the Bill, i.e. costs associated with raising charging orders. However, such costs are a fairly minor element when compared to the cost of making dangerous or defective buildings safe. Whilst the Bill will hopefully lead to the majority of the costs being recovered there is still a risk that not all costs will be recovered and also there is the issue of how the authority funds the upfront cost of repair until these can be recovered. These issues do not appear to have been covered in the FM

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

*Response:*
Not aware of anything

#### Other comments

- There are similar ongoing consultation processes with regard to the Local Government and Regeneration Committee and also the Community Empowerment (Scotland) Bill and some clarification and comparison is required.

- The Bill seems to be step in right direction in terms of hopefully increasing the recovery of costs of repairs. However for Local authorities to be encouraged to carry out more repairs to defective buildings we would be looking for a guarantee of full recovery.
Response from West Dunbartonshire Council

Date: 30 January 2014

Dear Sirs,

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

West Dunbartonshire Council welcomes the opportunity to contribute to the above consultation and we would comment on the questions asked as follows:

1. What are the advantages and disadvantages of the proposed Bill?

   **Advantages:**
   An additional way is made available that local authorities can seek to recover expenditure connected with defective and dangerous buildings.
   
   Charging order could be solution for some owners who are facing short term financial issues to have the work done and pay back in instalments.

   **Disadvantages:**
   As at present, local authorities would still have to source money at the time if the incident to pay their own and contractors costs in carrying out work. Local authorities would require to source and allocate money to enable them to pay now and recover later. A national fund as has been previously suggested could assist in resolving this issue.

   Fixed term of 30 years – see response to Q6.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

   It is felt that the Bill as proposed is unlikely to resolve existing problems due to it not being able to be applied retrospectively. For future incidents, some local authorities may decide to carry out discretionary work in default (where owner has not carried out the required work) as there would be more ways available to recover expenses incurred than exists at present; some local authorities may take confidence in the proposed charging order provisions and therefore carrying out work in default.
3. Where could the initial capital, required by local authorities to undertake this work, be found?

If the figures suggested within the financial memorandum are correct then given current budget pressures faced by local authorities it is not known where initial capital, to any great effect, would be obtained from. While not currently proposed and therefore not detailed in any way, consideration could be given to the establishment of a national fund from which local authorities could draw down money from and repay back once paid by the owner.

4. Where the owner of a building is not known how, will the Bill improve on the current situation?

It is not thought that the proposed bill will greatly improve situations in which the owner is unknown. It is however acknowledged that some local authorities could take some confidence in carrying out works and placing a charging order on the property in situations in which the owner is unknown.

5. Are there any equality issues arising from the proposed Bill?

None known.

6. What are your views on a fixed period of 30 years for repayment?

It is felt that it would be beneficial to have flexibility in the charging order period; especially in terms of relatively small amounts to be recovered by charging order (e.g. a £900 debt to be repaid at £30 (+interest) over 30 years, appears excessive). Ability for local authorities to have flexibility to determine the charging order period would enable such situations to be avoided. An upper limit of a 30 year charging order period could be fixed.

Other Comments:

We must point out that the proposals in this Bill have broadly the same aim as those currently contained within section 27 of the Draft Community Empowerment (Scotland) Bill (consultation draft) which is also currently open for consultation; albeit that that Bill aims to introduce a Notice of Liability process rather than a Charging Order process. While recognising that both bills are different and the exact detail differs, there are nonetheless similarities between both bills and it would appear to us that if at all possible then the opportunity should be taken to only introduce 1 proposed measure to assist local authorities at this time. In isolation we support the aims of both bills regarding recovery of expenses. We have no overall preference as to whether notice of liability or charging orders are introduced but would welcome that at least one of the proposed measures be introduced.
While the exact details do differ in some respects (e.g. flexible time period for repayment under notice of liability process v’s 30 year fixed period under charging order process) it appears that if common ground can be found, it would be worthwhile that one of the proposed bills as currently drafted be amended to reflect this, with the other being amended to deleting common provisions.

I trust that the above information is of use.

Yours faithfully

Colin Newman
Team Leader Building Standards
Local Government & Regeneration Committee's Call for Evidence
Response from South Lanarkshire Council

Question 1: What are the advantages and disadvantages of the proposed Bill?

Response:
The Council welcomes the option for recovery of expenses through charging orders however, it must be recognised that local authorities would still require to access funds at the time of carrying out works in order to pay the costs that they have incurred in dealing with the situation. These include costs incurred by contractors acting on behalf of local authorities to rectify the danger / defect.

Having the option or threat of a charging order would improve the chance of receiving monies owed sooner than currently is the case. It would also be a mechanism to recoup monies, albeit after a potentially significant period of time, from owners who are unwilling or unable to pay.

Other advantages include:
- The ability to be able to register charging orders could provide an incentive to owners to undertake repairs without the need to use them at all.
- A charging order may have a more certain cost-recovery process and arguably a better prospect of recovery too than other debt recovery means.
- Where an owner cannot afford to pay their share of the costs, a charging order effectively means there is another option available - to pay back a local authority in annual instalments over 30 years.
- Whilst a charging order might have a ‘blighting’ effect on the marketability of a property, if repairs were not carried out at all, this would arguably have more of an impact.
- The proposals allow interest to be charged on sums due.

Whilst an improvement on the current position, the proposals still mean that local authorities will have to incur ‘up-front’ expenditure with no certainty of when the debt will be repaid, if at all. It is questionable how local authorities will be able to fund this in the next few years given budgetary constraints.

While perhaps not a disadvantage, the introduction of charging orders will not in itself stimulate activity to bring buildings into a good state of repair, particularly relating to defective buildings where the duty on local authorities is discretionary.

Other disadvantages include:
- Debt recovery might in some cases, in practice, need to wait until the property is sold and even then the value of the property may be less than the debt due.
- Arguably, the administrative costs of setting up a charging order and running an account for up to 30 years would mean that for small amounts of sums due, it would not be cost-effective to set this up (albeit it is noted interest runs on sums due under the proposals).
The Financial Memorandum refers to the Housing (Scotland) Act 2006 where there are provisions for the equivalent of charging orders. According to Registers of Scotland, since 1 April 2009, there has been approximately 125 repayment charges registered for the whole of Scotland only which suggests local authorities are not finding this mechanism very useful and that might prove to be the case here too.

The Call for Evidence states that the Bill seeks to ‘prevent the sale or transfer of land’ until the debt has been repaid. Whilst a charging order will ‘run with the land’ and be enforceable against successor owners, the proposed Bill will not actually prevent the sale of land until the debt is repaid. Thus, properties are and will be sold with a charging order registered over the property and it does put successor owners on notice that they will become liable for the debt. In practice, whilst a charging order may have the effect of preventing sales going ahead, we agree the proposed Bill (as drafted) should not actually prevent sales occurring.

Early Repayment Provisions: The proposed Bill states that an owner of a building subject to a charging order may at any time pay the amount due ‘in full or such lower sum as the owner may agree with the local authority’. There is provision in the Bill that if the parties disagree as to the amount, the Scottish Ministers may decide this either in a specific case or by reference to criteria to be set out by subsequent Orders. The Policy Memorandum accompanying the Bill [para.57] indeed states that a local authority might decide to “round down” the total amount due to it or waive in-house administrative costs. Thus, the whole tenor of this, and possibly subsequent Orders, appears to be it is for local authorities to take the financial ‘hit’ here. Also, it gives an owner a right of appeal if the parties cannot agree such lesser sum to Scottish Ministers. This seems to be unduly onerous on local authorities and a potentially cumbersome procedure. After all, this proposal would give an owner the ability to seek to reduce sums properly expended on its property by a local authority.

Whilst the facility to redeem the outstanding amount early is welcomed, especially if that increases debt recovery rates generally, that should not be framed to be at the local authorities’ expense which seems to be a realistic outcome given the proposals as drafted here. A local authority’s discretion on this specific point either should not be fettered by intervention from the Scottish Ministers as proposed or the provisions about agreeing a lesser sum should be removed from the proposed Bill.

Question 2: How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

Response:
As mentioned above, the option for charging orders will improve the cost recovery process somewhat, however it is still the case that full cost recovery could take decades to recoup. On this basis it is unlikely that local authorities would move to a pro-active approach to defective building due to the upfront capital costs. With regards to dangerous buildings, the Council has a strict duty to act and so we will continue to do what we have always done to ensure the safety of the public.
**Question 3:** Where could the initial capital, required by local authorities to undertake this work, be found?

**Response:**
For dangerous buildings, the Council must act and therefore the capital costs must be provided from current capital budgets. For defective buildings, the legislation is rarely used and as mentioned previously, we do not see ‘pro-active’ action by Councils due to the additional capital costs required.

**Question 4:** Where the owner of a building is not known, how will the Bill improve on the current situation?

**Response:**
Charging orders should improve the current situation however it may take a long period of time before the charging order would be enacted if at all. Some buildings which we demolish could remain as a gap site for 5-10 years for example before being sold. Where an owner cannot be traced for whatever reason or indeed, the owner has refused to pay its share or is unable to do so, the proposed charging order under the Bill will be a useful tool to the Council. A charging order on the property, as allowed by the Bill, will provide a greater chance of recouping monies owed but it must be recognised that this could take some time.

**Question 5:** Are there any equality issues arising from the proposed Bill?

**Response:**
It is not envisaged that there would be any equality issues arising from the proposed Bill.

**Question 6:** What are your views on a fixed period of 30 years for repayment?

**Response:**
The Council feel that whilst the 30 year period proposed is in line with the equivalent provisions under the Housing (Scotland ) Act 2006, it is our view that 30 years is too long a period and should be reduced to not more than 15 or 20 years. Although a longer period has the effect of reducing annual instalments, and hence possibly making instalments more affordable and more likely to be payable, it is thought that it would be extremely unlikely for an owner’s circumstances to remain unchanged over such a long period. Thus, for example, within that time-frame an owner may be able to afford to repay higher amounts or may want to sell the property. From a local authority’s point of view, 30 years seems a very long period in which to forward plan / budget for possible cost-recovery.
Local Government & Regeneration Committee’s Call for Evidence
Response from East Renfrewshire Council

1. What are the advantages and disadvantages of the proposed Bill?

**Advantages**

Will allow LAs to recover costs more effectively.

Amends The Building (Scotland) Act 2003, which ties it into the legislation used to serve defective and dangerous building Notices, instead of using separate legislation which could become confusing.

Estimated recovery of costs of £3.9M over the whole of Scotland.

Should allow LAs to take action on defective and dangerous buildings where perhaps they may not have if they couldn’t recover their costs.

Having the ability to inform building owners that charging orders exist and that costs would be sought might encourage building owners to take responsibility and carry out any necessary works to their property.

**Disadvantages**

Can take up to 30 years to recover costs from Charging Orders.

LAs still bear the brunt of upfront costs.

Isn’t clear if the time spent on the initial call out by Council staff can be included in the charging order (surveyors/EHOs time inspecting, recording, writing out to owners, serving notices etc).

There is no provision for retrospectively applying charging orders where the works were carried out by the LA, due to the refusal of the owner to carry out works, and where the property is still owned by the same person once/if the provisions contained in the Bill pass into law.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

East Renfrewshire Council splits the responsibility for defective and dangerous buildings between 2 departments. The Building Standards Service deals with dangerous buildings, the Environmental Health Service deals with defective buildings.

East Renfrewshire Councils Building Standards Service always acts where a dangerous building is reported and takes remedial action where required. We do limit ourselves to the minimum amount of works possible, generally fencing off and boarding up, preventing
access to any dangerous structures. This minimal approach can lead to buildings sitting fenced off/boarded up, deteriorating further over time, and generally leads to further call outs due to unauthorised access and vandalism. If costs were easier to recover then we may be enabled to undertake more robust works to remove the danger posed by a structure rather than just preventing access to it.

3. Where could the initial capital, required by local authorities to undertake this work, be found?

East Renfrewshire Councils Building Standards Service has a budget set aside for dangerous buildings works. This would continue for the foreseeable future although it would have to be established if the budget could be extended in any way to allow for any change in the way costs can be recovered. Perhaps funding from the Scottish Government through the Loan Fund mentioned in the Policy Memorandum could be made available to deal with any funding problems faced by LAs.

4. Where the owner of a building is not known how, will the Bill improve on the current situation?

Theoretically, owners of properties would have to come forward at some point when they wished to sell the property on, and at that point the charging order could be enforced, although it is unclear how the provisions for missed payments would work into this sort of situation. But often owners do not come forward for many years, if at all. This may require numerous interventions by Local Authorities, causing further costs on an ongoing basis. Would multiple charging orders be allowed against the same property? And would that be cost effective given registration costs applied on top of the costs of dealing with the building.

5. Are there any equality issues arising from the proposed Bill?

Unknown. There may be perhaps cases where a building owner is disabled and on low income and would have problems affording works which were required to their building.

6. What are your views on a fixed period of 30 years for repayment?

In most instances 30 years would be too long. 30 years would be suitable for large debts but where the works were under set amounts, perhaps a graded payment period would be appropriate - maybe 30 years for large debts, say over £15k or so but for debts below that probably a graded maximum period – i.e. debt of £5k – 10 years maximum, £10k – 20 years maximum and so on.
1. What are the advantages and disadvantages of the proposed Bill?

**Advantages**
- The introduction of charging orders with the Bill provides Local Authorities with a supplementary avenue for cost recovery in addition to the current Civil Debt recovery procedures and this is welcomed.
- Allowing the debt to be paid by instalments should encourage repayment where otherwise an owner may not be able to pay, particularly for larger amounts.

**Disadvantages**
- The 30-year recovery period for instalments is excessive.
- The repayment period does not start until the property is sold and this combined with the long repayment period means it will take an unacceptable length of time for LA’s to recover the capital cost.
- The charging order is subject to appeal this could delay the process or have implications to the recovery of costs.
- There is no legal requirement to clear a debt on a charging order when a property is sold. Money lenders may not allow this to happen but a cash sale would not fall within the same parameters.
- For a non-payment of an instalment a civil debt recovery procedure can only be used for that instalment – not the whole amount.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

- LA’s *must* take action if a building is dangerous so this question only really applies to defective buildings. The lengthy repayment process to recover costs therefore does not help the position and will not give an incentive to be proactive with the repair of defective buildings.

3. Where could the initial capital, required by local authorities to undertake this work be found?

- There would be no change from the current position.

4. Where the owner of a building is not known, how will the Bill improve on the current situation?

- There would be little improvement on the current position. It should still be possible to register a charging order against a property even if the owner is not known although this in itself would attract further costs.
5. Are there any equality issues arising from the proposed Bill?
   - There does not appear to be any issues arising from the Bill

6. What are your views on a fixed period of 30 years for repayment?
   - As stated above Moray Council does not support such a lengthy recovery period.
Local Government and Regeneration Committee
Scrutiny of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

Local Government & Regeneration Committee’s Call for Evidence
Response from Glasgow City Council

1. What are the advantages and disadvantages of the proposed Bill?

We welcome the re-introduction of charging orders on buildings as means of securing local authority expenses. Securing against the property will aid cost recovery due to the increased likelihood of the debt being settled prior to ownership change.

However it is of concern that local authority expenses, whilst a fixed security, would no longer have priority over other creditors in the way of previous charging orders. It should seek to replicate the powers of such as Part 7 of the Housing (Scotland) Act 2006. This gives priority to recovery of local authority expenses over all future and existing burdens similar to previous charging order powers. It is considered likely many domestic properties would already have other securities against them thus gaining priority in the current proposals. This lessens the likelihood of local authorities securing adequate recovery of their expenses.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

As for Question 1. securing the debt against the property will aid cost recovery due to the increased likelihood of the debt being settled prior to ownership change. However on its own it will not improve the ability to undertake repairs on defective buildings. Refer to question 3.

It would also not affect our extensive use of the dangerous building powers as we already have a duty to take action under the 2003 Act where we decide a danger exists

3. Where could the initial capital, required by local authorities to undertake this work, be found?

This question implies a large investment and significant change in emphasis; there should be no expectation that Local Authorities will take on additional discretionary duties and consequential costs. If Government considers this a priority, then separate funding requires investigation. If necessary we would intend approaching the Government to seek capital resources.

4. Where the current owner is not known how will the Bill improve on the current situation?

It is not clear that it will improve the situation although it can be seen to have the ability to highlight the debt should the sale of the land ever occur.
5. **Are there any equality issues arising from the proposed Bill?**

None that we are aware of.

6. **What are your views on a fixed period of 30 years for repayment?**

This period operated under the previous Building (Scotland) Act and other legislation. We believe it was intended to reflect a generational change in ownership and in general it was found to be satisfactory. It can be said that 30 years is too long a period particularly for small debts.
Defective and Dangerous Buildings
(Recovery of Expenses) (Scotland) Bill

The Law Society of Scotland’s response
January 2014
Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes. To help us do this, we use our various Society Committees which are made up of Solicitors and non Solicitors and ensure we benefit from the knowledge and expertise from both within and outwith the Solicitor profession.

The Society welcomes the opportunity to respond to the Scottish Parliament’s Local Government and Regeneration Committee’s call for evidence with regard to the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill and should like to provide the following comments.

Question 1: What are the advantages and disadvantages of the proposed Bill?

The Society highlights the advantages of this bill which amends the Building (Scotland) Act 2003 by allowing local authorities to make charging orders for recovery of expenses incurred where they have carried out work to Defective and Dangerous Buildings under Sections 28, 29 or 30 of the 2003 Act. The Society considers that this is a significant improvement on the current provisions where local authorities can face difficulties in tracing owners and pursuing owners through the courts.

The Society believes that a significant burden of recovered costs is therefore placed on the public purse at present by owners who allow their buildings to deteriorate to the point at which councils must take action.
Question 2: How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

The Society believes that this bill should allow local authorities to recover expenses more easily by virtue of the fact that, in terms of Section 46A of the Act as amended by Section 1 of the bill, the local authority will be entitled to make in favour of itself a charging order specifying the building concerned and the repayable amount, rather than trying to track down the building’s owner to seek recovery. This involves practical difficulties particularly in the case of owners who have moved abroad.

Question 3: Where could the initial capital, required by local authorities to undertake this work, be found?

The Society is concerned that a significant period of time elapses before costs can be recovered through the imposition of charging orders and that the issue of the need for authorities for resources to meet essential costs should be considered by the Scottish Government.

The Society suggests that some consideration should be given to the creation of a National Fund on which authorities can draw to meet the cost of work on dangerous buildings.

Question 4: Where the owner of a building is not known how, will the Bill improve on the current situation?
The Society notes that the situation at present is that costs are recovered as civil debts and additional costs are incurred in establishing ownership and pursuing owners.

Accordingly, any debt incurred in terms of the 2003 Act, for the purpose of bankruptcy, the local authority is not a preferred creditor and often has a lower priority than other creditors.

Additional legal costs can also be incurred by the local authority where the costs have to be pursued by court action.

The Society notes that local authorities require to have the option of pursuing costs in the most effective manner possible and therefore believes that the re-introduction of charging orders would greatly assist local authorities in this process. It should be noted that the charging order is to be placed upon the property rather than against any individual and accordingly will have priority over other debts. The costs are eventually recovered when the property is sold.

**Question 5: Are there any equality issues arising from the proposed Bill?**

The Society has no comment.

**Question 6: What are your views on a fixed period of 30 years for repayment?**
The Society notes that some concerns have been previously expressed with regard to a
time period of 30 years as this represents a significantly long time period before costs can be recovered.

The Society, however, also notes that this considerable period of time may be a solution to
some owners who may not have sufficient capital at the time to privately arrange for repairs or to fully meet their reliability.

With regard to the terms of Section 46D of the Act as inserted by Section 1 of the bill, the Society notes that the charging order “must provide

(a) for the repayable amount to be paid in 30 annual instalments falling due on the same
date, to be specified in the charge, in each calendar year,

(b) that in default of such payment each instalment, together with any amount
recoverable in respect of that instalment under Section 46C (2) (a) or (b), is to be
separately recoverable as a debt.”

The Society believes that the intent is to provide an additional layer of “recoverability” as is evidenced by Section 46 D (1) (c) of the bill which states that any unpaid balance is “immediately due for repayment”.

The Society notes that the charging order, in providing the payment must be made in
annual instalments on a specified annual date, is in effect creating an annuity and could therefore invoke the provisions of the Prescription and Limitation (Scotland) Act 1973 Schedule 1 which lists those obligations which are subject to a five year prescriptive period by virtue of Section 6 of the 1973 Act. At paragraph 1 (a) (ii) of Schedule 1 to the 1973 Act, any obligation to pay a sum of money due in respect of a particular period by way of an
instalment of an annuity is therefore subject to a five year prescriptive period by virtue of Section 6 of the 1973 Act.

The Society notes that debts payable at present under the Building Scotland Act 2003 with regard to Defective and Dangerous Buildings do not prescribe and therefore believes that the provisions at Sections 46 D (1) (c) of the Act as inserted by Section 1 of the bill could be interpreted as resulting in each instalment now being subject to prescription and therefore, by operation of the law, ceasing to be recoverable five years after it falls due.

The Society would therefore very much welcome some clarity in this regard.

The Society also wishes to bring to the attention of the Local Government and Regeneration Committee the prospect of the charging orders being capable of being called up and properties possessed by the local authority.

While it is noted that this provision does not form part of the bill and while the Society agrees that it is proper that such a provision should not apply in respect of a property which is occupied, the Society believes that consideration should be given to a situation where the property is not occupied, and all the more so where the property has been abandoned.

In those circumstances, the Society believes that local authorities will be discouraged to invoke the terms of Section 28 of the Building (Scotland) Act 2003 notwithstanding that the property may form part of a tenement with other properties being adversely impacted. The Society therefore believes that some consideration be given to a two tier system where a charging order placed on an occupied building could not be called up, but one placed on a building that is unoccupied ( or at least one placed on an abandoned building) was able to
be called up. The Society believes that this would encourage local authorities to use their powers in terms of Section 28 of the 2003 Act.

The Society suggests that, if consideration is given to this proposal, then Section 56 of the Local Government (Scotland) Act 1973 could be amended to the effect that a decision to call up a charging order could only be made by a local authority and could not be delegated to any committee or sub-committee of that local authority, therefore ensuring that a resolution to call up a charging order would be subject to the appropriate political scrutiny before it is made.
Local Government & Regeneration Committee’s Call for Evidence Response from Comhairle nan Eilean Siar

By the introduction of charging orders, this Bill provides an improvement in existing cost recovery powers for local authorities in terms of recovering costs in relation to undertaking work on dangerous and defective buildings. These measures would be especially useful in situations where the normal civil debt recovery procedures would be unlikely to be successful, for example, where the owner cannot be traced. In these situations the local authority would have some assurance that costs could be recovered.

One aspect of the Bill that could be re-examined is the period of 30 years over which costs are to be repaid. This would not be appropriate for smaller amounts and it would be advantageous to have some built in flexibility in relation to the duration of the repayments. The period could then be determined by the local authority after taking account of factors such as the ability to pay and the amount of debt outstanding. For these smaller amounts recovery of debts at the point of sale or conveyance may be one alternative that could be considered.

Notwithstanding the fact that charging orders may not be appropriate in every case they would provide a useful alternative to the normal civil debt recovery method where this is deemed unsuitable. On this basis the Comhairle would be supportive of the measures being proposed in the Bill.

John A. Gillies
Building Standards Manager
On behalf of Comhairle Nan Eilean Siar

29 January 2014
Local Government & Regeneration Committee’s Call for Evidence
Response from Aberdeenshire Council

1. What are the advantages and disadvantages of the proposed Bill?

**Advantages**
- Charging orders against a property would provide more certainty that a L.A. would recover any costs in dealing with a dangerous or defective building.
- With the debt being able to be paid over a number of years, this should encourage more owners to pay.

**Disadvantages**
- The long recovery instalment period of 30 years which starts when the property is sold.
- Should an annual instalment be missed only that instalment can be pursued by civil debt recovery means.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

- The introduction of a more certain recovery process may encourage some L.A. to become more proactive in repairing defective buildings, however this is offset by the 30 year recovery period.
  - L.A. must take action to make safe dangerous buildings, so these would be unaffected.

3. Where could the initial capital, required by local authorities to undertake this work be found?

- As existing, capital would be found within existing L.A. budgeting arrangements.

4. Where the owner of a building is not known, how will the Bill improve on the current situation?

- As the Charging Order is against the property, there should be more certainty that the debt would be recovered.

5. Are there any equality issues arising from the proposed Bill?

- There would be no equality issues.

6. What are your views on a fixed period of 30 years for repayment?

- 30 year period is too long to recover debt.
Building Standards

1. What are the advantages and disadvantages of the proposed Bill?

The bill would provide another method of debt recovery. The omission of Charging Orders from the Building (Scotland) Act 2005 caused many issues for Local Authorities. This Bill would restore that omission and provide us with an enhanced means of debt recovery when and if we carry out our statutory function.

I am concerned that there might be an expectation that we be more pro-active when dealing with defective buildings. We are not adequately resourced or funded to meet that expectation.

The issue of ranking of creditors should be addressed as the authority could/would be still unable to gain back the full costs involved.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

Dealing with Dangerous Buildings is a statutory function. Since the 2003 Act we have been left with no debt recovery system other than through civil proceedings. This Bill would provide another method and a degree of certainty that monies spent could be recovered.

It would be of assistance if the bill could be applied retrospectively in order to recover outstanding debt.

Where could the initial capital, required by local authorities to undertake this work, be found?

Building Warrant fees fund the verification role of the authority not enforcement. The authority does receive GAE to help run the service but undertaking works on dangerous and defective buildings could amount to six figure sums easily. An enhanced enforcement service would require additional funding.
Monies spent would not be recovered until the charging order had been expunged which could be 30 years.

4. Where the owner of a building is not known how, will the Bill improve on the current situation?

By being able to place a charging order on the title, the debt would be highlighted in any potential sale thus potentially resolving the outstanding debt when the property is sold.

5. Are there any equality issues arising from the proposed Bill?

It is the owner of the building responsibility for the general fabric of the building and should clearly ensure the necessary maintenance is carried out. However problems can and do occur when the property owner doesn't or perhaps can't afford to undertake repairs. In a building that has multiple owners there can be difficulty getting agreement to undertake repairs. There may be problems with shared costs. It could be argued that there may be an equality issue whereby any enforcement action does affect those less well off.

6. What are your views on a fixed period of 30 years for repayment?

Taking into cognisance the comments above the proposed period should allow anyone no matter what their circumstances to pay back the cost of works undertaken on their property. However until the outstanding amount is recovered the authority will have continuing expenses. The full amount should be paid back as soon as reasonably possible.
Submission from Local Authority Building Standards Scotland (LADSS)

Thank you for your communication of the 16th January 2014 regarding the above.

Local Authority Building Standards Scotland (LABSS) would like to take the opportunity to respond as follows:

1. **What are the advantages and disadvantages of the proposed Bill?**

The Bill would provide another tool for debt recovery. Any means of recovering debt is a welcome aid for Local Authorities performing their statutory function. A major concern is if the Bill were successful, there may be an expectation that councils will be more pro-active in addressing issues with defective buildings. Allocated Council resources and funds are likely to be insufficient to meet any expectation that this Bill will allow Local Authorities to actively pursue what is a discretionary function.

The ability for a home owner to appeal, that the debt is collected over 30 years and debt recovery processes only relating to defaulted installments detract from the functionality and all contribute to making the process unattractive to Local Authorities.

In order to make any cost recovery process fully effective Local Authorities should be ranked as being the preferred creditor.

2. **How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?**

It would be of assistance if the Bill could be applied retrospectively in order to recover outstanding debt. The Bill as proposed is unlikely to resolve existing problems.

Dealing with dangerous buildings is a statutory function and Local Authorities perform this to secure the health and safety of the public. Success of the Bill in theory may allow a Local Authority to go beyond dealing with the danger and progress onto addressing any remaining defects left once the danger has been removed. In terms of undertaking future works it would give Local Authorities a degree of comfort knowing that a process exists to secure the debt against the property, however, before Local Authorities would commit to a discretionary function and undertake repairs to defective buildings sound evidence would be required showing that the debt recovery procedures are working. As such and certainly in the short term, it would be difficult to see how it would improve a councils ability to undertake repairs.

3. **Where could the initial capital, required by local authorities to undertake this work, be found?**

This question implies a large investment and a significant change in emphasis to a more pro-active role. There can be no expectation that Local Authorities will, or have the ability, to take on additional discretionary duties and consequential costs.

If Government considers this issue a priority then separate funding provisions would have to be investigated.

4. **Where the owner of a building is not known how, will the Bill improve on the current situation?**

The ability to place a charging order on the title should highlight the debt in any sale potentially resolving the outstanding debt when the property is sold.
5. **Are there any equality issues arising from the proposed Bill?**

Building owners are responsible for the upkeep and maintenance of their own properties. Problems usually occur when the property owner can't afford or does not have the ability to undertake repairs. As such it could be argued that there may be an equality issue whereby any enforcement action or debt recovery process does affect those less well off.

Whilst this is unavoidable in the case of dangerous buildings, any active pursuit of defective buildings would target those who generally do not have the funds to maintain their property.

6. **What are your views on a fixed period of 30 years for repayment?**

A fixed repayment term of 30 years is unsuitable for works of varying size. Whilst it may be reasonable to reclaim several hundred thousand pounds over 30 years, the same time frame would not be suitable for much smaller debts.

The repayment term should be flexible and reflect the sum of money due.

I hope the above information is of assistance.

Yours faithfully
James Whiteford
Administration Convenor Local Authority Building Standards Scotland
Submission from Argyll and Bute Council

1. **What are the advantages and disadvantages of the proposed Bill?**

The Bill is welcomed by the Council and it is considered that the proposed provisions would be a step forward in enabling local authorities to recover costs incurred in respect of dangerous and defective buildings.

It is advantageous that the placement of a charging order will limit the circumstances in which a building will be sold or transferred until the debt due has been repaid.

It is advantageous that the Bill will authorise interest to be charged on the principal sum by way of a Charging Order.

It is advantageous that the Bill will entitle local authorities to recover the costs of the work and fees associated with registering and discharging the charging order from the owner of the building.

It is advantageous that the Bill will entitle Local Authorities to place a charging order over the site of a demolished building.

It is disadvantageous that the Bill will not make provisions for the calling up of the charging order on default. Whilst it is appreciated that calling up should be permitted in limited circumstances only, and that civil debt recovery procedures shall be made available in respect of any unpaid annual sums due under the charging order, it would be beneficial to permit calling up where the charge was placed and annual sums are unpaid for a specified period.

It is disadvantageous that the Bill will not make provisions for the power to place charging orders to apply retrospectively.

It is disadvantageous that the Bill does not provide that charging orders placed by a local authority will rank prior to all future and existing securities over the building.

It is disadvantageous that the Bill does little to improve the current insufficiency of funds that are available to local authorities to undertake works in respect of dangerous or defective buildings.

2. **How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?**

It is considered that the Bill will go some way towards resolving existing problems and improving the ability of local authorities to undertake repairs to dangerous and defective buildings.

The Bill will enable local authorities to recover costs over a longer term by enabling person who cannot pay a lump sum to make incremental payments. The normal requirement to
clear the charging order prior to the sale or transfer of the property will give an incentive for property owners to make payment of the outstanding sums to facilitate a sale.

As costs can be recovered by means other than civil debt recovery local authorities may take a more pro-active approach to undertaking works where the owner cannot be relied upon to co-operate, or is known to have short term financial difficulties. Awareness that the local authority may place a charging order and charge interest on the sum expended may encourage property owners to work together to remedy defects thus negating the requirement for local authority involvement. It is considered that, should the annual payments be made under the charging order, the charging order will be a more cost effective way of securing the repayment of the sums outstanding than civil debt recovery. Increased recovery of costs would make more money available to facilitate future works by the local authority in respect of other defective or dangerous buildings.

3. Where could the initial capital, required by local authorities to undertake this work, be found?

Initial capital to undertake works is not readily available to local authorities. Recovery of costs over a thirty year period will do little to improve this situation in the short term. In reality without a fund to draw upon it is unlikely that local authorities will take a pro-active role in undertaking works to dangerous or defective buildings. It is considered that a national fund that could be drawn upon by local authorities would significantly improve this situation.

4. Where the owner of a building is not known how will the Bill improve on the current situation?

It is considered that where the owner of the building is not known that the Bill will improve the current situation as civil debt recovery procedures are largely ineffectual in such circumstances. It is beneficial that the charging order can be placed and latterly enforced by the local authority against anyone who subsequently claims, or obtains, title to the charged building. There are however limited means by which the local authority can determine a change of ownership without incurring costs. It may therefore be considered that it would be beneficial for the Keeper of the Registers of Scotland to be required to intimate a change of ownership to a local authority in circumstances where a building that is subject to a charging order under the provisions of the Building (Scotland) Act 2003 is sold. The Bill does not provide that a copy of the charging order requires to be served on the owner of the building prior to a charging order coming into effect and this is considered to be advantageous in circumstances where the owner of a building is not known.

It is considered that where a charging order has been placed and the owner subsequently becomes unknown that the amendment of the Bill to provide local authorities with power to call up a charging order, in specific limited circumstances, would be beneficial. For instance in circumstances where the owner is not known, the period prescribed within the charging order has expired, and the local authority could not otherwise secure recovery of the outstanding debt by means of civil debt recovery.

5. Are there any equality issues arising from the proposed Bill?
It is considered that there are no equality issues arising from the proposed Bill.

6. What are your views on a fixed period of 30 years for repayment

It is considered that, whilst the 30 year period for repayments may be appropriate in some circumstance, it will not be appropriate to the majority of expenses that require to be recovered. Where works for the repair or securing of a building are undertaken by this Council costs claimed from an individual owner of a building, or part thereof, are rarely in excess of £10,000.00. Where a building is demolished the costs claimed by this Council are rarely in excess of £40,000.00. As the majority of works undertaken are for the repair or securing of a building it is considered that a 30 year annuity period for a debt of less than £10,000.00 is excessive and that it may therefore be beneficial to provide differing annuity periods for different levels of debt. i.e 20 years for debts up to and inclusive of £50,000, and 30 years for debts in excess of £50,000.00. It is considered that a reduction in the period will result in a reduction of the overall interest payable by the owner. Should the owner of a building be unable to meet an annual payment a payment schedule for the sum in arrears could be agreed through civil debt recovery.
Submission from Clackmannanshire Council

Improvement to Cost Recover Powers in the Building (Scotland) Act 2003
Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

Clackmannanshire Council welcomes any and all measures that would improve cost recovery in relation to local authority expenditure relating to Defective and Dangerous Buildings.

In addition to the above Bill the Council is aware of the draft Community Empowerment (Scotland) Bill in which section 27 relates to "liability for expenses" under the Building (Scotland) Act 2003.

Whilst both proposals contain commendable proposals this response will focus purely on the Members Bill.

Addressing the questions raised within the consultation document I would comment as follows:-

1. What are the advantages and disadvantages of the proposed Bill

Advantages

(a) The introduction of a legislative method of recovering local authority costs in relation to defective and dangerous buildings.
(b) Securing the debt over the property creates a priority for the debt which it would not otherwise have if it required to remain as an ordinary unsecured debt.
(c) Reducing local authority administrative costs associated with debt recovery, by offering the choice of a simpler less costly charging order
(d) The proposals are relatively straightforward to administer.
(e) Local authorities would be able to choose to use civic debt recovery or the charging order process or both depending upon the circumstances.
(f) Where agreed instalments have not been paid the local authority can then use civil debt recovery.
(g) Early repayment facility is available.
(h) The burden is placed on the property as well as the owner.
(i) There is an appeal facility to the Sheriff.
(j) The name used "charging order" gives a degree of gravitas to the document and process.

Disadvantages

(a) Fixed 30 year period.
(b) Debt not transferred to third party ownership. The proposals introduce potential for significant time delays occurring between the date the local authority instructs the remedial works and the date when the charging order can be put in place. This permits unscrupulous owners to avoid repayment given the current framing of the Bill.
Consideration should be given to incorporating a "notice of potential liability" facility similar to that available under the Tenement (Scotland) Act 2004.

(d) The proposals do not provide for a flexible repayment scheme.
(e) The Bill does not extend for use under section 25 (Building Regulation Compliance Notice), Section 26 (Continuing Requirements Enforcement Notice). Section 27 (Building Warrant Enforcement Notice) - albeit that these sections are seldomly used by local authorities in comparison with section 28, section 29 and section 30 included within the proposals.
(f) Compulsory Purchase Order under the Building (Scotland) Act can only be used where the owner is unknown.

Consideration should be given to introducing the ability to serve a Compulsory Purchase Order on the owner of a property where they are unable or unwilling to pay local authority recharged costs.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to defective and dangerous buildings?

(a) The introduction of the content of the Bill will provide local authorities with legislative powers to recover costs. This will consequently encourage property owners to maintain their buildings.
(b) The introduction of the Bill would improve local authorities cost recovery.
(c) Greater cost recovery may allow local authorities to "reinvest" repayments in to the process and therefore allow a more proactive stance to be adopted. Such early intervention would result in fewer dangerous buildings, increase the longevity of the building stock (more sustainable built environment) and visually enhance the built environment.

3. Where could the initial capital, required by local authorities to undertake this work be found?

(a) If the content of the Bill could be introduced retrospectively, even over a relatively short period, local authorities could create an specific budget to cover such matters.
(b) The Scottish Government could provide assistance either as a kick start over say a 3 to 5 year period or an annual grant based upon need and actions taken.

4. Where the owner of a building is not known how will the Bill improve on the current situation.

(a) The Notice will be placed on the property and therefore a prospective owner will be aware of the notice and associated burden.

• See "disadvantage (b)" the Bill should be amended to allow the notice to be transferred to a third party.

5. Are there any equality issues arising from the proposed Bill.
(a) None, on the assumption that all notices are appropriately served and recorded in the requisite manner and in the relevant registers.

6. What are your views on a fixed period of 30 years for repayment?

(a) Thirty years would appear to be too long a period for a small or medium sum of money as the "cost" of administering the repayments could outweigh each repayment received.

- Local authorities should be given ability to introduce flexible repayments and repayments over shorter time periods. An appeals process could be set up to cover instances where the owner is aggrieved at the repayment period set by the local authority.

The reintroduction of charging orders is not a "silver bullet" that would solve all our building repair problems overnight but it would greatly improve the recovery rates of local authority expenditure associated with defective and dangerous buildings. This will give authorities the comfort that costs will be recovered which may in turn encourage Councils to take a more proactive stance on policing and early intervention of the built environment where necessary.

It must be borne in mind that local authority Building Standards teams have reduced in size in recent years so in addition to the financial constraints experienced by local authorities there is also a staffing resource need that must be considered.

I trust the above comments will be of assistance in introducing measures that will improve cost recovery in relation to defective and dangerous buildings.
Submission from Stirling Council

Thank you for your communication regarding the above bill.

I would like to take the opportunity to respond as follows:

1. **What are the advantages and disadvantages of the proposed Bill?**

Cost recovery in relation to defective and dangerous buildings is a challenge for local authorities therefore any legislative changes that would assist in recovering costs associated with the statutory functions would be advantageous.

In terms of disadvantages, the Bill, if successful, could raise expectations that councils will be more pro-active in addressing issues with defective buildings. As this is a discretionary function, local authorities may not, at present, have adequate resources or funding to meet these expectations.

Another disadvantage of this Bill is the 30-year repayment period, which is too long (see answer to question 6 below).

2. **How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?**

It is felt that the Bill is unlikely to change a local authority’s approach to dealing with defective or dangerous buildings. In terms of existing problems it would be helpful if the Bill could be applied retrospectively to aid recovery of existing debt.

The Bill would improve the authority’s ability to recover costs in the future. However, owners defaulting on payment would still leave local authorities carrying the burden of debt.

The Bill does not address the challenge of Local authorities not currently having capital funds to carry out work.

3. **Where could the initial capital, required by local authorities to undertake this work, be found?**

The Government should establish separate resources, if this is a priority. Consideration could be given to the establishment of a national fund from which Local Authorities could obtain funds and then repay once the debt has been recovered from the owner.

4. **Where the owner of a building is not known how, will the Bill improve on the current situation?**

It is not thought that the proposed bill will greatly improve such situations. However, placing a charging order on the title would highlight the debt and may assist in resolving the outstanding debt at the time of a future sale of the property.

5. **Are there any equality issues arising from the proposed Bill?**

No.
6. **What are your views on a fixed period of 30 years for repayment?**

The fixed term of 30 years is too long. It would be preferable if the time frame for repayment could be flexible, at the discretion of the local authority. Costs incurred can vary considerably but for many situations 30 years would be too long. If a specific time period is required within the legislation it would be preferable if this could be considerably shorter with local authorities having discretion to agree a longer period, up to 30 years, where costs to be recovered are high.

I hope these comments are helpful.

Yours sincerely,

Joyce K Wighton
Building Standards & Licensing Manager
Dear Sir,

Committee’s Call for Evidence – Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

I refer to the above and I am pleased to offer the following as the Highland Council’s submission in response to the proposed Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill introduced by David Stewart MSP.

The Highland Council is fully supportive of the proposed Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill. The reasons for this view are set out below in response to the specific questions asked:

1. Local authorities are already required by the Act, as “the buildings authority” to employ the manpower that can demonstrate competency, qualification and the expertise to manage buildings under Sections 28, 29 and 30 of the Building (Scotland) Act 2003 therefore, monitoring and taking the appropriate action under the S28, 29 and 30 of the Act, to safeguard the public is an expenditure LAs already provide for. The added expense, in the event that a Charging Order is required will be very small when compared to the professional officer’s/surveyor’s time in dealing with what is a statutory obligation.

The main advantage of the proposed Bill, is that if charging orders are re-introduced into the Building (Scotland) Act 2003, this will permit local authorities (LAs) in Scotland, once again, to recover the costs incurred following commissioning works to dangerous and/or defective buildings under Sections 28, 29 or 30 of the Act, and where the owner cannot be found or where the owner refuses or is unable to pay the costs.

Another advantage with the proposed Bill is that LAs would be able take a more proactive approach when dealing with defective buildings meaning buildings will be inspected at an earlier stage and repairs instructed and carried out before the building fall into a state of disrepair resulting in the building being dangerous and unusable, resulting in the building being at risk of demolition or more costly to restore and bring back into use.
The responsibility for ensuring a building is maintained in a satisfactory and safe condition lies with the building owner and the Act is implicit on this. The threat of a charging order being raised and therefore a burden being placed on a building or property will ensure an owner cannot escape or ignore their liability.

By registering a charging order in the appropriate land register for a building or land where a building formerly stood will allow prospective purchasers to see the property history and that a third party (the local authority) has an outstanding debt against the property or land. This may be particularly useful where an owner cannot be found or possibly hasn't disclosed the financial burden.

The Highland Council is therefore not aware of any disadvantages of the proposed Bill

2. The lack of charging order powers is making the recovery of costs more difficult for LAs when dealing with incidents under the Building (Scotland) Act 2003. The charging order option was removed when the 2003 Act replaced the 1959 Act the reason given was because it was thought that the recovery of expenses by LAs could be accomplished by normal debt recovery methods. Unrecovered costs place a significant burden on the public purse.

The use of Defective Building Notices has not been widely used in Highland and of the 10 to 15 complaints received per annum regarding defects on buildings less than 5 notices were served this financial year. Charging orders would allow the LAs to take a more proactive approach when inspecting defective buildings and be more likely to instruct work to be carried out under Section 28 of the Act, safe in the knowledge that it will be recompensed.

It is not expected that charging orders will be used that often in Highland. The Highland Council responds to approximately 10 to 15 Defective Building complaints and 20 to 30 Dangerous Building incidents per year. Of this, on average, 13 dangerous building incidents result in the Council instructing work to be carried out on behalf of the owner to reinstate and/or make the building safe.

The best estimates stated in the Financial Memorandum (FM) supporting the Bill refer to additional costs to LAs being:

- Registering a charging order against a property in the Registers of Scotland (estimated at £50)
- Discharging a charging order (estimated at £50)
- The cost in administration to the LA of raising a Charging Order (estimated at £60)

The additional costs listed above amount to a very small percentage of the total costs lost to local authorities annually under the present legislative arrangement, when compared with the ability to place a Charging Order on a building.

This financial year the Highland Council has paid £14,478 in costs to contractors and professionals for 8 incidents where the Council instructed work to make buildings safe under dangerous buildings procedures. The best estimated cost in the FM of raising a
charging order and the administrative work related to this is £110. 8 x £110 = £880. This equates to 6% of the monies paid out by the Council under Sections 29 and 30 of the Act. These are costs that the Council has little hope of recovering without charging orders.

3. If charging orders are reintroduced the LA would be required to register a charging order in the appropriate land register. This public register will permit any interested party in the property or land to see that there is a history and that the LA has an interest in the property or land. This effectively places a burden on the property as well as the owner notwithstanding this person's whereabouts may not be known.

4. There are no equality issue arising from the proposed Bill that Highland Council is aware of.

5. The fixed period of 30 years for repayment proposed by the Bill is overly long in the opinion of Highland Council. With local government reorganisations occurring more often than this timeframe we would suggest a shorter repayment period, certainly no longer than 20 years.

Yours sincerely

Malcolm MacLeod
Head of Planning & Building Standards
Submission from the City of Edinburgh Council

I refer to the request for comments from the Local Government and Regeneration Committee at Stage 1 in relation to the above mentioned bill.

Please find below comments from the City of Edinburgh’s Building Standards Section in relation to the consultation questions and general comment’s from the Council’s Shared Service’s section who administer the Council’s new statutory repairs service.

Question 1 – What are the advantages and disadvantages of the proposed Bill?

Response.

Advantages – Charging Orders will provide a certain means by which a local authority can recover the costs it has incurred in dealing with defective and dangerous buildings. While the introduction of Charging Orders might not be appropriate in every case, for instance in situations where the financial liability is very small, they would provide a means of recovery that avoids the need to rely on the relatively costly civil debt recovery process. The cost of making and recording a Charging Order is seen as being less expensive than any court action involved in recovering a civil debt. The prospect of having their property burdened with an annuity will also encourage owners to settle their debts on a voluntary basis.

Disadvantages – The Bill does not go far enough in assisting Local Authorities to recover their costs. Even with Charging Orders in place, the Building (Scotland) Act must apportion costs in a manner that takes into account ‘all the circumstances, including any contract between the parties’. This is because anyone aggrieved by the apportionment imposed on them can appeal to the Sherriff who must have regard to all the above factors when determining the case. (ie.Building (Scotland) Act – Section 44 (3) & (4). Cost recovery without a method of apportionment that is laid down by statute is uncertain, time consuming and not practicable to administer on any large scale.

Question 2 – How will the Bill resolve existing problems and improve the ability of Local Authorities to undertake repairs to dangerous and defective buildings?

Response

The introduction of Charging Orders would in some instances provide Local Authorities with a more cost effective legal means of recovering the costs incurred when remediing dangerous and defective buildings.

The Bill improves the ability of Local Authorities to recover costs. In this regard, it could be argued that Local Authorities might be more inclined to intervene in situations where they
have been asked to assume control of the repair of defective buildings in situations where
the owners cannot agree to do so on a voluntary basis. It does not, however, actually
improve the ability of local authorities to undertake these repairs since sufficient powers
already exist to empower Local Authority involvement.

Question 3 – Where could the initial capital, required by Local Authorities to undertake this
work, be found?

Response

This question would seem to imply that a large financial investment and significant change
in emphasis is expected from local authorities in dealing with dangerous and defective
buildings if the provisions of the Bill are implemented. If this is a priority for Scottish
Government, then measures to provide local authorities with the necessary funding will
require separate investigation. Charging orders will in part improve the cost recovery
powers available to local authorities but initially they will still need to fund the repairs from
their own financial resources. Local authorities will subsequently need to carry the cost of
these repairs until they can be recouped from the owners. As noted in the response to
Question 1, without provision being made to recover costs on an equal share basis, full
recovery is likely to be extremely time-consuming, resource intensive, subject to appeal to
the Sherriff, and uncertain in outcome.

Question 4 – Where the owner of a building is not known how, will the Bill improve on the
current situation?

Response

The Bill does not provide a solution to this significant problem.

Question 5 – Are there any equality issues arising from the proposed Bill?

There are none identified. Any action by the Local Authority to enforce the correction of
defects in buildings is solely dependent on their condition. All owners have a responsibility
to maintain their buildings in a safe condition.

Question 6 – What are your views on a fixed period of 30 years for repayment?

Response
For smaller debts, a 30 year period would seem to be excessive. Perhaps a repayment period on a sliding scale based on the amount owed would be more appropriate. See also ‘General Comment’ below.

GENERAL COMMENT

The former Property Conservation Service within the City of Edinburgh Council, assisted property owners with carrying out repairs to common parts of their building using the City of Edinburgh Council Order Confirmation Act 1991, a piece of legislation unique to Edinburgh. This service ceased in April 2013.

Work is ongoing to develop potential options for replacing this service and it is proposed that this will rely on a range of difference pieces of legislation, depending on the nature of the barriers preventing owners from taking forward their common repairs.

In relation specifically to the development of a new service, the proposals to reinstate the Charging Order as another means of assisting owners who may be unable to pay their share of common repairs would be welcomed. However, it is felt that 30 years is not suitable for all individuals and circumstances, and the opportunity for the Council to be flexible with this time period based on individual circumstances would be beneficial. It would also be more valuable and applicable if there was minimal risk of non-recovery of the funds, and therefore it would be useful if the charging order was secured by prior ranking.

However, colleagues in Finance have reservations over the 30 year Charging Order. The Council has limited resources to loan these funds over such a long period. The Council can not borrow for this expenditure (as it would technically be revenue not capital), without express permission of Scottish Ministers. While the 30 year payment plan is better than not getting paid at all or an uncertain inhibition on the property, we would want to encourage owners to pay as soon as possible and the existence of the 30 year option would discourage this.

The unique benefit of the 1991 Order Confirmation Act is that it allows the Council to recover the cost of repairs on an equal shares basis across all owners responsible for the repair. It would be particularly useful if the cost of common repairs could be split on an equal shares basis under this legislation as well.

The proposals also provide the opportunity to assist where a non-residential property is involved in the repair which can, on occasion, be a stumbling block under the 1991 Confirmation Act.
Submission from COSLA

Introduction
1. COSLA welcomes the opportunity to provide written evidence to the Local Government & Regeneration Committee on the Policy Memorandum produced for the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill (‘the DDB Bill’). COSLA also sent comments on the financial aspect of the DDB Bill to the Finance Committee on 10 January.

Background
2. COSLA is the representative body for all 32 Councils in Scotland. Councils already have a statutory duty under the Buildings (Scotland) Act 2003 (‘the Act’) to deal with dangerous buildings within their local authority area in order to safeguard the public interest. Councils also have a discretionary power to deal with defective buildings.

3. The key issue in the DDB Bill for local authorities is in relation to the financial aspect of it. The DDB Bill would introduce charging orders into the Act that would permit Councils to recover the costs incurred following commissioning works to dangerous and/or defective buildings (under Sections 28, 29 or 30 of the Act) where the owner(s) cannot be found or where the owner(s) refuse or is/are unable to pay the costs.

General comments
4. Overall COSLA welcomes any additional means of recovering debt for local authorities performing their statutory duties. The Financial Memorandum highlights the additional costs for local authorities associated with the administration of charging orders. This cost is small in proportion to the cost associated with the actual remedial work on dangerous and defective buildings. The main issue for local authorities is therefore access to the funding to undertake the necessary work on dangerous and/or defective buildings. This is of particular concern with the likely increase in public expectation for a more pro-active approach to dangerous and defective buildings as a result of the DDB Bill. It is considered that the estimate of the number of charging orders within the Financial Memorandum does not take into account the likely increase in work carried out by the local authorities once a charging mechanism is put in place. The DDB Bill may improve cost recovery but will not address the issue of owners seeking to avoid costs or of not having the funds to carry out the works for themselves.

5. Local authorities are already required by the Building (Scotland) Act 2003 to to safeguard the public interest although responsibility for maintenance of buildings lies with the owner. The introduction of charging orders will permit local authorities to recover costs incurred following works where the owner cannot be found or refuses or is unable to pay the costs.

Specific comments
6. Although not provided for within the DDB Bill, it could be used to provide greater financial assistance to local authorities if they were ranked second to HMRC in terms of creditors, and if the provisions could be applied retrospectively in order to recover outstanding debt. This would assist local authorities in experiencing the debt recovery process, giving Councils greater confidence to undertake works that go beyond the statutory function of dealing with dangerous buildings to those that are defective.
7. The Committee may be aware that one urban Council currently has specific legislation that allows it to recover costs following work on dangerous and defective buildings. The experience of this one Council is that where Statutory Notices have been used then overall the Council has been reasonably good at collecting the monies due but that such Notices do not solve all the problems. For example, this Council is often challenged on the extent of the work carried out and so it is considered it might be useful to have guidance for Councils in assessing and justifying the level of work required.

8. As the works under the Act are not improvements to Council owned assets, then the Council is unable to borrow without applying for dispensation from the Scottish Government. Therefore Councils will need to fund such work from general revenue, which is only sustainable at low levels without the necessary funding requirement or the level of bad debt requiring cuts to Council services.

9. There is a risk that building owners may sell their property before the local authority can register the charging order, potentially resulting in the charging order not being enforceable against the new owner. Experience has shown that some owners will actively seek ways to avoid costs resulting from dangerous building interventions. An intermediate mechanism to register a “notice of potential liability for costs” should be considered, which does not require an amount to be specified at the point of registration (similar to that available under the Tenements (Scotland) Act 2004).

10. Care needs to be taken with the assumption of ‘savings’ as a result of the DDB Bill. Firstly, an improved cost recovery rate would reduce losses but would not achieve savings, and secondly, such an assumption about savings need to be tempered by the likelihood that the level of work (and therefore bad debt) will increase if a cost recovery mechanism is put in place. The level of estimated bad debt within the Financial Memorandum of £3.9m (paragraph 49) is also considered to be too low.

11. COSLA has concerns about the 30 year repayment period, with the view that this is too long and that it exacerbates the funding challenges that will be faced by Councils. There is concern over the delay between the Council’s expenditure and the potential 30 year repayment period given the large sums of money associated with some dangerous building interventions. The 30 year repayment period appears excessive for the following reasons:
   i. It increases the risk of non-payment;
   ii. It ties up Council money that could otherwise be used on other services;
   iii. The administrative burden over such a long period; and
   iv. The 30 year period could potentially be longer than the asset life of the repair work.

Clause 1 of the Bill introduces a number of new sections to the Building (Scotland) Act. Amongst those is proposed S 46D which states that a charging order "must provide"at (a) for the repayable amount be paid in 30 annual instalment at (b) in default of any such payment "each instalment" "is to separately recoverable as a debt". Our understanding of the intention behind this is to provide an additional layer of "recoverability", as is evidenced by para (c) which states that any unpaid balance is immediately due for repayment. However the charging order in providing that payment must be made in annual instalments on a specified annual date, is in effect creating an annuity. Therefore this could bring it within the provisions of the Prescription and Limitation (Scotland) Act 1973. Schedule 1 of that Act lists those obligations which are subject to a five year prescriptive period by virtue of section 6. At paragraph 1(a)(ii) it lists as such an obligation: to pay a
sum of money due in respect of a particular period by way of an instalment of an annuity. Our understanding is that at present debt payable under the Building (Scotland) Act re Defective/Dangerous Buildings does not prescribe. Notwithstanding proposed paragraph (c) the risk is that the new section could be interpreted as resulting in each instalment now being subject to prescription and therefore, by operation of the law ceasing to be recoverable five years after it falls due. Therefore the Bill would benefit from some clarity in this regard.

12. Regarding the need or otherwise for charging orders to be capable of being called up. We appreciate that approach has been rejected as it would be considered to be non-compliant with the Human Rights Act. On the other hand that balance might be quite different in circumstances where a property is not occupied, all the more where it has been abandoned. In those circumstances there is a significant disincentive upon a LA to utilise its powers under s28, notwithstanding that the property may form part of a tenement with other properties being adversely impacted. Therefore perhaps something like a two tier system could be introduced whereby a charging order placed on an occupied building could not be called up, but one placed on a building which is unoccupied (or at least one placed on an abandoned building) was able to be called up. It would of course be open to Parliament to direct that a resolution of a local authority to call up such a charging order could only be made by full Council (S56 of the Local Government (S) Act 1973 could be amended to that effect). This would have the benefit of ensuring the resolution is subject to appropriate political scrutiny before it is made.

13. Building owners are responsible for the upkeep and maintenance of their own properties. Problems usually occur when the property owner can't afford to undertake repairs or where there are multiple property owners and there is difficulty getting agreement to undertake repairs. As such it could be argued that there may be an equality issue whereby any enforcement action, particularly in relation to a building with shared ownership, affects those who are less well-off disproportionately.

14. Tracing owners remains a problem in relation to Statutory Notice work on residential properties as is securing the engagement of (known) absentee owners. In situations where councils are unable to trace owners and have undertaken works, we have been advised that councils’ assessments of the level of repair required are frequently subsequently challenged by the owners. It is not clear from the proposals whether the bill will provide an opportunity to clarify guidance to protect councils from significant levels of uncollectable debt and/or protect building owners from what they may consider excessive bills.

Links to the Community Empowerment (Scotland) Bill
15. COSLA considers it is worth highlighting the provisions within Part 4 of the Community Empowerment (Scotland) Bill (‘the CE Bill’) which is currently out to consultation. These provisions appear to seek to deliver a similar outcome of providing an additional debt recovery mechanism in relation to the Act.

16. The draft provisions within the CE Bill appear to offer more flexibility for Councils both in that a) they are wider in scope, covering Sections 25, 26 and 27 of the Act (as well as Sections 28, 29 and 30 covered by the DDB Bill); and b) they are more flexible around repayment terms, in particular around the 30 year term stipulated in the DDB Bill.

17. COSLA Leaders considered this area of duplication at their meeting on 31 January. Leaders concluded that given the potentially duplicate legislation on defective and
dangerous buildings, that this issue would better be dealt with within the Defective & Dangerous Buildings (Recovery of Expenses) (Scotland) Bill, and not as a part of the Community Empowerment (Scotland) Bill.

18. In COSLA’s view it seems sensible to suggest that the proposed intentions would be better served by merging the best of the two pieces of draft legislation and taking these forward in the Non-Executive Dangerous & Defective Buildings (Recovery of Expenses) (Scotland) Bill. Not only would this strengthen the narrative of the Community Empowerment (Scotland) Bill, it would also ensure that a matter regarding the statutory role of councils would receive appropriate scrutiny in a Bill specifically dedicated to Local Government.

COSLA
January 2014
Submission from East Ayrshire Council

Stage 1 consideration of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

1. What are the advantages and disadvantages of the proposed Bill?

At present, cost recovery is pursued as a civil debt. Should an individual or company become insolvent, then any debt in relation to work under the Act ranks with all other creditors and often has a lower priority debt. Additional legal cost can also be incurred where costs have to be pursued through the courts. Local Authorities require the option of pursuing costs and the introduction of charging orders would greatly assist this process. Although the introduction of charging orders is seen as a better alternative than already exists, it should be recognized that local authorities would still incur costs in dealing with dangerous and defective buildings. The introduction of charging orders will improve the cost recovery options available to a local authority for dangerous buildings, where the local authority has a duty to act, but they will do little to stimulate activity for defective buildings, given the lack of a statutory duty within the Act.

The introduction of charging orders will allow for the debt to be registered against a property with a repayment schedule agreed. However, if the owner defaults then the authority would still have to pursue the owner through the courts or wait for reimbursement at the point of sale. Should enforcement action be taken owners of building(s) which have negative equity the remedial costs incurred to make the building safe could far exceed the value or sale price of the building/land. Accordingly there will still be instances where money will not be recovered.

The proposals indicated within the Community Empowerment (Scotland) Bill allow more flexibility in setting a repayment term in relation to debt incurred and have a wider scope, covering Local Authority enforcement under Sections 25-27 via a Notice of liability for expenses. This degree of flexibility should be mirrored within the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill.

In the case of a mandatory duty, it is essential that the Local Authority tax payer is not disadvantaged by the actions of individuals in failing to maintain or secure their buildings. The introduction of charging orders would provide a better alternative than currently exists within the Building (Scotland) Act 2003. However, consideration should also be given to incorporating the proposals included in the Community Empowerment (Scotland) Bill as a means of providing greater flexibility; the same argument applies, of course, when Local Authorities do decide to take action in respect to a defective building.

Within Section 46E(4) it would appear that the charging order is not transferable to a third party if the charging order is not registered, i.e. due to a quick sale of the property before a charging order can be registered this would result in a Local Authority being unable to raise a charging order on the property. Provisions similar to those contained within the proposed Community Empowerment (Scotland) Bill in relation to a Notice of liability for expenses would give flexibility in connection with such events. Alternatively, an option to register a notice of potential liability for costs, similar to that available under the Tenements (S) Act 2004, which does not require an amount to be specified at the time of registration. Section 46E would have to be reworded to allow for this.
2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

The introduction of charging orders will improve the cost recovery options available to a local authority, although they will do little to stimulate activity generally with no access available for funding for the remedial works. Charging orders will aid the recovery of costs options available to a local authority for dangerous buildings, where the local authority has a duty to act, but they will do little to stimulate activity for defective buildings, given the lack of a statutory duty within the Act.

Consideration should be given to including the proposals indicated within the Community Empowerment (Scotland) Bill to allow further flexibility in providing for the repayment of a debt.

In respect of dangerous buildings, where a local authority has incurred costs and the owner cannot be traced to recover these costs, the local authority can use section 45 of the Building (Scotland) Act 2003 to seek authorisation from the Scottish Ministers to compulsorily purchase the building and/or its site. It would be a more meaningful improvement to see direct powers to recover costs by Compulsory Purchase Orders (CPO’s). The only CPO powers in the Building (Scotland) Act 2003 are contained in section 45 and are very restrictive. These powers can only be used for dangerous buildings and only where the owner is not known. Consideration should be given to extending these powers to allow CPO powers where the owner is known and in relation to all works undertaken under Section 28, 29 & 30 of the 2003 Act.

3. Where could the initial capital, required by local authorities to undertake this work, be found?

The initial capital, required by local authorities to undertake this work may be minimal. The Bill should have a positive financial impact for local authorities both in terms of repayment and legal costs of pursuing debt. The use of charging orders will enable local authorities to improve their cost recovery rates to recover more of their outstanding debt, while also providing more certainty in recovery over existing cost recovery procedures.

4. Where the owner of a building is not known how, will the Bill improve on the current situation?

Where the owner of a building is not known the Bill will provide local authorities with the option of placing a charging order against a building, where the owner cannot be traced, or it is uneconomical to pursue the building owner via a civil debt. This will supplement the existing cost recovery powers and will link the debt to the Land Register or if appropriate, register of Sasines. The prospect of a charging order secured on their property should in addition encourage the building owner to settle the outstanding debt or enter into negotiation with the local authority.
In respect of dangerous buildings, where a local authority has incurred costs and the owner cannot be traced to recover these costs, the local authority can use section 45 of the Building (Scotland) Act 2003 to seek authorisation from the Scottish Ministers to compulsorily purchase the building and/or its site. It would be a more meaningful improvement to see direct powers to recover costs by Compulsory Purchase Orders (CPO’s). The only CPO powers in the Building (Scotland) Act 2003 are contained in section 45 and are very restrictive. These powers can only be used for dangerous buildings and only where the owner is not known. Consideration should be given to extending these powers to allow CPO powers where the owner is known and in relation to all works undertaken under Section 28, 29 & 30 of the 2003 Act.

5. Are there any equality issues arising from the proposed Bill?

There does not seem to be any equality issues arising from the proposed Bill. The Bill’s provisions would not appear to be discriminatory in any way. Although applying a charging order to a property might affect the market value of property this is mitigated in that the work carried out will be in the public interest both in terms of public safety and return to the public purse.

The introduction of charging orders, where the debt is secured on the property and not the person, would have a positive impact on equalities as it would enable those on low incomes to pay off the debt at a more manageable rate.

6. What are your views on a fixed period of 30 years for repayment?

A fixed period of 30 years is thought to be too long in most instances for a local authority to recoup their costs. The repayment period should be able to be negotiated between both parties taking into account the amount of debt, financial position and assets available to the owner of a building.

The proposals indicated within the Community Empowerment (Scotland) Bill (CEB) and currently used in the Historic Environment (Amendment) (Scotland) Act 2011 and High Hedges (Scotland) Act 2013 allow more flexibility in setting a repayment term in relation to debt incurred via a Notice of liability. This degree of flexibility should be mirrored within the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill.
Dear Sir/Madam

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

I am writing to you on behalf of the Scottish Building Federation. Founded in 1895, the Scottish Building Federation (SBF) is the lead voice of the construction industry in Scotland. Our membership comprises hundreds of construction businesses located throughout Scotland from Orkney to the Borders and ranging from large national, international, residential and commercial builders and civil contractors to smaller local subcontractors, suppliers and professional industry advisers.

SBF views the Defective and Dangerous Building (Recovery of Expenses) (Scotland) Bill as a welcome move to support the repair of unsafe buildings in Scotland.

Buildings that are not properly maintained can pose a major risk to the public, particularly in built-up areas. Local authorities have an important responsibility to protect the public from buildings that have reached an urgent state of disrepair and are consequently defective or dangerous. This legislation would enable them to fulfil that role with a greater level of confidence of being able to recover the associated costs from those ultimately responsible for their maintenance.

With the number of new homes being built in Scotland currently at a record low, an ageing building stock will inevitably lead to an increase in the number of buildings classed as dangerous or defective and requiring urgent repair.

A clear benefit of the legislation will be to reduce the number of instances where repairs to defective or dangerous buildings are delayed, scaled back or even cancelled due to concerns over cost recovery. That in turn should provide an additional stimulus to the repair and maintenance sector of the construction industry that carries out these repairs.

We have consistently argued that the rate of VAT payable on building repair and maintenance works should be reduced to 5%. As well as reducing the cost to local authorities of commissioning repair work to
dangerous or defective buildings, this would provide further encouragement to owners to invest more proactively in necessary repairs and maintenance to their property, thereby ensuring fewer instances of buildings reaching a dangerous or defective state in the first place.

We fully support proposals within the Bill for a standard repayment period of 30 years, coupled with provisions allowing for early redemption. There would seem to be a natural incentive for owners to agree to early redemption where they can afford to do so since this would reduce the level of interest payable and therefore the total cost incurred.

We accept that, separate from the provisions of the current legislation, consideration will also need to be given to providing the means for local authorities to access the capital to cover the up-front costs of carrying out urgent repairs to dangerous and defective buildings. We note proposals for the establishment of a loan fund and believe this would merit further consideration in the event that the current Bill becomes law.

We note also conclusions around the potential introduction of regular inspection and certification schemes to be submitted to by building owners. We fully agree that the possible introduction of any such regime would require further examination and consultation, not least because of the potentially far-reaching legal implications it could pose.

In conclusion, we are fully supportive of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill as presented to the Scottish Parliament.

Should the committee require any further information or input to its scrutiny of the Bill, I remain at your disposal.

Yours sincerely,

Vaughan Hart
Managing Director
Submission from Fife Council

Fife Council welcomes the opportunity to contribute to this consultation and would respond as follows:

Committee’s Call for evidence

1. What are the advantages and disadvantages of the proposed Bill?

Advantages:

Fife Council welcomes the additional cost recovery options that this Bill would provide following defective and dangerous buildings interventions beyond those currently available to local authorities via civil debt recovery procedures.

Having the option to attach and record such debt against property and land and then recover by instalment, early redemption or at the time of sale provides additional confidence around the likelihood of successful debt recovery at some point in the future.

The proposed charging order option could also allow property owners to make repayments over time even if they could not do so by other means at the time the works were necessary.

Disadvantages:

Although the Bill provides another means by which Councils may recover debt, it does not resolve the issue of how the initial costs, particularly in the case of discretionary defective buildings works can be provided for. (see Question 3)

Whilst the Bill does reintroduce charging orders in addition to the other civil debt recovery options, it does not reduce the process that the local authority has to complete to secure registration of the order against the title or titles. This has resource implications for the local authority in terms of costs, process and time and indeed these costs are multiplied by the number of owners and therefore properties sharing the debt. It is not uncommon to be dealing with twenty or more owners following dangerous building works within tenements.

The inclusion of an appeal process if initiated by an owner would also be resource intensive for the local authority and could potentially be abused by persons wishing to avoid or delay payments – is there a need for an appeal process? For example there is no such equivalent appeal process proposed within section 27 of the Draft Community Empowerment (Scotland) Bill.

The Bill also only applies to the dangerous and defective buildings sections of the Building (Scotland) Act 2003 and not to building regulation compliance enforcements as provided for previously within the Building (Scotland) Act 1959. Increasing focus on compliance within the building warrant process will likely result in increased enforcement activity being considered by local authorities and the Bill should be extended to support cost recovery following such enforcement and therefore encourage the appropriate use of these Sections of the Building (Scotland) Act 2003.
As reported in Fife Council’s response to the Scottish Parliament Finance Committee Call for Evidence on this Bill, regarding Section 46E, there is a risk that building owners may sell their property before the local authority can carry out the work, apportion costs and register the charging order - potentially resulting in the charging order not being enforceable against the new owner. Experience has shown that some owners will actively seek ways to avoid costs resulting from dangerous building interventions. An intermediate mechanism to register a “notice of potential liability for costs” should be considered, which does not require an amount to be specified at the point of registration (similar to that available under the Tenements (S) Act 2004).

The measures contained in Schedule 6 to the previous 1959 Act also entitled local authorities to place a charging order which had priority over existing and future burdens and incumbrances. The Bill should include such provision particularly as it appears unreasonable that local authority may provide public funding to remedy danger or disrepair (likely adding value to the property) then for other creditors to recover these same funds when the property is sold.

2. **How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?**

As it is not proposed to apply these powers retrospectively it is not expected that the Bill will help address existing and previous problematic cost recovery cases.

However as the Bill extends cost recovery options it may increase confidence in the ability of local authorities to recover such expenditure and thereby positively influence the decisions that local authorities make regarding undertaking discretionary work (defective buildings).

3. **Where could the initial capital, required by local authorities to undertake this work, be found?**

Unless monies can be provided via a funding mechanism such as a central capital fund allocation or accessed from a national loan fund for these purposes, capital can only come from other budgets to the detriment of other Council priorities.

Fife Council has already reported concerns in this area to the Scottish Parliament Finance Committee Call for Evidence on this Bill, suggesting the need for such a funding mechanism and also relating to the delay between local authority expenditure and the potential 30 year repayment period - particularly recognising the large sums of money associated with some dangerous buildings interventions.

4. **Where the owner of a building is not known how, will the Bill improve on the current situation?**

As the Bill would allow local authority costs to be charged against the land/property this should highlight the debt at the point of any sale and may lead to the sums being recovered by the local authority. It may therefore provide increased cost recovery
confidence in these circumstances and could help facilitate a decision to intervene where the intervention required is discretionary (defective buildings).

Fife Council considers that compulsory purchase orders (CPO) powers should also be available even when all the building owners are known and CPO is considered the best way of either securing or at least reducing local authority losses following dangerous or defective buildings interventions.

Fife Council has an example where significant sums are outstanding against dangerous building works but cannot recover these costs using current powers and CPO is not available as all the owners are known. CPO would potentially provide an effective tool in enabling local authorities to better recover such costs and be in a position to consider redevelopment the site to benefit the local community.

5. **Are there any equality issues arising from the proposed Bill?**

None that we can identify

6. **What are your views on a fixed period of 30 years for repayment?**

The 30 year period should be the backstop time period and is considered appropriate for larger outstanding sums. The repayment period for smaller sums should be shorter and appropriate reflecting the viability of the local authority in administering the yearly repayments and pursuing the debt if not paid annually.

**Other Comments:**

Fife Council is aware and also welcomes the similar proposals and approach as proposed in the Draft Community Empowerment (Scotland) Bill and would suggest that whatever bill is ultimately taken forward that the suggested amendments are included i.e.:

- flexibility in terms of the time period over which the repayments can be made (reflecting the amount payable)
- extension of CPO powers to also include for when owners are known
- ability to apply the cost recovery powers retrospectively in appropriate circumstances
- the proposed cost recovery powers also extend to building regulation compliance
- ability to use a “notice of potential liability” or similar to reduce the risk of new owners not being liable for the debt
- the provision of some kind of funding mechanism to provide the necessary initial capital to bridge the gap between local authority expenditure and potentially protracted recovery

This Bill and the associated proposals in the draft Community Empowerment (Scotland) Bill do not address the significant and associated issue of neglected, often unoccupied commercial buildings that are neither dangerous or defective in terms of the Building
(Scotland) Act 2003 but visually blight priority areas in our communities such as town centres. Fife Council would welcome powers to better address these situations.
Submission from South Ayrshire Council

South Ayrshire Council’s (SAC’s) response is set out below and reflects the response on this Bill to the Scottish Parliament Finance Committee and to the similar ongoing consultation on the Community Empowerment (Scotland) Bill.

1. What are the advantages and disadvantages of the proposed Bill?

Response:

Advantages

- The re-introduction of wider powers to use a Charging Order (CO) to recover Local Authority (LA) expenses in making safe dangerous buildings should improve the recovery of costs and encourage LA’s to act.
- The increased scope of the Bill to extend Charging Order (CO) powers to cover defective buildings should encourage greater Local Authority (LA) activity in this area.
- LAs experience problems where action is followed by a transfer of ownership and it is expected this will be covered by the CO ensuring payments are made before a sale is complete.

Disadvantages

- The increased scope of the Bill to extend the use of CO’s where buildings are dangerous and to cover defective buildings should encourage greater Local Authority (LA) activity in this area and lead to a potential increase in costs incurred.
- The proposal to reintroduce wider powers to issue Charging Orders will assist with the recovery of costs in particular in relation to clarifying the extent of the LAs expenses and the problems associated when property ownership changes. However, it does not directly enable the recovery of expenses where the owner does not have the funds or is unwilling to make payment. Consequently, LAs will continue to have doubt concerning recovering costs.
- CO’s will not in themselves ensure greater cost recovery. Although they should be a useful tool to help improve cost recovery they do not provide a complete solution and as a consequence it is anticipated that LA’s will continue to be exposed to financial risk arising from the Bill. For example, where the owner of a property does not have funds to repay the Council, a CO may assist the LA in recovering costs incurred at the point in time when a property is sold, but not up to that point.
- Where the cost of the work is greater than the value of the property (e.g. SAC is currently negotiating a contract to demolish buildings on a site contaminated with asbestos where the cost will exceed £300,000 and the residual property value is less than £100,000) then a CO will not assist the local authority in fully recovering expenses.
- The promotion of 2 pieces of legislation, this Bill and the Community Empowerment (Scotland) Bill is not the ideal situation and merging the legislative proposals is favoured, if possible. This would give a simpler approach and avoid the possibility of creating confusion.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

Response:
LAs need to improve their ability to recover costs when undertaking work on defective and dangerous buildings. Historically there has been a serious risk of not recovering expenditure in these situations and this has created difficulties for LAs being unable to secure alternative funds to carry out works to private properties. In many cases taking action in relation to dangerous and defective buildings falls to the Building Standards service in LAs and the impact of not recovering costs damages the annual revenue budget to provide a range of services. In particular, the important and separate role of verifying Building Warrant work can be affected by the reduction of staffing levels in LA’s Building Standards establishment. Consequently, the use of CO’s is viewed as a welcome improvement to cost recovery legislation and considered necessary if intervention by LA’s is to be encouraged.

Problems with buildings becoming unsafe is becoming a more frequent occurrence and often the owner is known but is unable or unwilling to pay for works to make a building safe for a variety of reasons including no working capital, no access to finance and negative equity. The proposals to use CO’s in this Bill will go some way to alleviate the problems for LA’s by offering owners a route to repay LA’s for capital works or the potential for LA’s to recover expenses at point of sale. However, although a CO would provide an opportunity to provide finance over a long term with small repayments this can be ignored and in these circumstances the introduction of powers for compulsory purchase as a last resort would create an opportunity for the

SAC supports each and every available route to recover expenditure to deal with dangerous and defective buildings and to this end recommends existing powers are improved with all the tools currently proposed within both the Community Empowerment (Scotland) Bill and the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill. This would give the following tools as a minimum number of routes for cost recovery -

- Debt recovery
- Notice of Liability
- CO
- CPO

These tools could be used selectively and either individually or collectively depending on several factors including the profile of the owner, the size of the outstanding debt and the condition of the property. For example, the recovery process may be initiated by debt recovery and although this may work well for minor works it would not be straightforward for large expenditure where, for example, the property value is lower than the costs of the works. Where debt recovery was unsuccessful it could lead to the simple Notice of Liability process to register a warning to any potential purchaser, without an appeal process. In the longer term the CO would be more effective by inhibiting the sale of a property until expenses were paid and would also be helpful for some owners who were unable to pay unless the Council made available a payment plan over a number of years. Where other methods of recovery fail the legislation should include CPO powers as measure of last resort and this should be extended to any case where it is appropriate. The CPO would then be a strong tool for enabling LA’s to recover costs, however, to be effective the CPO procedure needs to be kept simple and not lengthy or cumbersome.
3. Where could the initial capital, required by local authorities to undertake this work, be found?

*Response:* More needs to be done to provide suitable funding to LAs that embark on this work and one possible solution to how these costs could be met is a central capital fund allocation (e.g. similar to that employed for flooding) that could support LAs until the costs incurred were recovered.

4. Where the owner of a building is not known how, will the Bill improve on the current situation?

*Response:* At present section 45 of the Building (Scotland) Act 2003 provides for CPO powers where the owner cannot be found, consequently, it is difficult to see how the Bill improves upon this. However, the same powers are not currently available in relation to defective buildings and although the proposals for CO’s in the Bill will be useful they should be augmented with CPO powers where appropriate.

5. Are there any equality issues arising from the proposed Bill?

*Response:* The use of CO’s will provide a route to, in effect, repay capital borrowing that may otherwise be unavailable to owners as a result of a number of issues, including negative equity, low income, low credit threshold etc.

6. What are your views on a fixed period of 30 years for repayment?

*Response:* The period for repayment should be flexible enough to vary the length of term for repayments, not fixed to 30 years or less but flexible to range from 12 months to several years up to 30.
Submission from East Lothian Council

Date: 31 January 2014

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

1. What are the advantages and disadvantages of the proposed Bill

Advantages

- A Local Authority (LA) may avoid the need to pursue the debt through the courts and incur the cost of that. Generally costs are not always recoverable and even then judicial expenses are limited.
- Civil litigation can be an uneconomical way for LAs to recover the debt incurred in complying with their statutory duties to render dangerous buildings safe for the public etc resulting in costs incurred being written off and incurred as bad debts. This can fall to a LA’s building standards department to incur. Thereby greatly affecting their budget (and desire to become involved with and carry out work on dangerous and defective buildings.
- It may provide for immediate payment by way of instalments from a landowner, prompt payment when the land is sold and ensure a LA is protected from their debt prescribing.
- It could be administratively simpler for LAs to apply and obtain payment for the work they have carried out under a statutory duty.
- Recovery of costs in registering the Charging Order (CO) is appropriate.
- Interest on the debt where it is not paid in accordance with the proposed methods of instalments is a useful tool of enforcement of the CO.

Disadvantages

- COs as proposed provide an unviable length of time for repayment. Financial budgets and other planning by LAs is generally done on an annual basis. The cost is incurred immediately and not over any length of time. By only proposing that a CO will provide for repayment over 30 years it is unlikely a LA will see this is a viable option, preferring maybe to just pursue the debt through the courts in the ordinary course and only use COs where the debt is low level and prospects of repayment low.
- COs like inhibitions can remain in place for a long time and until the registered property is sold, remortgaged etc, with payment being required to provide a clear and marketable title. The disadvantage of this and for a LA in using a CO is that the debt can remain outstanding for some length of time and with 30 years to repay the debt little impetus on a land owner to address the debt.
- The Bill as drafted suggests there would be no default until the 30 annual payment is due and it is only then it would fall to be repayable as a debt. If this is correct, it is unrealistic to expect a LA to sit with a debt, which could arguably accrue interest, until the repayment period has entirely passed. In the normal course of commercial debts, there would be a point at which, if say 2 or 3 repayments have not been made the owner would “default” and the whole debt could become due and repayable immediately.
There is, as the Bill stands, no obligation on a LA to provide a clear outline of the work, which has been carried out or of the actual costs incurred with a breakdown. Any CO without this information will stand to be successfully challenged by an owner who cannot easily ascertain from the CO what the debt is for. The amounts due should be clearly ascertainable from the terms of the CO. Summary diligence should not be used by a creditor unless they clearly formulate the basis on which the debt is due and agreed this in advance with a debtor or they demonstrate it as part of the CO. Although a LA is under a statutory obligation to do the work, as matters stand, they have to seek repayment through the courts if it is not paid. This provides a method by which the debt can be scrutinised. Absent of that a LA could be challenged by a land owner for registering a CO, leaving it to be discharged and the matter disputed whilst the land is then sold. A schedule or scope of works and invoices of third parties’ costs should be provided with the CO. This may be especially important if the repayment period is to be so lengthy as files can be destroyed or original parties to the situation no longer available for comment etc when the debt is then to be repaid and the charging order discharged.

There should be a clear provision for a period of time in which an owner can challenge the CO. A LA needs certainty that they can recover the debt whether by way of instalment or when the land is to be sold, without the possibility of a challenge being raised later and after the CO has been registered. Provision could be made that a LA should make reasonable attempts to contact the registered owner by post and to leave a copy notice at the building, so as to raise awareness of the CO being registered.

The provision on interest being applied is open to each LA to interpret and apply as they see fit. It would be more appropriate to fix a rate of interest or link it to current interest rates – i.e. 0.5% above base etc. Also that interest may only be applied by a LA in specific circumstances e.g. on default of an instalment and that is only on that instalment and not the whole debt thereby calculated accordingly.

An owner should be able to call upon a LA to discharge the CO on repayment of the debt and on provision of costs for that discharge. This would avoid delay by the LA and ensure any sale can proceed, with provision of appropriate mandates for payment etc.

Provision should be made to ensure it is clear a CO will remain registered with the title for as long as it takes the debt to be repaid, it is not affected by failure of an owner to pay an instalment nor if the LA choses to recover the debt through the courts etc.

Can registration of a CO ensure a debt does not prescribe? Provision can be made to ensure a LA is still entitled to pursue the debt, on failure of an owner to pay X number of instalments, but has to take that action within X number of years so that normal rules of prescription do not apply i.e. from five years of the debt being incurred. Otherwise, at what stage might a LA lose its ability to reclaim the costs incurred in complying with its statutory duties and find it has forgone its ability to pursue the debt through the courts?

The core term of the CO being 30 years for repayment is unrealistic and would be more effective if referring to the total debt. Provision for 30 years could be entirely disproportionate to the debt e.g. work costing £5000 is
carried out and a LA administrative fee of say £500 (including registration costs). An owner on the current drafted Bill is allowed 30 years to repay this. This equates to £183.33 per year.

Whereas if provision were made for a shorter period of time of repayment then the amount due to be paid increases and the LA recovers the debt more quickly and effectively. The longer the debt takes to recover the more administration costs incurred by a LA. If there is concern about a landowner being required to make instalments over an unrealistic period then some form of calculation might be more appropriate or a maximum amount repayment by a landowner in one year set by legislation.

- A LA might prefer to choose payment by bi-annual instalments or even instalments as agreed with a landowner that suits parties better. Thereby ensuring the debt is repaid at a suitable pace and amount for the LA and/or landowner. It is not necessarily beneficial to prescribe the length of time at which repayment must take place. The circumstance in which a LA has carried out work under its statutory obligations varies, as does the amount due for the work.

- At what time of year is the landowner obliged to repay the debt? Should this be reference to when the CO is registered? There needs to be provision for a date to be set, otherwise it could become a point of dispute as to when the instalment is overdue/unpaid.

- Parties could be entitled to chose mediation or arbitration, if there is dispute regarding the debt or the CO rather than involving the courts and the landowner being required to challenge registration of the CO, possibly by reference to the Court of Session. The method by which a landowner may challenge a CO at minimal cost is not entirely clear to legal practitioners or LAs and should address the wider issue of Access to Justice.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

The Bill will not necessarily address the existing problems for reasons outlined above. There may be little motivation by a LA to incur cost at all where recovery of the debt is still seen as something of an arduous task and unlikely to see repayment of a debt in the shorter term.

COs as proposed are not necessarily a solution to the real issue, which is to address the ever increasing age and dilapidation of buildings, resulting in LAs having to carry out work to comply with their statutory obligations.

LAs deal with many buildings that would largely benefit from more work being done than the alternative, which at its extreme would be nothing. A LA may just fence off a dangerous building in order to meet its statutory obligation.

All things being equal a LA’s should only carry out the minimal amount of work required to comply with its statutory obligations and ensure the public’s safety – as that is all they may ultimately recover from a land owner. On one view that is correct and all a LA should do where the work is urgent. Legislation does not provide for a
Local Government and Regeneration Committee
Scrutiny of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

LA to do what they see as fit for the building, but rather just what is absolutely urgent and necessary under S29. Where a LA incurs debts by virtue of a landowner’s failure to upkeep its buildings and prevent their dilapidation though a LA is empowered to carry out that work, but of course reluctant to do unless really imperative for safety reasons. Preventing further dilapidation may be part of that and could form some of the works, but in the knowledge a LA has little prospect of recovering those costs they will do the minimal amount of work necessary and may chose to not intervene at all.

A LA having strong debt recovery tools at their disposal to recover costs is the only way to make the legislation effective and ensure that the increasing number of dilapidated and dangerous buildings can and will be dealt with by LAs. As the Bill stands a LA is unlikely to feel much more empowered to anything but minimal work under the legislation. It may find in some circumstances a CO useful as a way of eventually recovering payment but again with little guarantee or short term prospect of recovery.

3. Where could the initial capital required by local authorities to undertake work be found?

The Bill does not appear to anticipate their being a change in the current arrangements and LAs are still to find the capital themselves to carry out dangerous building work. There could be a method by which a LA can apply for grants retrospectively from a centrally funded Government fund to ensure they can continue to finance the work needed to comply with their statutory obligations. A situation can arise, which involves just one dangerous building, that will absorb all the capital a LA has set aside for dangerous buildings then leaving it to take a view on other situations and the need to incur other costs and work.

4. Where the owner of a building is not known how will the Bill improve on the current situation?

It will not necessarily given the anticipated core terms of the CO. If an owner cannot be found court action can still be raised and an inhibition (on the dependence or on decree) registered. Either way the effect would be that the debt remains with the LA until such time as the land is sold etc if repayment is not made by a landowner, which is not uncommon. Especially where many landowners are registered limited companies, with limited liability and no other assets.

5. Are there any equality issues arising from the proposed Bill?

No.

6. What are your views on a fixed period of 30 years for repayment?

As above – this is seen as a disadvantage. It is too long and does not account for the amount of debt which may have been incurred by the LA in carrying out the work,
which can vary tremendously depending on the type of building and basis on which work is carried out in terms of the legislation.

7. **Other comments.**

The Committee should consider the basis on which a CO could work in practice and on the basis so far provided for. A CO is a useful tool, but it could be made quite ineffective and unattractive if not thoroughly considered and LA’s undermined by a long repayment period and being tied to that.
Submission from Midlothian Council

What are the advantages of the proposed Bill and how will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

Midlothian Council considers the advantages of the Bill to be that of an additional tool within the Local Authority’s (LA’s) remit. Such a tool could beneficially be utilised to recover costs where existing debt recovery measures have failed, or are seen as a burden to implement relative to certain aspects of the case.

The charging order is also expected to fill a loophole in the current debt recovery mechanisms available to LAs, where ownership is in dispute or unable to be established. In such cases, charging orders allow for the burden to be placed on the property, without the need to establish an owner and recorded in relative registers.

Although there is already a similar process to charging orders within the Housing (Scotland) Act which can provide a process to recover costs relative to domestic property, there appears to be no such process available for non domestic buildings. The reintroduction of charging orders with the Building Scot Act would therefore allow charging orders to be levied against any building type and any combination of buildings.

What are the disadvantages of the proposed Bill?

Midlothian Council would support the reintroduction of charging orders but would like to point out that it should be recognised that access to funds to carry out works in order to make buildings safe, or to repair defective buildings, requires to be provided by the LA. Not only do such funds have to be provided to cover the LA’s own costs, the costs incurred by contractors undertaking work on behalf of the LA also require to be covered.

In order to stimulate activity, consideration needs to be given to a financial support mechanism that is capable of supporting both the LAs and private sector. In this manner, a strong financial support system could potentially assist in delivering significantly reduced numbers of defective and dangerous buildings.

Where could the initial capital, required by local authorities to undertake this work, be found?

At a time when most LAs are considering methods of reducing their outgoings, specifically in relation to non-statutory requirements, LAs will have little incentive to move forward with burden of repairing private property. Unless some form of financial support/return can be established, LAs focus will remain wholly on dangerous buildings, at the expense of concerns for defective buildings.

It may be that some form of national fund could allow LAs to apply for financial support to remedy dangerous/defective buildings. Such support could provide LAs with the assurance that they could arrange to carry out the work within current budgets. The fund could then be reimbursed once the charging order is discharged, either directly by the owner, or at the time of a future sale of the property.
Where the owner of a building is not known how, will the Bill improve on the current situation?

The charging order is also expected to fill a loophole in the current debt recovery mechanisms available to LAs, where ownership is in dispute or unable to be established. In these cases, charging orders allow for the burden to be placed on the property, without the need to establish an owner and recorded in relative registers.

Are there any equality issues arising from the proposed Bill?

Midlothian Council is unaware of any equality issues which may arise from the introduction of the Bill.

What are your views on a fixed period of 30 years for repayment?

Consideration should be given to allow flexibility of the 30-year period. Discretion as to the duration of the time period should be established, having regard to sum of monies involved and the means of the owner to pay. Placing a fixed 30-year burden on the LA for what could be considered a relatively small sum of money, with relatively high administration costs over the extended 30-year lifetime, may discourage LAs in the use of the charging order system.
Comments by IHBC (Scotland) - 

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

The Bill is available here with explanatory notes here and an article in Holyrood magazine that outlines the MSP’s aims here. The committee seeks oral evidence on the following questions:

1. What are the advantages and disadvantages of the proposed Bill?

1A) IHBC (Scotland) is concerned that the “Keeping Scotland Safe” Briefing Note and the objective of the Bill fails to recognise the other relevant legislation (other than the Building (Scotland) Act 2003 - s.28 Defective Building or s.29 Dangerous Building Notice) that apply – in particular:

- Town and Country Planning (Scotland) Act 1997 - s.179 Amenity Notice (as updated by Planning etc (Scotland) Act 2006)
- Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 - s.49 Urgent Works Notice or s.43 Repairs Notice (as updated by s.25 Historic Environment (Amendment)(Scotland) Act 2011)

In particular it is disappointing that the commentary fails to recognise and address the potential conflict between a s.29 Dangerous Building Notice (where demolition is a means of compliance) – which - if applied to a Listed Building or heritage building in a Conservation Area – would be encouraging the owner to carry out a prosecutable offence. This can be addressed (as per s.35 of Building (Scotland) Act 2003) by a simple one line requirement on formal notices – where served on a listed building or on a heritage building in a Conservation Area – to point out the separate need for Listed Building or Conservation Area Consent and to require consultation with the Council’s relevant conservation expert (or Historic Scotland).

This rather narrow focus on Building Act Notices thus fails to embrace and apply a common approach to the related Planning and Listed Building actions in default (see 5A below). Encouraging demolition via a Dangerous Building Notice does not necessarily solve the long term blight of the vacant or gap site.

1B) Whilst IHBC agrees that the current situation does not work well and that there is a lack of proactive work - the main danger is that the Bill seeks to tackle the results of the problem – rather than address how the problem might be prevented in the first place. In particular it fails to explore options such as:-

- How a formal “Duty of Care” might best be promoted – perhaps starting with a formal legislative responsibility on all public bodies to protect, enhance and have special regard to Scotland’s historic environment in exercising their duties, and to designated assets in state ownership.
- How a fiscal policy could better encourage building repair and maintenance (eg say a £3,000 tax allowance over a 3 year period) to help improve maintenance, or
- Exploring whether – as recently suggested for London – Council Tax could be able to be applied at a double rate on vacant properties after due notice (say 2 years to allow time for action to sell or renovate the property). This seeks to address the current position that currently there is minimal financial penalty (indeed often a tax saving) on owners arising from letting a building deteriorate to the point of becoming uninhabitable, or
How a lower VAT rate would act as an incentive to encourage repair and maintenance work (as opposed to the current new build VAT incentive. This might also address the current incentive to use non-VAT registered companies - and the related “cash” economy. IHBC has worked with many other groups (such as Federation of Master Builders) to research the benefits of a lower (5%) VAT rate for heritage building repair work – and will be updating this research at a Westminster Parliamentary Reception on 3 March 2014. All too often a 20% VAT rate adversely affects the viability of refurbishment projects – favouring housebuilders over home owners. Hopefully government will realise that a simple, cost-effective relaxation of tax on maintenance and repairs can offer a much wider range of benefits to the treasury, while also supporting carbon reduction, building standards, heritage skills, and cheaper heating bills, as research and experience both demonstrate, or

How “short life” uses might be encouraged – whether from a national Scottish Short-life Housing Association, or encouraging “pop-up” temporary uses. Temporary Licences (of at least 2 years) can help minimise deterioration during the development process and facilitate effective temporary uses.

Any of these options are likely to be more successful than the suggested “certification and inspection” (MoT) regime suggested.

(1C) Whilst case law (Stroud LGO maladministration case) has established the need for Councils to consider the appropriate use of relevant legislation (Building Act s.28 Defective Building or s.29 Dangerous Building Notice; or Planning Act s.179 Amenity Notice (to remove but not improve position); or (where listed or in a CA) a s.49 Urgent Works Notice or s.43 Repairs Notice) – there is little incentive to actually use the legislative powers – and no existing duty of care or requirement to have special regard to expert advice (as for example, with Perth City Hall case). In particular – there is a point where the costs of carrying out works in default is simply too great to allow a Council to justify action. Thus overall – and in the absence of any data in SHEA (Scottish Historic Environment Audit) or elsewhere – these formal notices are generally poorly used. Such notices are it is suggested used even less than the Building Act Notices (only used by 6 authorities in Scotland). Too often public safety (via a Dangerous Buildings Notice) is used to go down the demolition path.

For example, there are very very few uses of a s.43 Repairs Notice as the only enforcement powers are Compulsory Purchase – with a high risk of legal challenge and attempts to argue for a high “residual value” of the site. These used to be linked via a “back-to-back” agreement with a Building Preservation Trust to securing the refurbishment of a Building At Risk – an option now little used. There would be a much greater interest in utilising such notices if – after due notice – the Repairs Notice allowed the building to be acquired for a nominal sum (say £1) (see for example the Arnos Vale Cemetery, Bristol case). Again – the low (but effective) use of such notices was identified in an IHBC survey (some years ago by Bob Kindred) which indicated that only 1 in 20 notices actually needed follow up action.

Indeed at the Scottish Government seminar on CPO powers (s.189 of T&C (Scotland) Act 1997) a few years ago the concept of unlocking such sites through such a “Council CPO for a nominal sum” approach - with the property then being immediately auctioned (with a legal agreement to secure repairs within a reasonable 12 or 18 month period) was reported – having being used extensively and successfully by a number of English Councils (Kings Lynn & others). It was suggested that wider use of CPO powers was the way to give teeth to existing notice procedures (whether Housing, Building Act, Planning or Conservation). However the current perceived risks in Scotland of taking even temporary responsibility for a vacant or derelict building to facilitate such an auction-based solution have again limited any take-up.

(1D) There is undoubtedly an urgent need for an improved framework to tackle vacant and derelict buildings.

The latest Buildings at Risk Register (BARR) (2013) has Scotland BAR at 8% (albeit falling) whilst in England there are 4% BAR (albeit rising). In part this reflects the Annual BAR survey in England – which is only done bi-annually in Scotland - and the specific targeting of lottery and English Heritage grants on BAR in England. (Note that the BARR data compares Cat A (Scotland) with Grade I and II* (England) – with a small variance of 9% to 9.3% of all listed buildings). As a leaked Historic Scotland report in Oct 2013 indicated –
there is estimated to be some £176 million needed immediately to tackle the Heritage backlog – let alone the wider repairs backlog (estimated as £1.2 billion in Edinburgh alone).

This underfunding and lack of a robust preventative approach is the real crisis in Scotland’s Heritage that needs to be urgently tackled. In part the various Heritage Lottery conditions, Housing Association funding structure, and the economic climate (leading for example to school, NHS, and Court closures) – as well as increased VAT - have combined to make it very difficult for refurbishment and re-use schemes to “stack up” (compared to 4 or 5 years ago). Councils are, for example, not required to have an active Building Preservation Trust in their area (though Historic Scotland funds one in each City). Guidance (in so far as it exists) for Asset Management Plans seldom goes beyond simply listing heritage assets (if that) with no Duty of Care or other requirements (eg to identify preservation/reuse strategy). The emerging policy emphasis on “Town Centres First” or “Creating Places” need to be rooted in valuing, retaining and celebrating the existing heritage if they are to be successful. The jury is still out on this.

(1E) Equally the Scottish Government’s welcome emphasis on Sustainability has not yet recognised the importance of embodied energy or linked this to prioritising the retention and reuse of building assets. Indeed the Scottish Government slipped through - without any consultation - a lax approach to controlling demolition in the planning process (The Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2011) – relying on complex wording and inferring by omission. All too often a cleared site is perceived as a success. Embodied Energy needs greater emphasis as part of a successful sustainability strategy.

(1F) The whole formality of the proposed charging order and treatment as a “land register” issue with monthly repayments is potentially excessively complex for the many default works – many of which are likely to be under say £20k to £30k. The related civil debt recovery procedures further hinder current recovery of costs.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

(2A) The introduction of Liability Orders (under The Historic Environment (Amendment) (Scotland) Act 2011) has – although little used in practice as yet – helped strengthen the ability to recover costs from “paper company” owners – who used to move ownership of the building around to evade recovering costs. Whether “Charging Orders” (as proposed by the bill – as a charge on the land) – or as “Liability Orders” (with liability on owner(s)of the land) – this ability to tie incurred costs to the land AND owner(s) is essential.

However there may be merit in promoting a common recharging approach (also covering default action in relation to Planning Act s.179 Amenity Notices) – which as well as tying costs (including interest) to the land value - also allows cost recovery against individual Directors (if they have other assets). At the same time any recovery process needs to recognise the position of someone inheriting a difficult property who may be pleased to get rid of the responsibility (eg promoting a voluntary agreement to take property to auction), or where market values are such as to deter action.

3. Where could the initial capital, required by local authorities to undertake this work, be found?

(3A) Most Council’s have an allocated fund for such Building Act work (say £70k to £100k) – but this is now frequently utilised to its maximum at present due to the delays in securing the repayment of past costs – in turn deterring action on current problems. With only a 48% recovery rate there is little appetite for action.

(3B) The availability of a small national budget which could be bid for would in itself be likely to encourage more robust action – as well as better inform the Scottish Government of the extent of the problem. This might be appropriately funded for example from waste levy.

(3C) Equally the legislation (clause 46C) might be sharpened to confirm that legitimate legal costs (“administrative or other expenses”) can be added to the building repair costs – so reducing this frequent area of dispute. Such on-costs might sensibly be capped at a maximum of around 5% to 7% of the cost of works. Clause 46C (2)(c) re interest costs is welcome.
4. Where the owner of a building is not known how, will the Bill improve on the current situation?

(4A) There does need to be a succinct mechanism for dealing with land or properties with an unknown owner. There might usefully be a process – where reasonable steps have failed to identify the owner – to allow action to be taken to get the property onto the market and into a positive use. This affects other formal actions (eg compulsory purchase). The suggested “equal apportionment” provides a useful start.

(4B) Caution needs to be raised with clause 46E (4) Registration – given for example the difficulties in ascertaining title (eg for Tree Preservation Orders) – and to ensure that there is not a gap between costs being incurred and a charging order being registered – where section 4 appears to allow “ignorance” to offer a let out. The charging order needs to be able to be “provisionally registered in advance” with Land Register to reduce the risk of abuse of this clause – and effectively negating the purpose of the bill.

5. Are there any equality issues arising from the proposed Bill?

(5A) There would be a benefit – if Charging Orders are to taken forward alongside the Listed Building “Liability Orders” - to amend s.1 to also refer to s.179 of the Town and Country Planning (Scotland) Act 1997 as amended by Planning etc (Scotland) Act 2006, and s.49 and s.43 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

(5B) The wording of clause 46C (1)(b) is considered to be too open ended – and needs to be qualified ... eg “any amount determined by the local authority as reasonably incurred in relation to tackling the land in question”.

(5C) Para 6 and 7 of the Explanatory Notes repeats the frequent failure to identify the legislative caveats on the use of sections 29 and 30 of the Building (Scotland) Act 2003 to take account of the parallel Listed Building legislation. Good practice requires the relevant conservation expert to be consulted prior to taking action on a relevant building – and any Building Act notice served also requires to note that unauthorised work to a listed building can be a prosecutable offence. The Explanatory Notes need to be corrected to recognise the position of a Listed Building.

(5D) IHBC would support greater flexibility in the tight periods that exist (7 and 21 days) under a s.28 Defective Buildings Notice. In general more reasonable time periods for action are applied. It does however also need to be recognised that owners are adept at finding reasons and excuses for failing to take action – whether under a Building Act Notice or Urgent Works Notice.

6. What are your views on a fixed period of 30 years for repayment?

(6A) This is considered to be far too long a period – and it is suggested that a 10 year maximum repayment period should be aimed for. Whilst many leases require a 25 year minimum term to facilitate external funding; legal property issues can have a 20 year life – and many related retention documents having a maximum 5 or 10 year life. Flexibility in the length of a charging order is essential (to avoid a 30 year charge over, say, a relatively small £3,000 cost, and to avoid excessively complex calculations). Thus in defining Charging Orders (Schedule 5A para 2) sections (d),(e) and (f) need greater flexibility. For example – if the land was sold it is unclear whether the priority is to clear the charging order or whether it would continue?

(6B) Equally it is unclear what further actions would be possible under Schedule 5A para 3 (b).

(6C) The charging order assumes that annual payments apply. There may be positions where quarterly or even monthly repayments are more appropriate (eg if costs are being repaid out of a salary).

(6D) Clause 46D (2)(a) also suggests that the amount to be repaid is a “negotiable sum” - and so likely to encourage extensive negotiation – when in practice where the Council has incurred the costs (with due notice to owner and multiple quotes to ensure they are competitive) they are in effect “non-negotiable”. Where land values are insufficient – clearly a Council may have to write off costs. But if the sum is seen as negotiable then this will act as a deterrent to formal action.
The Community Empowerment Bill proposes to tackle the same issue a different way.

48. Communities can be affected by buildings which become dangerous or defective, for example by falling into disrepair. Local authorities have powers under the Building (Scotland) Act 2003[4] to deal with such buildings. They have a mandatory duty to take action to deal with buildings which are dangerous; for those which are "defective" they can serve a notice on the owner requiring them to take action, and if the owner does not comply the local authority may do the work. In each case the local authority is entitled to recover the costs of that action from the owner of the building. **Such actions tend to be limited by the relevant Council budget (say in £70k to £100k region).**

**Action under the Building (Scotland) Act 2003 is also constrained where a building is listed or in a Conservation area – although action under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (as amended by The Historic Environment (Amendment) (Scotland) Act 2011) – an Urgent Works Notice or Repairs Notice may in turn be appropriate.**

49. Under the Building (Scotland) Act 2003, the local authority can only recover its costs through normal debt recovery methods. This can make it difficult to recover costs, which in turn discourages local authorities from using their powers to ensure the local built environment is maintained. Previous building legislation applying to dangerous buildings and other building regulation contraventions, and other legislation applying to housing and historic buildings, provides for a charging order or notice of liability for expenses to be registered against the property in the appropriate property register - in practice this enables the debt to be paid when the property is sold, otherwise the new owner becomes liable. Consultation and research has supported the introduction of such a mechanism to assist local authorities in recovering their costs of carrying out work on dangerous or defective buildings. **Action to recover costs can indeed be difficult – leading to the costs of undertaking works in default often being written off. Indeed the very costs and length of legal action around civil debt recovery do not assist (eg typically taking up to 12 months).**

The "Notice of Liability" introduced under The Historic Environment (Amendment) (Scotland) Act 2011 has been a helpful step – particularly to deal with buildings owned by paper companies and where the costs of works in default could be avoided through a change in ownership. Albeit that it has not been widely used to date. It is however considered to be beneficial for the options of a “Notice of Liability” or “Charging Order” (as proposed by the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill) to both be available for action under Building Act (s.28 Defective Building or s.29-30 Dangerous Building), Planning Act (s.179 Amenity Notice – requiring proper maintenance of land) or Conservation (s.49 Urgent Works Notice or s.43 Repairs Notice) legislation – according to what is most appropriate.

50. It is also proposed that the same improvements to the powers to recover costs should apply to buildings regulations compliance, continuing requirement enforcement notices, and building warrant enforcement notices, under sections 25, 26 and 27 of the Building (Scotland) Act 2003.

Draft Bill: Part 4 "Liability for expenses under Building (Scotland) Act 2003"

51. Part 4 of the draft Bill inserts new sections into the Building (Scotland) Act 2003 which allow for a "notice of liability for expenses" to be registered in the appropriate property register in relation to a building on which work has been done. Where such a notice is registered, if the building is sold, the previous owner and the new owner become severally liable for the debt; in other words, it can be recovered from either of them. 52. In practice, a potential buyer (new owner) will want to ensure that the debt is paid and will negotiate the purchase price accordingly. If the new owner pays the expenses, they may recover that amount from the former owner (seller), if the former owner is liable.

53. The provisions set out the procedures to be followed and the administrative expenses and interest which can be charged.

For details see page 17-19 of the draft Bill here. **Such a “Notice of Liability” approach should also usefully be applied to action carried out in default under the Planning Act (eg Amenity Notice under s.179 of 1997 Act).**
Submission from North Lanarkshire Council

1. What are the advantages and disadvantages of the proposed Bill?

Advantages:

It offers another option for debt recovery.
A burden is placed on the property.
There is a recovery of expenses on the sale of the property.

Disadvantages:

It may lead to an expectation that councils will be more proactive when dealing with defective and dangerous buildings.
Council resources may not be sufficient to meet the expectations of the Bill.
Individual defaults result in civil actions; this could prove to be inefficient.
Council may not be the preferred creditor.

2. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

Councils have a statutory duty to deal with dangerous and defective buildings. It is unlikely that anything would change unless there was the initial funding and/or more certainty about the success of debt recovery.

3. Where could the initial capital, required by local authorities to undertake this work, be found?

Unknown.
If this is considered a priority, then separate funding would need to be found.

4. Where the owner of a building is not known how, will the Bill improve on the current situation?

With a charging order on the property, any future sale may potentially cover the cost of the debt.

5. Are there any equality issues arising from the proposed Bill?

There does not appear to be any equality issues.

6. What are your views on a fixed period of 30 years for repayment?

30 years appears reasonable when the debt is a large sum of money, but it would be unsuitable for smaller debts, which are in the majority of cases. The time period appears inflexible. Administration costs could add up over the 30 years.
Memorandum by the Scottish Government to the Local Government and Regeneration Committee

Introduction

1. This memorandum has been prepared by the Scottish Government to assist consideration by the Local Government and Regeneration Committee of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill (“the Bill”), which was introduced by David Stewart MSP on 30 October 2013.

Background

2. The Bill provides for improved cost recovery powers for local authorities dealing with defective and dangerous buildings under the Building (Scotland) Act 2003. Although local authorities have a range of discretionary powers available to them to deal with defective buildings they have a long standing duty to deal with dangerous buildings. These powers allow them to carry out emergency work, evacuate people and serve a notice on building owners to remove the danger. If the owner does not comply with the notice the local authority may do the work.

3. Charging orders had been available for local authorities dealing with dangerous building buildings under the Building (Scotland) Act 1959. The local authority had power to make an order which placed a charge on the building to pay an annuity of equal instalments over 30 years for the expenses incurred carrying out works. If the owner did not pay, costs could be recovered when the property was sold although there can be some years between the sale and cost recovery.

4. The dangerous building powers were carried over in Sections 29 and 30 of the current Building (Scotland) Act 2003 (in force from 1 May 2005) and were supplemented by new powers for defective buildings under Section 28. However charging orders were dropped resulting in local authority expenses being managed by normal debt recovery methods.

5. Over recent years local authorities have raised concerns that the loss of charging orders has reduced the certainty of them recovering their costs. David Stewart MSP has shared their concerns and done research that indicates there is a substantial amount of unrecovered costs incurred by local authorities. His Bill covers this issue and is based on research by Mr Stewart that indicates there is a substantial amount of unrecovered costs incurred by local authorities. His consultation in 2011 attracted 43 responses with 21 from local authorities. 81% supported re-introducing charging orders. 4 respondents did not support the proposals stating they thought further legislation was unnecessary.

6. In September 2011, Mr Stewart met with Aileen Campbell in her role as Minister for Local Government and Planning to discuss his Bill proposals in detail. The original Bill proposals had a wider scope that included the introduction of “Building MOT” inspections as an optional service for owners to identify work required to avoid defects affecting the fabric of the building. The original Bill proposals fell at dissolution of Parliament in December 2011.
7. A revised set of Bill proposals covering the single issue of charging orders was lodged on 17 January 2012 and the Local Government and Regeneration Committee took oral evidence on the issue at their meeting on 18 January 2012. Mr Stewart indicated in his evidence session at the meeting of the Local Government and Regeneration Committee on 8 February 2012 that he would be very happy for the Government to legislate. He wished an improvement to be made that addresses what he perceived to be a gap in the legislation and he would be content for Government to take this forward. He wrote to Business Improvement Districts in late February to consult on the proposed Bill before lodging the final proposal on 15 March 2012.

8. In March 2012, David Stewart lodged a final proposal for a Building Repairs (Scotland) Bill focussing solely on the reintroduction of charging orders for local authorities undertaking work on defective or dangerous buildings.

9. David Stewart was advised in April 2012 that the Government was aware of the issues faced by local authorities in recovering their costs, there is merit in strengthening cost recovery powers and that they were broadly supportive of the policy. Whilst supporting the aim overall, the Government confirmed that it intended to introduce legislation to improve cost recovery powers and so could not support his Bill.

10. Mr Stewart’s Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill was introduced on 30 October 2013. The objective of the Bill is to reintroduce charging orders which local authorities can use to recover their costs when they do work to defective and dangerous buildings in default of the owner. This in turn should allow local authorities to take a more pro-active approach to intervening on the existing building stock, having greater certainty of getting their costs back.

11. Mr Stewart’s proposals allow local authorities to choose either to recover the whole amount by usual civil debt recovery methods or make a charging order meaning the whole sum recoverable is to be repaid over 30 years in equal instalments. This is a similar approach to that under the 1959 Act and if an instalment is not paid, the local authority can pursue the recovery of the instalment by usual debt recovery methods.

12. Currently the owner can appeal against the defective or dangerous building notice itself. However once the local authority has carried out the work, there is no appeal under the Act against the level of expenses they are demanding. Mr Stewart’s Bill allows for the charging order to be appealed to the Sheriff which introduces a level of complication that could create delays until it has been finally determined.

13. The proposals do not apply to notices or work done before the changes come into force, which does not help recovery the expenses currently outstanding. In addition, the proposals in the Bill do not cover the other enforcement powers under the Act being Section 25 building regulations compliance; Section 26 continuing requirement enforcement notices; and Section 27 building warrant enforcement notices.

14. It is accepted by Government, local authorities and Mr Stewart that the current powers should be improved. They should build on the current normal debt recovery
methods in place since 2005, still allowing the local authority flexibility in settlement terms if they wish. However charging orders are not the only way of linking the local authority expenses to the land or future owners. The Government’s preferred way is by notices of liability which is the approach for works carried out to listed buildings as introduced by the Historic Environment (Amendment) (Scotland) Act 2011 and as intended for remedial works to high hedges when the High Hedges (Scotland) Act 2013 comes into force. It therefore makes sense to give local authorities the same debt recovery tools.

Financial Impact

15. The Financial Memorandum accompanying the Bill indicates there is no change in the financial implications for local authorities with the introduction of improved cost recovery powers as they are already using these powers. There only administration costs may be in the region of £100, and there is a £60 fee for recording a charging order/repayment order against a property in the Land Register. There will be some costs associated to any appeals against charging orders taken to the Sheriff and if Scottish Ministers need to determine early settlement amounts. However a local authority will not be able to recover their costs for any appeal that is successful. The research carried out by Mr Stewart into the impacts of his proposed Bill does not indicate any adverse financial implications.

Scottish Government’s Position

16. The Scottish Government agrees that cost recovery powers need improving and commissioned research into a suitable cost recovery mechanism. The final report was published in November 2012. The Government has committed to legislate in this area and recognises, following its 2012 consultation on the proposed Community Empowerment (Scotland) Bill (CEB), the need for action to improve the existing cost recovery powers for local authorities. Proposed amendments to the Building (Scotland) Act 2003 form part of the current consultation on the draft CEB launched on 6 November.

17. The CEB proposals allow local authorities a straightforward mechanism to register a Notice of Liability for Expenses for their relevant expenses including the expenses of carrying out any construction or protective work, under sections 25, 26, 27, 28, 29 or 30 of the Building (Scotland) together with administration expenses and interest. The notice is registered in the appropriate property register. The current and any future owner will be severally liable for the expenses even if they sell the land and the local authority may pursue either for the full amount. In practice, on the sale of the property, a seller, not willing to be liable for the debt will, ensure that the debt is paid and the Notice discharged by the seller or by themselves where the relevant adjustment has been made to the purchase price of the property.

18. Any changes introduced must be flexible enough to take account of the range of work that a local authority might undertake from minor work replacing roof tiles of £200 to a large demolition which could be up towards £1m. The CEB consultation proposals are intended to provide this by allowing local authorities to negotiate settlements and pursue the owner or any future owner how and when they see fit. The eventual solution may differ from a charging order but the intention is to introduce an effective measure that provides
the appropriate mechanism for local authorities and achieves or exceeds the aims of Mr Stewart’s Bill.

19. The Scottish Government therefore does not support the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill in its current form. The Government supports the aims of the Bill and intends to legislate in this area through the CEB which is currently out to consultation. The Government accepts that further engagement on the proposals with local authorities, through Local Authority Building Standards Scotland (LABSS), is essential.

20. Derek Mackay, Minister for Local Government and Planning, met Mr Stewart on 3 December 2013 to discuss the proposals and options. Mr Stewart’s proposals could be introduced earlier than the CEB however the CEB consultation proposals go wider and include all local authority enforcement powers under the Building (Scotland) Act 2003. The Minister agreed, once the responses from the CEB consultation are known, to consider his Bill again, and then meet him to discuss the options at that time.

Consultation

21. The Scottish Government’s consultation on a draft CEB recently launched on 6 November 2013 (with responses sought by 24 January 2014) and has been sent to all 32 local authorities and Local Authority Building Standards Managers for comment. These are considered to be relevant organisations to make comment on the cost recovery powers proposed.

22. The Scottish Government will be engaging with LABSS and all 32 local authorities on both sets of proposals over coming months.

Conclusion

23. In conclusion, although the Scottish Government has previously expressed support for the broad aim of Mr Stewart’s Bill, it does not support the Bill itself.

24. The Bill is not necessary given that the Government intends to legislate to improve the cost recovery powers in the Building (Scotland) Act 2003. Initial proposals form part of the Community Empowerment (Scotland) Bill consultation that closes on 24 January 2014.

25. The Government is committed to introduce the most appropriate mechanism for local authorities to take enforcement action with the confidence of improved cost recovery powers, and will engage with all local authorities throughout the consultation period.

26. The Minister for Local Government and Planning has agreed, when the responses to the CEB consultation are known, to consider Mr Stewart’s proposals again, and then meet him to discuss the options at that time.

Building Standards Division
18 December 2013
MEMORANDUM BY THE SCOTTISH GOVERNMENT TO THE LOCAL GOVERNMENT AND REGENERATION COMMITTEE

Introduction

1. This memorandum has been prepared by the Scottish Government to assist consideration by the Local Government and Regeneration Committee of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill, which was introduced by David Stewart MSP on 30 October 2013.

2. The Committee has asked the Minister for Local Government and Planning, Derek Mackay to give evidence at the meeting on 26 February, and asked the Scottish Government to provide written evidence to them.

3. This memorandum provides an update to the earlier memorandum issued to the Committee in December. It covers the specific areas the Committee have asked about and takes account of the Committee’s call for evidence on the Bill that are now published on the Scottish Parliament website. It also reflects the responses to the Community Empowerment (Scotland) Bill consultation that closed on 24 January, and discussions at a consultation workshop that Building Standards Division (BSD) held for local authorities on 16 January 2014 to discuss both sets of proposals.

Background

4. There are currently two different sets of proposals to amend the Building (Scotland) Act 2003 to improve cost recovery powers for local authorities dealing with defective and dangerous buildings. The proposals in the non-executive Defective and Dangerous Buildings (Recovery of expenses) (Scotland) Bill (the Bill) centre on the introduction of charging orders, whereas the Government’s proposals in the Community Empowerment (Scotland) Bill (CEB) use notices of liability to achieve the same aim. The memorandum of 19 December set out a number of conclusions:

   a) In conclusion, although the Scottish Government has previously expressed support for the broad aim of Mr Stewart’s Bill, it does not support the Bill itself.

   b) The Bill is not necessary given that the Government intends to legislate to improve the cost recovery powers in the Building (Scotland) Act 2003. Initial proposals form part of the Community Empowerment (Scotland) Bill consultation that closes on 24 January 2014.

   c) The Government is committed to introduce the most appropriate mechanism for local authorities to take enforcement action with the confidence of improved cost recovery powers, and will engage with all local authorities throughout the consultation period.

   d) The Minister for Local Government and Planning has agreed, when the responses to the CEB consultation are known, to consider Mr Stewart’s proposals again, and then meet him to discuss the options at that time.
5. Since the memorandum was submitted the following has happened. Firstly, the Scottish Government has continued engaging with all 32 local authorities to help them understand both sets of proposals, in preparation for the Committee’s call for evidence and the CEB consultation. BSD held a workshop at Denholm House, Livingston on 17 January to discuss both sets of proposals and twenty one councils attended. Although both proposals were supported, the CEB proposals were preferred by the majority of local authorities as they allow flexible terms, and allow registration of the notice of liability and debt recovery to happen at the same time. The formality of charging orders was liked but 30 year payments would result in small annual payments. Charging orders were viewed as the last resort for use after debt recovery has been exhausted.

6. The CEB consultation closed on 24 January and the main thrust of the views is now known. There were over 140 specific responses to Part 4 (covering defective and dangerous buildings) including from COSLA and Local Authority Building Standards Scotland (LABSS), and 30 individual local authorities. The consultation asked whether consultees agreed with the proposals, and whether the same improvements should apply to the other enforcement powers for local authorities under sections 25, 26 and 27 of the Building (Scotland) Act 2003. There was overwhelming support for both questions, with some respondees providing additional comment.

7. The Committee’s call for evidence on the Bill closed on 31 January and 30 responses are published on the Scottish Parliament website, including 21 local authorities. The call for evidence focussed on six specific questions and these will be considered later in more detail. Although the evidence was in relation to the Bill, there were some references to the proposals in the CEB consultation proposals. This is unsurprising as CEB proposals have the same overall aims.

8. Having considered the views expressed, it is clearer what stakeholders would like improved cost recovery powers in the Building (Scotland) Act 2003 to include. The Member’s Bill however does not currently fully meet these. The fixed 30 year repayment term is not flexible enough for small works, and would result in low value annual repayments. Also, owners may use stalling tactics to delay or avoid settling the debt. This could be by appealing the charging order or selling the property before the charging order is registered. The improved powers cannot be used on expenses incurred before the new powers come into force. If they could and with some constraints, this would allow local authorities to revisit their outstanding debts with the improved likelihood of recovering some of the expenses. Lastly, the improved powers should not be limited just to enforcement of defective and dangerous buildings under sections 28-30 of the Building (Scotland) Act 2003, they should apply to all enforcement powers including those under section 25-27.

Scottish Government’s Position

9. The Scottish Government agrees that cost recovery powers need improving and the proposals in the Member’s Bill are an improvement to the current situation. The Committee’s call for evidence on the Bill focussed on six specific questions. These are considered below:

Q. What are the advantages and disadvantages of the proposed Bill?
10. Linking the expenses to the property through a charging order is an improvement on the existing powers. The procedure should be relatively straightforward as local authorities had these powers up until 2005, and the formality of a charging order is attractive. The ability for local authorities to recover their administration costs and apply reasonable interest charges to the protective work, demolition or construction costs, is supported. As is the ability for the local authority to accept early settlement.

11. The fixed repayment period of 30 equal annual instalments is too rigid taking into account the wide range of works that could be dealt with by the local authority. This is further covered under the last question.

12. Local authorities may see a charging order as the last resort, and not register it until normal debt recovery powers have been exhausted. This may allow owners to use methods to avoid or delay paying or even sell the property. Registration on the property register needs to happen quickly to mitigate this possibility occurring. Local authorities will need to balance the likelihood of getting their expenses back quickly. If they delay registering the charging order, an owner may sell their property. If they register it immediately, they will only expect to get their costs over the 30 year period.

13. Charging orders can be appealed by summary application to the sheriff which could be used as a stalling tactic. Other methods such as notices of liability can be registered immediately with normal debt recovery running concurrently.

14. In some cases with dangerous buildings, the local authority may incur costs taking immediate action to restrict access to the dangerous building and surrounding area or provide temporary works. They may then follow up serving a dangerous buildings notice on the owner. If the owner fails to act, the local authority may step in to do the work in default of the owner and incur further expenses. Local authorities may delay registering a charging order until the outcome from the notice is known, which could be some time.

15. If an owner fails to make an instalment payment in relation to a charging order, the local authority will need to use civil debt recovery to get it. This is in effect the current position where local authorities can and do agree payment terms with owners. There are also some concerns raised over possible time limitations for local authorities to pursue these payments.

16. Local authorities will be able to use the improved powers in the Bill six months after Royal Assent in relation to notices or work served or done after commencement of the new legislation. However this will not help the expenses that are currently outstanding or those that are incurred prior to commencement.

17. As stated above, the ability for the local authority to accept early settlement is supported. However the provision for Scottish Ministers to determine a suitable settlement amount if the owner and local authority cannot reach agreement is not supported. This is a matter for the local authority to resolve as is the current situation.

18. The proposals relate to enforcement action taken on defective and dangerous buildings under sections 28-30, and are not applicable to enforcement action under
sections 25, 26 and 27. This is not supported and the improved powers should apply to all enforcement under the Building (Scotland) Act 2003, sections 25-30, as was the case under the Building (Scotland) Act 1959 up until 2005.

Q. How will the Bill resolve existing problems and improve the ability of local authorities to undertake repairs to dangerous and defective buildings?

19. The proposals will support local authorities to recover their expenses when undertaking work on defective and dangerous buildings under the Building (Scotland) Act 2003. The ability to register the charging order against the property should provide greater certainty of them recovering their costs, or at least some of them.

20. It is important to note that there is no change to the actual enforcement powers themselves. The changes only apply after the local authority has taken formal action (such as serving an enforcement notice), the owner has not responded to the action, and the local authority have had to step in and carry out the work themselves. The proposals allow a charging order to be registered for the unpaid expenses placing a burden on the property.

21. Local authorities have a duty to act on dangerous buildings and the proposals will help on these cases where they must take the necessary action. Action on defective buildings is discretionary and may be subject to local priorities and resources. It is hoped that successful use of the new powers in the early years would give local authorities the confidence to be more proactive in dealing with defective buildings in the longer term. This may take some time and will need investment by the local authority from the start.

Q. Where could the initial capital, required by local authorities to undertake this work, be found?

22. There is an expectation that the introduction of the Bill will increase the level of activity on defective buildings. Local authorities see their priority being to deal with dangerous buildings. However defective buildings are important as they may become the dangerous buildings of the future. Also, it is likely to be more cost effective to act early to rectify any defects rather than wait until they escalate, and face additional costs. Local authorities have cited limited finances as a significant factor in the extent of action they can take on defective buildings. There is also a concern that local authorities are reluctant in starting the initial notice-serving action, fearing that will be committed to step in later to do the work in default of the owner.

23. Local authorities will need to cover the costs of any upscaling of activity on defective buildings through their individual current and future resources. In 2013-14 the Scottish Government is providing local authorities with revenue funding of £10.3 billion. The vast majority of this funding, including funding for building standards enforcement, is provided by means of a block grant. It is the responsibility of individual local authorities to manage their own budgets and to allocate the total financial resources available to them on the basis of local needs and priorities, having first fulfilled their statutory obligations and the jointly agreed set of national and local priorities.
24. If the proposals could be used for expenses already outstanding at the time of implementation, local authorities could pursue those unpaid debts.

Q. Where the owner of a building is not known how, will the Bill improve on the current situation?

25. The proposals will allow local authorities to register a charging order in the appropriate property register. The order declares that the building is burdened with an annual payment to the local authority for the qualifying expenses and other fees and interest. This highlights the situation to any future owner or other person with an interest in the building if the building is later sold on.

Q. Are there any equality issues arising from the proposed Bill?

26. The enforcement powers themselves are unchanged and local authorities will continue dealing with defective and dangerous buildings in the way they have for many years.

27. Registering a charging order is discretionary and local authorities will consider each case carefully before doing so. The proposals allow the local authority to accept a lower sum in settlement and discharge the order.

Q. What are your views on a fixed period of 30 years for repayment?

28. The fixed repayment period of 30 equal annual instalments for all cases is too rigid taking into account the wide range of works that could be dealt with by the local authority. This term may be applicable to instances of high cost expenditure by the local authority, but these are less frequent. Costs for the majority of instances of work on dangerous buildings may individually be quite low, but collectively would be more significant.

29. For work on defective buildings, costs may vary due to the complexity. The remedial work could require low expenditure, however the associated temporary works or other facilitation costs could be more significant.

30. A fixed term of 30 equal payments for would see small returns every year for the majority of cases. If a payment is not made, the local authority would need to resort to civil debt recovery which may be less attractive given the value of each payment. This situation could continue year on year through the 30 year term of the order.

Conclusions

31. The Scottish Government agrees that the cost recovery powers in the Building (Scotland) Act 2003 need improving. The Bill proposes to reintroduce charging orders for local authority to use to recovery their expenses for dealing with defective and dangerous buildings. Charging orders are an obvious option as they were available until 2005 under the Building (Scotland) Act 1959 for work on dangerous buildings and building regulation enforcement.
32. In the December memorandum, the Scottish Government confirmed that it had previously expressed support for the broad aim of Mr Stewart’s Bill but did not support the Bill itself. Also, the Minister for Local Government and Planning agreed, when the responses to the CEB consultation are known, to consider Mr Stewart’s proposals again, and then meet him to discuss the options at that time.

33. Stakeholders have now had the opportunity to express their views through the BSD consultation workshop held in January; the CEB consultation that closed on 24 January; and the call for evidence by the Local Government and Regeneration Committee.

34. The Bill proposals have been reconsidered, in light of the stakeholder views, and it appears that the Bill does not fully address all the key attributes that improved cost recovery powers need to have.

35. The Scottish Government would be prepared to support the Bill, subject to the Bill addressing the key attributes for improved cost recovery powers which are set out below. This approach would allow the improved powers to come into force sooner.

   a) Terms of repayment should be flexible, to take account of the variations in levels of possible expenditure;
   b) The time between the local authority incurring the expenses and the registration in the appropriate property register needs to be minimal;
   c) Proposals should consider the ability for action to be taken on debts incurred prior to implementation (subject to equitable time constraints);
   d) Any appeal mechanism must be defined to prevent it being used to stall or prevent registration in the appropriate property register; and
   e) Proposals should apply to all enforcement powers under the Building (Scotland) Act 2003, not limited to defective and dangerous buildings.

36. The Scottish Government would be prepared to work with Mr Stewart to achieve this aim.
Ms Sheenagh Adams  
Keeper of the Registers of Scotland  
Meadowbank House  
153 London Road  
Edinburgh  
EH8 7AU

By email

Dear Ms Adams,

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

The Local Government and Regeneration Committee are considering David Stewart’s above Members Bill at Stage 1. The Bill seeks to reintroduce charging orders allowing local authorities to recover expenses incurred after carrying out work to defective or dangerous buildings.

The Committee would welcome information from Registers of Scotland in advance of oral evidence sessions to inform them on your role. It is anticipated that provision of written information will obviate any need to take oral evidence from your office.

As explained by Mr Stewart a charging order is ‘a form of statutory charge which attaches to land and property, for example, in relation to the repayment of a loan, recovery of expenses incurred or grants made. Charging orders usually provide for the repayment of a capital sum, often by instalments. The charging order is registered in the Land Register or, where appropriate, the Register of Sasines (gradually being replaced by the Land Register).’ The proposal is, in effect, to reinstate provisions which were available to local authorities under the Building (Scotland) Act 1959, but were repealed by the Building (Scotland) Act 2003. The reason for repeal is not disclosed.

The Policy Memorandum also notes that charging orders are used in ‘a number of Acts’ and in a ‘housing and building repair context’ as well as ‘health and social care’. The scope and processes appear to vary under each provision.
The Committee would welcome any detail that you were able to provide about the operation of charging orders and their registration with the Keeper of the Registers. In particular it would be helpful if you were able to provide the following specific information:

- Detail on the various legislation under which you register charging orders.
- The number of registrations made.
- The number of discharges made.
- Any information you hold covering periods between registration and discharge.
- The fees charged for registration and discharge.
- Your costs in handling registration and discharge.

In addition any information you hold in relation to registration under the 1959 Act would be of interest as would any comment you wished to make on the general approach proposed by this Bill.

It would be helpful to have the above information by 18 December. Should you wish to discuss any aspect of this request please contact either myself or Fiona Sinclair in this office.

Yours sincerely,

David Cullum
Clerk to the Local Government and Regeneration Committee
Dear Mr Cullum

Thank you for your letter of 11 November requesting information about my role as Keeper of the Registers of Scotland in relation to the registration and discharge of charging orders.

As the Policy Memorandum sets out, there are a number of enactments that provide for the use and registration of charging orders and other such statutory charges. The common factor is that such charges are all types of heritable security but their specific operation varies depending on the terms of the authorising enactment. In particular, the enactment may not always set out a prescribed form for the charging order and it can, sometimes, be difficult to determine, from the deed submitted for registration, the specific authorising enactment. For that reason, I am unable to provide a comprehensive list of all enactments under which registration of a charging order may occur. I can, however, confirm the following Acts under which the majority of charging orders have been or are now registered:

- Building (Scotland) Act 1959;
- Civic Government (Scotland) Act 1982;
- Health and Social Services and Social Security Adjudications Act 1983;
- Legal Aid (Scotland) Act 1986;
- Housing (Scotland) Act 1987; and
- Housing (Scotland) Act 2006.

Part 7 of the Housing (Scotland) Act 2006 provides for repayment charges rather than charging orders. Repayment charges are, as with charging orders, a form of heritable security. That perhaps illustrates some of the difficulty with providing absolutely accurate figures as it is not unknown for charging orders to go by different names in different enactments.

I can confirm that, as of November 2013, the number of charging orders registered as such in the Land Register is 4,426, of which 2,947 have been discharged. As you will be aware, the General Register of Sasines is a register of deeds and does not operate in the same way as the Land Register. The nature of the register, combined with the difficulties noted above, make it impossible to provide exact numbers for the Register of Sasines. I can, however, confirm that as of November 2013 at least 7,163 charging orders and 1,406 discharges have been recorded.

A charging order will typically be discharged following repayment of the underlying debt. That will often coincide with the sale of the property to a third party. As such, the relationship between registration of the order and
discharge is determined by the particular circumstances and I do not hold any information on average periods between the two events.

The fee charged for charging orders and discharges, in both the Land Register and Register of Sasines, is £60. A reduced fee of £50 is available for Land Register cases only where our Automated Registration of Title to Land system (ARTL) is used. The fees are set by Scottish Ministers, currently on a cost recovery basis.

I do not hold any particular information in respect of registration under the 1959 Act and I have no view on the general approach or policy proposed by the Bill.

I hope the Committee finds this information useful. If you require anything further please do not hesitate to contact me.

Yours sincerely

Sheenagh Adams
Keeper of the Registers of Scotland
Delegated Powers and Law Reform Committee

6th Report, 2014 (Session 4)

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

Published by the Scottish Parliament on 22 January 2014
Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
   (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   (ii) [deleted]
   (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
   (c) general questions relating to powers to make subordinate legislation;
   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
   (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
   (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
   (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
   (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
Delegated Powers and Law Reform Committee

6th Report, 2014 (Session 4)

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 3 December 2013 and 21 January 2014 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill at stage 1 (“the Bill”). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Member in charge provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

OVERVIEW OF BILL

3. The Bill was introduced in the Scottish Parliament on 30 October 2013. The Bill is a Member’s Bill, introduced by David Stewart, MSP.

4. The Bill makes provision, by way of amendments to the Building (Scotland) Act 2003 (“the 2003 Act”), to enable local authorities to recover costs incurred in carrying out repairs to defective or dangerous buildings by imposing a charging order on the property concerned. A charging order is an order made by a local authority which provides for the amount due in respect of works the authority has carried out to a defective or dangerous building to be repaid in instalments over a period of 30 years.

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5. At present, expenses incurred by a local authority in carrying out works to a defective or dangerous building are recoverable as a personal debt owed to the authority by the owner of the property. The charging orders for which the Bill makes provision will represent an additional cost-recovery option for the local authority in circumstances where it has had to undertake work to a defective or dangerous building. The expenses to be recovered (known as “qualifying expenses”) are payable under the charging order together with any fee in respect of the costs of registering or discharging a charging order, any administrative expenses and interest at a rate to be determined by the local authority.

6. A charging order is registered against the property concerned either in the Land Register or the Register of Sasines. Once it is registered, the order is enforceable against anyone deriving title to the property with the exception of those who derives title to the property in good faith and for value prior to the registration of the order in the appropriate land register.

DELEGATED POWERS PROVISIONS

7. There are two delegated powers in the Bill. The Committee considered both of these powers at its meeting on 3 December 2013. At that meeting, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated power:

Section 46D(4) – Repayment or early redemption of amounts payable under a charging order

8. The Committee also agreed at its meeting on 3 December 2013 to write to the Member in charge of the Bill to raise questions on the remaining delegated power in the Bill (Section 46A(3) of the 2003 Act as inserted by section 1 of the Bill – Form of charging orders and discharges of charging orders). This correspondence is reproduced at the Annex. The Committee's comments on this power are set out in the following paragraphs:

Section 46A(3) of the 2003 Act as inserted by section 1 of the Bill – Form of charging orders and discharges of charging orders

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: negative procedure

9. The Bill inserts a new section 46A(2) into the 2003 Act which provides that, unless otherwise required by an order made under section 46A(3), charging orders and discharges of charging orders are to be in such form as the local authority determines so as to give effect to, and state the information required by, schedule 5A.

10. The Bill inserts schedule 5A into the 2003 Act which provides the information referred to in section 46A(2). This includes the postal address of the building to be charged, the name and address of the local authority making the order, the repayable amount, and the amount of the annual instalment due under the charging order. Section 46A(3) of the 2003 Act, as inserted by the Bill, provides
that the Scottish Ministers may by order specify the form which charging orders and discharges of charging orders are to take. This power is subject to the negative procedure.

11. At its meeting on 3 December 2013, the Committee agreed to seek an explanation from the Member in charge of the Bill as to the manner in which the power in the new section 46A(3) was intended to be exercised by the Scottish Ministers. The Committee also queried whether, if it was envisaged that the power would be used to make amendments to the new schedule 5A, the negative procedure was appropriate, given that this would entail textual amendments being made to primary legislation.

12. In his response to the Committee’s questions, the Member in charge of the Bill has explained that the information included in schedule 5A would ordinarily have been set out in subordinate legislation made using powers granted by the Bill. Given, however, that the Bill is a Member’s Bill, it was considered necessary to make sufficient provision on the face of the Bill itself so as to enable the scheme it sets up to operate without requiring the making of any subordinate legislation by the Scottish Ministers. Nevertheless, should the Scottish Ministers consider it necessary to make further provision in relation to the information required to be contained in a charging order or a discharge, this power will afford them the flexibility to do so.

13. In this instance, it is not the Member in charge of the Bill who will have responsibility for the exercise of this power, but the Scottish Ministers. The Member can give no guarantee as to the manner in which the power will be exercised, nor that it will be exercised at all, if the provisions already made by the Bill appear to the Scottish Ministers to operate effectively in practice.

14. In response to the Committee’s questions, the Member has indicated that he would expect the power in section 46A(3) to be used to make replacement provision within subordinate legislation for the form and content of charging orders, rather than to amend schedule 5A itself. The Member also makes reference to the narrow focus of the power, and its essentially administrative nature to justify the use of the negative procedure.

15. The Committee accepts that the manner of exercise of this power is ultimately a matter for the Scottish Ministers, and not the Member in charge of the Bill. In light of the Member’s explanation the Committee finds conferring the power to modify the information required in charging orders and discharges of charging orders on Ministers acceptable in principle. However, the Committee has some reservations as to the current drafting of the power in that the information contained in schedule 5A could be supplemented by further provision made in separate subordinate legislation. Were the power to be exercised in this way, the result would be that the information required to be contained in a charging order or a discharge of a charging order would be contained in two places: schedule 5A of the 2003 Act and the subordinate legislation that is made using this power. Given the wording of section 46A(2) disputes could arise as to the extent to which the effect of schedule 5 had been altered by any order.
16. The Committee considers that it would be undesirable for users of the legislation to be required to consult two separate legislative sources in order to gain a complete picture of what is required to be specified in a charging order or a discharge. The Committee considers it important that the legislation is accessible to those who require to use it, as well as those who may be affected by it, and as such, that it should be clear from the terms of the power how that power is to be exercised, given that the Member cannot guarantee the manner in which the Scottish Government would choose to operate it.

17. The Committee considers that it would be clearer and simpler, having regard to the context of the Bill, to provide the Scottish Ministers with an express power to amend schedule 5A, rather than to allow the schedule to be supplemented by subordinate legislation. The Committee considers that this would ensure that the scheme set up by the Bill was not fragmented by the making of subordinate legislation. The Committee accepts the Member's comments regarding the narrow focus of the power and its essentially administrative nature and accordingly considers that the negative procedure would afford the appropriate level of Parliamentary scrutiny over the power in the new section 46A(3), even if that power was amended to provide in express terms for textual amendments to be made to schedule 5A.

18. The Committee accordingly draws the power in section 46A(3) of the Building (Scotland) Act 2003 as inserted by section 1 of the Bill to the attention of the Parliament on the basis that the Committee considers that the power should be amended to provide a power to amend new schedule 5A to the 2003 Act, as inserted by section 1 of the Bill.
ANNEX

Correspondence with the David Stewart MSP (Member in charge of the Bill) dated

On 3 December 2013, the Delegated Powers and Law Reform Committee wrote to David Stewart MSP, the member in charge of the Bill, as follows:

Section 46A(3) – Form of charging orders and discharges of charging orders

Power conferred on:    the Scottish Ministers
Power exercisable by:    order
Parliamentary procedure:  negative procedure

1. The Bill inserts a new schedule 5A into the Building (Scotland) Act 2003 (“the 2003 Act”) which specifies the content of both charging orders and discharges of charging orders.

2. The inserted section 46A(2) to the 2003 Act provides that, unless otherwise required by an order made under section 46A(3), a charging order is to be in such form as the local authority may determine to give effect to, and state the information required by, schedule 5A. Section 46A(3) provides that the Scottish Ministers may by order specify the form which charging orders and discharges of charging orders are to take.

3. The Committee asks for further explanation as to the manner in which this power is to be exercised. In particular, the Committee asks whether it is expected that Ministers will use the power to amend the terms of the new schedule 5A to the 2003 Act?

4. The Committee also asks, if it is expected that the power will be used to make textual amendments to primary legislation, why the negative procedure is considered to afford the appropriate level of scrutiny over the exercise of this power?

On 10 December 2013, David Stewart MSP, the member in charge of the Bill, responded as follows:

The context for Schedule 5A, and the power set out at section 46A(3), is that of a Member’s Bill. The information included in the Schedule would ordinarily have been set out in subordinate legislation; however as it is a Member’s Bill it was considered necessary to specify a level of detail which would enable the Bill to be operated independently without reliance on Ministers making subordinate legislation. These considerations have informed the approach taken here.

As indicated at paragraphs 5 to 7 of the Delegated Powers Memorandum, Schedule 5A itself sets out the detail of what information is to be included within a charging order (and discharge), and is concerned with matters of form and
content. It is considered that what has been provided for within Schedule 5A is sufficient to enable the new legislation to be operated effectively. However, it is also recognised that the Scottish Ministers might take the view, possibly after a period of operating the legislation, that it would be desirable to make alternative provision so far as the form and content of such orders is concerned. This instrument making power has therefore been included within the Bill to afford the Scottish Ministers some flexibility in their approach to the form and content of orders.

So far as it is possible to give an indication of how it is expected that Ministers will use the power, we would envisage it being exercised to make replacement provision within subordinate legislation for the form and content of charging orders, rather than to amend Schedule 5A itself. On that basis, and given that the focus of any order made under the power set out at section 46A(3) is a narrow one, dealing with the administrative detail of the form and content of charging orders and discharges, it is considered that the negative procedure affords an appropriate, and proportionate, level of scrutiny over the exercise of this power.
19 February 2014

Dear Euan,

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

I refer to the Committee’s report to the Parliament (6th Report, published 22 January 2014) and am grateful to the Committee for its consideration of the delegated powers provisions contained in the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill.

The Bill contains two delegated powers and I note that the Committee determined at its meeting on 3 December 2013 that it did not need to draw the attention of the Parliament to the power contained within inserted section 46D(4), which relates to the repayment or early redemption of amounts repayable under a charging order.

I have considered the Committee’s comments concerning the power set out at inserted section 46A(3) of the Bill. This provides that the Scottish Ministers may by order specify the form which charging orders and discharges of charging orders must be in. The Committee earlier sought further explanation as to the manner in which this power is to be exercised, and the procedure attaching to it, and I set this out in correspondence (as reproduced in the Annex to the Committee’s report).

I note firstly that the Committee considers that the negative procedure, as presently provided for, would afford the appropriate level of scrutiny over the power in section 46A(3), even if that power was amended on the basis outlined in the report. In that regard, I note that the Committee considers that the power in section 46A(3) should be amended to provide a power to amend new schedule 5A (which is inserted by section 1 of the Bill into the Building (Scotland) Act 2003), and has drawn that matter to the attention of the Parliament.

Having reflected on the comments which the Committee makes regarding the power set out in the new section 46A(3), I am happy to take account of them, and in the
event of the Bill proceeding further, and will look to bring forward an appropriate amendment to the Bill to address them.

I trust this reply deals satisfactorily with the matters covered in the Committee’s report.

Yours sincerely,

David Stewart MSP
Member in Charge
Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill:
Financial Memorandum

Dear Kevin,

The Finance Committee issued a call for evidence on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill’s Financial Memorandum (FM) on 13 November 2013 giving a deadline of 20 December 2013 for responses. A total of eleven responses were received and these are attached.

Charging orders
The responses were generally supportive of the introduction of charging orders, with Highland Council, for example, stating that this would “permit greater flexibility to the local authority on how to recover costs”. Respondents were also broadly content that the FM reasonably captured the administrative costs of issuing charging orders which were described by Angus Council as being “minimal”. The City of Edinburgh Council stated that “the expense of invoking the charging order is more than offset by the gain of debt recovery.”

Some respondents suggested that the FM’s estimate of 700 charging orders being registered Scotland-wide per year might be an underestimate, with South Lanarkshire Council, for example, stating that the figure “does appear to be low given the number of incidents the Council currently deals with, a significant proportion of which involve multiple owners.” However, Highland Council suggested conversely that in its view, “this figure appears ambitious. In Highland Council there are on average no more than ten incidents per annum where the Council has been unable to recover expenses.”

A number of local authorities also noted that, on the face of the Bill, it appeared that a charging order would not be transferable to a third party, potentially resulting in the order...
being unenforceable against the new owner should the property be sold before the order was registered. Fife and East Ayrshire Councils suggested that an intermediate mechanism to register a “notice of potential liability for costs” should be considered in order to mitigate against this possibility.

Savings and expenditure
In relation to the estimated savings set out in the FM, some respondents sounded notes of caution. For example, Fife Council stated—

“The reference to “savings” in para 60 [of the FM] is potentially misleading. An improved cost recovery rate would reduce losses but would not achieve savings. In fact, if the view in para. 31 is correct and local authorities do become more proactive in issuing defective buildings notices and taking action into their own hands, it is more likely that local authorities will incur additional expenditure than make savings.”

Whilst it was noted that local authorities were already required by statute to take appropriate action with regard to dangerous buildings, it was suggested that the fact that the Bill would also apply to defective buildings might result in increased expenditure with COSLA, for example, stating—

“Care needs to be taken with the assumption of ‘savings’ as a result of the DBB Bill. Firstly, an improved cost recovery rate would reduce losses but would not achieve savings, and secondly, such an assumption about savings needs to be tempered by the likelihood that the level of work (and therefore bad debt) will increase if a cost recovery mechanism is put in place.”

Repayment period
A number of respondents expressed concerns that the proposed 30 year repayment period for a charging order was too long. For example, Fife Council stated that it—

“has concerns that relate to the delay between local authority expenditure and the potential 30 year repayment period recognising the large sums of money associated with some dangerous buildings interventions.”

Expanding on this point, COSLA stated—

“COSLA has concerns about the 30 year repayment period, with the view that this is too long and that it exacerbates the funding challenges that will be faced by Councils… The 30 year repayment period appears excessive for the following reasons:

- It increases the risk of non-payment;
- It ties up Council money that could otherwise be used on other services;
- The administrative burden over such a long period; and
- The 30 year period could potentially be longer than the asset life of the repair work.”

Financial support
Several respondents spoke of the need, in their view, for financial support, with COSLA stating that—
“The main issue for local authorities is therefore access to the funding to undertake the necessary work on dangerous and/or defective buildings. This is of particular concern with the likely increase in public expectation for a more pro-active approach to dangerous and defective buildings as a result of the DDB Bill.”

South Lanarkshire Council echoed this, stating—

“the move to a more ‘proactive’ approach by councils will only be likely if a support mechanism, both in monetary terms and expertise, and sufficient resources are made available.”

South Ayrshire Council suggested that a possible solution might be the creation of a “central capital fund allocation (e.g. similar to that employed for flooding) that could support local authorities until the costs incurred were recovered.”

Fife Council echoed this suggestion, stating that “a mechanism such as a central capital fund allocation should be considered to support local authorities during the cost recovery period.”

Conclusion
Your committee may wish to consider the above information along with the attached submissions in its evidence session with the Member in charge.

Yours sincerely,

Kenneth Gibson MSP,
Convener
Written submissions received by the Finance Committee

Aberdeenshire Council
Angus Council
City of Edinburgh Council
COSLA
East Ayrshire Council
Fife Council
Highland Council
Scottish Legal Aid Board
South Ayrshire Council
South Lanarkshire Council
West Dunbartonshire Council
Consultation
Questions 1-3
1. Not applicable as Aberdeenshire Council was not involved in the initial consultation exercise which preceded the Bill.

Costs
Question 4
2. Yes, we are of the opinion that reasonable assumptions and forecasting have been considered to facilitate debt recovery implications.

Question 5
3. Yes, whenever the Bill achieves formal legislative approval, a more robust and practicable cost recovery mechanism will be in place. It is anticipated that an increased amount of Notices will be served in conjunction with costs incurred.

Question 6
4. Yes, we are reasonably satisfied that financial costs for the setting up and administering charging orders can be met.

Question 7
5. It is anticipated that timescales and estimates are a fair reflection from the data available at this juncture, however the future relating to the extent of charging orders issued is unknown, and therefore additional costs may arise.

Wider Issues
Question 8
6. Yes - we understand that the Financial Memorandum would appear to be reasonable in terms of future cost capture.

Question 9
7. There may be an unknown underlying costs relating to future amendments to legislation affecting the contents of the Bill which cannot be quantified meantime.
Consultation
Questions 1 – 3
1. We did not take part in either of the consultation exercises. We did not provide any financial information therefore we cannot comment on any of the financial assumptions and statements made by the authorities consulted.

Question 4
2. On the whole the financial implications of the proposed bill on this authority will be minimal. Any costs associated with placing charging orders on properties dealt with via a defective or dangerous building notice will be minimal and are likely to be contained within existing budgets.

Question 5
3. Given the fact that, in particular, dangerous buildings can vary and the work required to negate the danger can also vary it is difficult to fully set out, with any certainty, the costs and potential savings in dealing with dangerous buildings.

Question 6
4. In our experience and the make-up of the building stock in our authority area gives us an indication that any costs associated with the bill can be met through normal budgets. This is based on dealing with defective and dangerous buildings as we currently do. Given the pressures on local authority budgets it is difficult to predict or see additional monies being allocated to deal with these buildings, other than to make them safe, thereby meeting our statutory obligations under the Building (Scotland) Act 2003.

Question 7
5. Suffice to say, given our previous experience, there is a large amount of uncertainty as to how and when monies are recouped by a local authority. Much depends on the state of the property market in a particular area. If that market is buoyant there is a greater chance of a charging order placed on a property being redeemed and monies recouped.

Wider Issues
Question 8
6. On the whole the Financial Memorandum reflects the costs associated with charging orders. As stated previously, we as an authority do not expect, based on our previous experience, for any costs associated with the bill to be excessive.

Question 9
7. As far as we are aware, any further costs, if any, are likely to be insignificant
Consultation
Did you take part in either of the Scottish Consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made.
1. No.
2. Not applicable.
3. Not applicable.

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM?
4. Yes.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
5. No comment.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur?
6. Yes.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill.
7. Yes.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation?
8. No.

Additional Comments
9. The bottom line is that the Charging Order system provides a certain means by which a local authority can recover the costs it has incurred when dealing with defective and dangerous buildings. The expense of invoking the Charging Order is more than offset by the gain of debt recovery. Without the Charging Order, the cost to the local authority of undertaking work on dangerous and defective buildings
would be the entire debt in those cases where the debtor refused to pay. Alternative legal means through normal debt recovery processes, are more costly and time consuming.

10. In conclusion therefore the City of Edinburgh Council fully supports the provisions of the Bill as introduced and which is intended to be enacted in 2014.
Introduction
1. COSLA welcomes the opportunity to provide written evidence to the Finance Committee on the Financial Memorandum produced for the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill ("the DDB Bill"). COSLA will be sending comments on the policy aspect of the DDB Bill to the Local Government and Regeneration Committee in due course, so this response focuses on the financial issues.

Background
2. COSLA is the representative body for all 32 Councils in Scotland. Councils already have a statutory duty under the Buildings (Scotland) Act 2003 ("the Act") to deal with dangerous buildings within their local authority area in order to safeguard the public interest. Councils also have a discretionary power to deal with defective buildings.

3. The key issue in the DDB Bill for local authorities is in relation to the financial aspect of it. The DDB Bill would introduce charging orders into the Act that would permit Councils to recover the costs incurred following commissioning works to dangerous and/or defective buildings (under Sections 28, 29 or 30 of the Act) where the owner(s) cannot be found or where the owner(s) refuse or is/are unable to pay the costs.

General comments
4. Overall COSLA welcomes any additional means of recovering debt for local authorities performing their statutory duties. The Financial Memorandum highlights the additional costs for local authorities associated with the administration of charging orders. This cost is small in proportion to the cost associated with the actual remedial work on dangerous and defective buildings. The main issue for local authorities is therefore access to the funding to undertake the necessary work on dangerous and/or defective buildings. This is of particular concern with the likely increase in public expectation for a more pro-active approach to dangerous and defective buildings as a result of the DDB Bill. It is considered that the estimate of the number of charging orders within the Financial Memorandum does not take into account the likely increase in work carried out by the local authorities once a charging mechanism is put in place. The DDB Bill may improve cost recovery but will not address the issue of owners seeking to avoid costs or of not having the funds to carry out the works for themselves.

Specific comments
5. Although not provided for within the DDB Bill, it could be used to provide greater financial assistance to local authorities if they were ranked second to HMRC in terms of creditors, and if the provisions could be applied retrospectively in order to
recover outstanding debt. This would assist local authorities in experiencing the debt recovery process, giving Councils greater confidence to undertake works that go beyond the statutory function of dealing with dangerous buildings to those that are defective.

6. The Finance Committee may be aware that one urban Council currently has specific legislation that allows it to recover costs following work on dangerous and defective buildings. The experience of this one Council is that where Statutory Notices have been used then overall the Council has been reasonably good at collecting the monies due but that such Notices do not solve all the problems. For example, this Council is often challenged on the extent of the work carried out and so it is considered it might be useful to have guidance for Councils in assessing and justifying the level of work required.

7. As the works under the Act are not improvements to Council owned assets, then the Council is unable to borrow without applying for dispensation from the Scottish Government. Therefore Councils will need to fund such work from general revenue, which is only sustainable at low levels without the necessary funding requirement or the level of bad debt requiring cuts to Council services.

8. There is a risk that building owners may sell their property before the local authority can register the charging order, potentially resulting in the charging order not being enforceable against the new owner. Experience has shown that some owners will actively seek ways to avoid costs resulting from dangerous building interventions. An intermediate mechanism to register a “notice of potential liability for costs” should be considered, which does not require an amount to be specified at the point of registration (similar to that available under the Tenements (Scotland) Act 2004).

9. Care needs to be taken with the assumption of ‘savings’ as a result of the DDB Bill. Firstly, an improved cost recovery rate would reduce losses but would not achieve savings, and secondly, such an assumption about savings need to be tempered by the likelihood that the level of work (and therefore bad debt) will increase if a cost recovery mechanism is put in place. The level of estimated bad debt within the Financial Memorandum of £3.9m (paragraph 49) is also considered to be too low.

10. COSLA has concerns about the 30 year repayment period, with the view that this is too long and that it exacerbates the funding challenges that will be faced by Councils. There is concern over the delay between the Council’s expenditure and the potential 30 year repayment period given the large sums of money associated with some dangerous building interventions. The 30 year repayment period appears excessive for the following reasons:

- It increases the risk of non-payment;
- It ties up Council money that could otherwise be used on other services;
- The administrative burden over such a long period; and
- The 30 year period could potentially be longer than the asset life of the repair work.
11. Building owners are responsible for the upkeep and maintenance of their own properties. Problems usually occur when the property owner can't afford to undertake repairs or where there are multiple property owners and there is difficulty getting agreement to undertake repairs. As such it could be argued that there may be an equality issue whereby any enforcement action, particularly in relation to a building with shared ownership, affects those who are less well-off disproportionately.

Links to the Community Empowerment (Scotland) Bill
12. COSLA considers it is worth highlighting the provisions within Part 4 of the Community Empowerment (Scotland) Bill ("the CE Bill") which is currently out to consultation. These provisions appear to seek to deliver a similar outcome of providing an additional debt recovery mechanism in relation to the Act.

13. The draft provisions within the CE Bill appear to offer more flexibility for Councils both in that a) they are wider in scope, covering Sections 25, 26 and 27 of the Act (as well as Sections 28, 29 and 30 covered by the DDB Bill); and b) they are more flexible around repayment terms, in particular around the 30 year term stipulated in the DDB Bill. COSLA Leaders will be considering a report on the policy and financial issues associated with the DDB Bill at their meeting at the end of January. COSLA will also raise the issues in relation to the consultation for the CE Bill.
Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. No

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. Yes

Did you have sufficient time to contribute to the consultation exercise?
3. Yes

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
4. Yes - Although the introduction of charging orders is seen as a better alternative than already exists it should be recognised that local authorities would still require to incur costs in dealing with dangerous and defective buildings. The introduction of charging orders will improve the cost recovery options available to a local authority, although they will do little to stimulate activity generally with no access available for funding for the remedial works. Charging orders will aid the recovery of costs options available to a local authority for dangerous buildings, where the local authority has a duty to act, but they will do little to stimulate activity for defective buildings, given the lack of a statutory duty within the Act.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
5. Yes

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
6. Yes - It is recognised that local authorities would still require to incur costs in dealing with dangerous and defective buildings but the Bill provides a better alternative than already exists.
Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

7. Yes – Although, by the very nature of the task being undertaken the costs in undertaken works to Defective and Dangerous Buildings can vary greatly each year and as such previous years data cannot always be relied on.

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

8. Yes

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

9. Within Section 46E(4) it would appear that the charging order is not transferable to a third party if the charging order is not registered, i.e. due to a quick sale of the property before the charging order is registered would result in a Local Authority being unable to raise a charging order on the property. An option to register a notice of potential liability for costs, similar to that available under the Tenements (S) Act 2004, which does not require an amount to be specified at the time of registration. If that was registered, and followed up by a charging order, that would resolve the issue. Section 46E would have to be reworded to allow for this.
Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. Building Standards Officers on behalf of Fife Council and via LABSS (Local Authority Building Standards Scotland) were involved in The Building Repairs (Scotland) Bill Consultation in 2011.
2. Finance Officers have not been involved previously in any related consultation exercise

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum (FM)?
3. Not applicable.

Did you have sufficient time to contribute to the consultation exercise?
4. Building Standards Officers as per Q1 were involved before and during the consultation exercise and had sufficient time to contribute.

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
5. Re financial risk, Fife Council has experience where statutory demolition works significantly exceeded the value of the land and owners also either sought to avoid these costs or did not have any funds. The Bill will not fully address these circumstances but may improve cost recovery.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
6. There was no reference to projected costs and savings over a 15 year period. The methodology for projecting costs to local authorities of the actual procedure seems reasonable, and the costs are accurate based on the assumptions used. However, it is impossible to comment on the overall accuracy of the projected costs since the memorandum itself makes reference to the uncertainty around the quantity of charging orders and notices which may result from the proposed amendment to the legislation.
7. The reference to “savings” in para 60 is potentially misleading. An improved cost recovery rate would reduce losses but would not achieve savings. In fact, if the view in para. 31 is correct and local authorities do become more proactive in issuing
defective buildings notices and taking action into their own hands, it is more likely that local authorities will incur additional expenditure than make savings. To expand on this, even if charging orders were to raise the level of debt recovery from 50% to 75%, the local authority would still be losing 25% of the costs expended. Based on the information in Para 31, currently local authorities mostly do not do undertake work themselves on defective buildings so the expenditure on fixing them is currently practically zero. If they start incurring this expenditure and get, say, 75% of the costs back, they will still have increased their expenditure over previous years to the equivalent of the shortfall on the debt recovery.

If relevant, are you content with that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

8. Although Fife Council is content regarding being able to fund the on-going revenue costs relating to the charging order administration costs, Fife Council has concerns that relate to the delay between local authority expenditure and the potential 30 year repayment period recognising the large sums of money associated with some dangerous buildings interventions (previous experience of circa £300K for a single dangerous building). Additionally the possible wider use of defective building notices will increase this financial exposure and a mechanism such as a central capital fund allocation should be considered to support local authorities during the cost recovery period.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

9. Yes

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

10. The FM reasonably captures the costs relating to the mechanism of charging orders. However, it does not address the issue of where the initial outlay on repairing the buildings would be found nor the delay between the council incurring the expenditure and the pay back over potentially 30 years.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

11. None that we can foresee at this time.

Fife Council Comment:
12. Re Section 46E, there is a risk that building owners may sell their property before the local authority can register the charging order, potentially resulting in the charging order not being enforceable against the new owner. Experience has shown that some owners will actively seek ways to avoid costs resulting from dangerous building interventions. An intermediate mechanism to register a “notice of potential liability for costs” should be considered, which does not require an amount to be
specified at the point of registration (similar to that available under the Tenements (S) Act 2004).
Consultation
1. The Highland Council (Building Standards) did participate in the earlier consultation carried out by the Non-Government Bills Unit (NGBU) on behalf of David Stewart MSP. The consultations and meetings mainly concentrated on:
   - Establishing the facts and reasoning of why Charging Orders had not been carried over to the new Building (Scotland) Act 2003
   - The Highland Council provided the NGBU with information on the number of Defective and Dangerous Building incidents and Notices served in pursuance of the legislation; to ensure the health, safety, welfare and convenience of the public in and around buildings.
   - The Highland Council also provided the NGBU with information on the costs that the Highland Council had incurred in dealing with Defective and Dangerous building incidents where the owner of a building could not be found or where the owner refused or could not pay the costs.

2. The Highland Council did not comment on the financial assumptions made.

3. Highland Council, other than providing annual costs that the Council incurred when dealing with defective and/or dangerous buildings incidents, didn’t contribute to the financial assumptions made in the Financial Memorandum. Possibly this formed part of the secondary consultation by the NGBU, which this Council didn’t participate. The Council has however, no reason to dispute the sums stated.

4. The Highland Council was afforded sufficient time to prepare for the consultation meetings.

Costs
5. The Defective and Dangerous Building (Recovery of Expenses) (Scotland) Bill will simply allow local authorities the opportunity to make Charging Orders for the benefit of recovering expenses incurred where the local authority has had to carry out the work on behalf of the owner of a building and that owner cannot or will not recompense the local authority for the work.

6. The additional costs to local authorities if the proposed Bill is accepted will be:
   - Registering a charging order against a property in the Registers of Scotland (estimated at £50)
   - Discharging a charging order (estimated at £50)
• The cost in administration to the local authority of raising a Charging Order (estimated at £60)

7. The additional costs listed above amount to a very small percentage of the total costs lost to local authorities annually under the present legislative arrangement, when compared with the ability to place a Charging Order on a building. By allowing the local authority the opportunity to place a Charging Order permits greater flexibility to the local authority on how to recover their costs. Placing a burden (Charging Order) on a building or site will ensure the local authority is recompensed for the sometimes significant expenditure the Council incurs when carrying out work that is, the responsibility of the building owner to ensure.

8. The Highland Council has no reason to believe the figures stated in the Bill are anything other than best estimates, given there is no factual costs available at this time.

9. The estimated costs and savings set out in the Financial Memorandum appear to rely on data that exists for other legislative repayment procedures. Given there is no information available at this time for recovery of costs related to the Building (Scotland) Act 2003 for defective and dangerous building incidents the Highland Council is satisfied with the estimates and information stated as being best estimates.

10. It’s not a question about whether the Highland Council can meet the financial costs associated with what the Bill proposes. The Building (Scotland) Act 2003 already requires the local authority under Sections 29 and 30 to take the appropriate action to ensure the H & S of the public. If an owner cannot pay the costs associated with making a building safe the legislation places that responsibility and costs related to making the building safe on the local authority. The proposed Bill is simply attempting to safeguard the local authority in being recompensed for the costs expended in making buildings safe when the owner cannot be found or will not accept their liability.

11. In relation to the costs; on average, The Highland Council responds to 10 to 15 Defective Building complaints and 20 to 30 Dangerous Building incidents per year. Of this, on average more than 10 to 15 dangerous building incidents result in the Council financing the work to be done under Sections 29 or 30 of the Building (Scotland) Act 2003, because the owner cannot be found or refuses to accept liability.

12. The £110 registration and administrative fee multiplied by the incidents this Council has had to fund this financial year where the owners cannot be found amounts to less than 10% of the value of money the Highland Council has paid out to professionals and contractors in undertaking a statutory duty under Sections 29 and 30 of the Building (Scotland) Act 2003. These costs are the minimum necessary to return the buildings to a safe condition following fire, wind or water damage.

13. It should not be the public purse paying for negligent or absent building owner’s refusal or inability to manage their own properties. The Highland Council is
of the view the entire costs associated with defective and/or dangerous building incidents, including costs related to Charging Orders, should be borne by the owner of a building or land.

14. The Bill refers to 700 Charging Orders being issued per annum throughout Scotland. This figure appears ambitious. In Highland Council there is on average no more than 10 incidents per annum where the Council has been unable to recover expenses. However, if Charging Orders was available to local authorities under the Building (Scotland) Act 2003 then a more proactive approach to the building heritage would also be available by initiating action under Section 28 Defective Buildings in the Act. Permitting the local authority an earlier opportunity to instigate repairs to buildings before the building becomes dangerous, similar to the principles that Edinburgh City adopted.

15. With reference to timescales, the only concern Highland Council has is proposed the 30 year repayment period. Highland Council is of the view this is too long.

16. The Highland Council is of the view that the Financial Memorandum captures costs as accurately as the information that was available, at the time, permitted. Local authorities have been consulted during the exercise conducted by the NGBU on behalf of David Stewart MSP, and provided data that was available through the Building Standards Registers.

17. Also, NGBU has consulted with Pye Tait, a private sector organisation commissioned by Scottish Government’s Building Standards Division to undertake a study aimed at identifying ways to improve recovery of costs associated with defective and dangerous building incidents.

18. The Highland Council is of the opinion the introduction of Charging Orders into the Building (Scotland) Act 2003 should have little or no impact on local authority structures or finances provided, there is not the expectation by Scottish Parliament that by re-instating Charging Orders will result in local authorities deliberately inspecting their built heritage. Local authority staff resources simply are not equipped to take on this additional role.

19. Local authorities are already obligated to deal with defective and dangerous buildings under the Building (Scotland) Act 2003 and in the case of dangerous buildings under Section 29 of the Building (Scotland) Act 2003, to undertake the work necessary to remove the danger, immediately, if the risk is serious or if the owner cannot or refuses to carry out the work, then try and recover the expenses incurred at a later date. Charging Orders provides the local authorities with a greater opportunity of recovering the expenses expended.
Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. No. The Board has no record of being consulted on the Bill.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. n/a

Did you have sufficient time to contribute to the consultation exercise?
3. n/a

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
4. The Board believes that, based on the assumption that there will be a very small number of appeals, the cost to the Legal Aid Fund should be negligible.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
n/a

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
5. The Legal Aid Fund is non-cash limited and the Scottish Government makes available the funds required to meet the costs of legal aid cases that meet the statutory tests.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
6. n/a.

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill?
If not, which other costs might be incurred and by whom?
7. n/a.
Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

8. n/a.
Consultation

Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

1. Building Standards officers were involved in consultation during 2011 on the Building Repairs (Scotland) Bill, which addressed some of the aspects in this Bill. Finance officers have not been involved in any previous consultation exercise.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum (FM)?

2. Not applicable.

Did you have sufficient time to contribute to the consultation exercise?

3. Building Standards officers were content with their involvement in the above consultation exercise.

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?

4. For South Ayrshire Council (SAC), we are satisfied that the financial implications as they arise from the introduction of charging orders have been accurately reflected in the FM. While the re-introduction of charging orders is another tool that can be used to improve the recovery of the cost of making safe dangerous or defective buildings, they do not provide a complete solution and as a consequence SAC anticipate continued exposure to financial risk arising from the Bill. For example, where the owner of a property does not have funds to repay the Council, a charging order may assist the local authority in recovering costs incurred at the point in time when a property is sold, but not up to that point. Furthermore, where the cost of the work is greater than the value of the property (e.g. SAC is currently negotiating a contract to demolish buildings on a site contaminated with asbestos where the cost will exceed £250,000 and the residual property value is less than £100,000) then a charging order will not assist the local authority in fully recovering its costs.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?

5. We found no reference to projected costs and savings over a 15 year period in the accompanying documentation. However, we consider the use of the term ‘savings’ to be potentially misleading as although the Bill provides tools to improve
recovery of costs, we do not consider it likely that any aspect of the Bill will lead to efficiencies. At best the Bill will provide an opportunity to reduce losses.

If relevant, are you content with that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

6. SAC are content that it can meet the financial costs associated with the Bill as they directly relate to the process of issuing charging orders. We continue to have concerns regarding the ability of the Bill to ensure that local authorities are not exposed to financial risk arising from making dangerous buildings safe. The increased scope of the Bill to cover defective buildings may encourage greater activity, leading to a potential increase in costs incurred. As stated above, charging orders will not in themselves ensure greater cost recovery, although they are a useful tool to help improve cost recovery. One possible solution to how these costs could be met is a central capital fund allocation (e.g. similar to that employed for flooding) that could support local authorities until the costs incurred were recovered.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

7. Please refer to our responses to Q4-6 above.

Wider Issues

Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

8. With reference to our responses to Q4-6 above, we believe that the FM reasonably captures costs directly associated with the Bill, i.e. costs associated with raising charging orders. However, such costs are a fairly minor element when compared to the cost of making dangerous or defective buildings safe.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

9. No future costs that we are currently aware of.

Other comments

• With reference to section 46E(4) of the Bill, we seek clarification of the difference in powers between a “charging order” and a “notice of liability for expenses”.
• The Bill makes no reference to compulsory purchase orders (CPO). We consider that, possibly as measure of last resort, CPO would be a strong tool in enabling local authorities to recover the cost of making safe dangerous and defective buildings.
• We acknowledge similar ongoing consultation processes with regard to the Local Government and Regeneration Committee and also the Community Empowerment (Scotland) Bill.
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. The Council contributed to earlier consultations via Local Authority Building Standards Scotland (LABSS). No specific comments were made on the financial implications.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. Not Applicable - as noted above, no specific comments were made on the financial assumptions.

Did you have sufficient time to contribute to the consultation exercise?
3. Yes.

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
4. The Council feel that the financial implications are conservative although they do seem to be based on reliable data, albeit from a limited number of local authorities. The number of 700 charging orders per year does appear to be low given the number of incidents the Council currently deals with, a significant proportion of which involve multiple owners.

5. The FM states that the intention is to place no significant new burdens or duties on local authorities and that the focus is about increasing the ability to recover costs more easily.

6. To that end, the costs identified per order are not unreasonable – however, it is not the administrative burden that is the issue, it is the capital works. If more work is carried out in advance of the order put in place, then the Council will incur greater costs. These costs should be offset by the recovery. However, there are two issues – there is still the potential that the recovery is not made, but more likely, even if the recovery is made, there is concern about when - it may be in 30 years time.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
7. As mentioned above, associated costs and savings indicated are believed to be optimistic.
If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

8. With regards to dangerous buildings which involve a strict duty on the Council to act, financial costs will continue to be met and recovered as required.

9. In terms of defective buildings, where action continues to be discretionary, the move to a more ‘proactive’ approach by councils will only be likely if a support mechanism, both in monetary terms and expertise, and sufficient resources are made available. Again, it should be noted that whilst the administrative burden would be greater, and the costs of capital works also increased, this should be mitigated by the charging order. However, the issue is whether this order is then paid and when.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

10. As mentioned previously, estimates are felt to be conservative. However, should be recoverable from owners.

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

11. As noted previously, the Bill expands the cost recovery ability of the Council in terms of defective buildings. If the Council therefore uses its discretion to use these new cost recovery powers, particularly relating to defective buildings, then the cost burden on the Council could be significant given the initial capital costs required. However, the ability to recover these costs would be the reason for the initial choice to carry out the works.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

12. The Council is unaware of any further costs.
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. Unknown

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. n/a

Did you have sufficient time to contribute to the consultation exercise?
3. Yes

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
4. The Bill attempts to identify costs which would be incurred by local authorities and these seem reasonable estimates per incident, perhaps for some local authorities with high numbers of these the additional work may require additional staff.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
5. As above the costs identified seem reasonable, though cannot see 15 year projections in the financial memorandum.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
6. It is not anticipated that the costs in relation to the placing of a charging order will be significant. However as is currently the case, there is some concern over the ability of the local authority to source the initial money required to pay its expenses (both its own costs and those of a contractor who they engage to carry out the work) at the time of an incident. Due to existing budget pressures any substantial demand on a local authority to pay its expenses in carrying out work could have a knock on effect on other local authority services until the money paid out is recovered from the owner(s).
**Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?**

7. It is clear that the ability to actually recover costs should be improved, however the extent of the recovery will depend on the cost of works undertaken and the value if any income from the charging order. Presumably funds may only be received once the remaining land (if building is demolished) or land and building is sold by the owner and this presumably may never happen.

**Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?**

8. Yes

**Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?**

9. Unknown
Dear Mr Stewart,

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

NGBU’s role is to ensure best practice has been followed in undertaking the Equalities Impact Assessment (EQIA) for any proposed Bill and that its impact has been appropriately identified and considered.

As such, I attach the EQIA which was carried out in respect of the above Bill.

Yours sincerely

[Signature]

Non-Government Bills Unit
# Equality Impact Assessment

## Defective and Dangerous Buildings (Recovery of Expenses)(Scotland) Bill

### (1) Aims of the Policy

<table>
<thead>
<tr>
<th>Question</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is the purpose of the proposed policy?</td>
<td>To make provision for a local authority to recover its costs by charging order where it has carried out work to a defective or dangerous building.</td>
</tr>
<tr>
<td>What are the anticipated outcomes of the policy?</td>
<td>To provide an additional discretionary cost recovery tool to enable local authorities to recover their costs more effectively.</td>
</tr>
<tr>
<td>Who will be affected by the policy?</td>
<td>Local authorities will implement the legislation. Property owners have a responsibility to maintain their properties. Only those property owners whose property has been repaired by local authorities under the defective or dangerous building notice regime under the Building (Scotland) Act 2003 will be affected.</td>
</tr>
</tbody>
</table>

### (2) What is known about the diverse needs of those who will be affected by the policy

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender* (including transgender, maternity and pregnancy)</td>
<td>Single parents who own property are more likely to be on lower incomes or have less disposable income. Part-time workers might also be on lower incomes.</td>
</tr>
<tr>
<td>Religion and Belief</td>
<td>There is no evidence which relates to this group. It is considered that this is not a gap in evidence, but that the proposed policy is unlikely to present a either a particular positive or negative impact on people within this group.</td>
</tr>
<tr>
<td>Age*</td>
<td>Older people who own property might be on lower incomes and find it more difficult to access funds. Carers of older people may have had to reduce their work commitments to undertake caring responsibilities and therefore may be on lower incomes.</td>
</tr>
<tr>
<td>Disability*</td>
<td>Disabled people or families caring for disabled people might be on lower incomes and find it more difficult to access funds.</td>
</tr>
<tr>
<td>Ethnicity and Race</td>
<td>There is no evidence which relates to this group. It is considered that this is not a gap in evidence, but that the proposed policy is unlikely to present a either a particular</td>
</tr>
<tr>
<td>Positive or negative impact on people within this group.</td>
<td></td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Sexual Orientation</td>
<td></td>
</tr>
<tr>
<td>There is no evidence which relates to this group. It is</td>
<td></td>
</tr>
<tr>
<td>considered that this is not a gap in evidence, but that</td>
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<tr>
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<tr>
<td>particular positive or negative impact on people</td>
<td></td>
</tr>
<tr>
<td>within this group.</td>
<td></td>
</tr>
<tr>
<td>Marriage and Civil Partnership</td>
<td></td>
</tr>
<tr>
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<td></td>
</tr>
<tr>
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<td>particular positive or negative impact on people</td>
<td></td>
</tr>
<tr>
<td>within this group.</td>
<td></td>
</tr>
</tbody>
</table>

(3) Is there enough information to help understand the needs and/or experiences of those affected by the policy

<table>
<thead>
<tr>
<th>Gender* (including transgender, maternity and pregnancy)</th>
<th>YES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Religion and Belief</td>
<td>YES</td>
</tr>
<tr>
<td>Age*</td>
<td>YES</td>
</tr>
<tr>
<td>Disability*</td>
<td>YES</td>
</tr>
<tr>
<td>Ethnicity and Race</td>
<td>YES</td>
</tr>
<tr>
<td>Sexual Orientation</td>
<td>YES</td>
</tr>
<tr>
<td>Marriage and Civil Partnership</td>
<td>YES</td>
</tr>
</tbody>
</table>

If not, what other information is required

(4) What does the information given say about how the policy might impact positively and negatively on different groups

<table>
<thead>
<tr>
<th>Gender* (including transgender, maternity and pregnancy)</th>
<th>Positive impacts: Currently local authorities treat these expenses as a normal debt which can be recovered by taking the owner of the property to court. The current policy could be seen to negatively impact on those on low incomes who are less able to maintain and carry out repairs to their property or reimburse the local authorities for their reasonable expenses having undertaken work. The proposed introduction of charging orders, where the debt is secured on the property and not the person, would mitigate this situation to some extent as the individual would not need to be pursued through the courts, but could</th>
</tr>
</thead>
<tbody>
<tr>
<td>Religion and Belief</td>
<td>N/A</td>
</tr>
<tr>
<td>--------------------</td>
<td>-----</td>
</tr>
</tbody>
</table>
| **Age**            | Positive impacts: Currently local authorities treat these expenses as a normal debt which can be recovered by taking the owner of the property to court. The current policy could be seen to negatively impact on those on low incomes who are less able to maintain and carry out repairs to their property or reimburse the local authorities for their reasonable expenses having undertaken work. The proposed introduction of charging orders, where the debt is secured on the property and not the person, would mitigate this situation to some extent as the individual would not need to be pursued through the courts, but could repay on the sale of the property. There is no calling-up power attached to the charging order so an owner could not be forced to sell their property. Instalments over a 30 year period make paying off the debt more manageable.  
Adverse impacts: Older people and carers of older people might find it more difficult to raise the funds to pay off a charging order before the 30 years due to the limited financial products available because of age or low income. |
| **Disability**     | Positive impacts: Currently local authorities treat these expenses as a normal debt which can be recovered by taking the owner of the property to court. The current policy could be seen to negatively impact on those on low incomes who are less able to maintain and carry out repairs to their property or reimburse the local authorities for their reasonable expenses having undertaken work. The proposed introduction of charging orders, where the debt is secured on the property and not the person, would mitigate this situation to some extent as the individual would not need to be pursued through the courts, but could repay on the sale of the property. There is no calling-up power attached to the charging order so an owner could not be forced to sell their property. Instalments over a 30 year period make paying off the debt more manageable.  
Adverse impacts: Disabled people and carers of disabled
people might find it more difficult to raise the funds to pay off a charging order before the 30 years due to the limited financial products available because of age or low income.

<table>
<thead>
<tr>
<th>Ethnicity and Race</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual Orientation</td>
<td>N/A</td>
</tr>
<tr>
<td>Marriage and Civil Partnership</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Completed by the Non-Government Bills Unit: 16 July 2013
<table>
<thead>
<tr>
<th>Evidence gaps identified</th>
<th>None identified</th>
</tr>
</thead>
</table>

**Member's comment:**

I confirm that I am not aware of any potential gaps in evidence.

<table>
<thead>
<tr>
<th>Adverse impacts identified</th>
<th>Those on low incomes might find it more difficult to access funds to repay local authorities and would therefore be more likely to have a charging order registered against their property.</th>
</tr>
</thead>
</table>

**Member's comment:**

My policy provides for a 30 year repayment period. This is a longer term than many high street lenders would offer and makes instalments much more manageable. I believe this mitigates the fact that older people, single parents, disabled people and those with caring responsibilities might have more difficulty in securing financial products to meet their debt.

My Bill also offers a process whereby the local authority can accept a lower amount where circumstances suggest that this might be appropriate. Again, I believe this mitigates any adverse impact that might result from the registration of a charging order.

**Completed by David Stewart MSP: 23 July 2013**
Dear Kevin,

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

Further to the evidence received on my Bill, I thought it might be useful to provide the Committee with some clarification about the operation of the Bill.

In the first instance I would like to deal with a couple of separate areas which were raised by the Scottish Federation of Housing Associations (SFHA) and the Institute of Historic Building Conservation (IHBC) during the Committee’s evidence session on 19 February and supported by written evidence.

The first point relates to the extension of charging orders where housing associations have paid for remedial works; the second point relates to the interaction between the provisions of the Building (Scotland) Act 2003 Act (the 2003 Act) and building conservation.

With regard to the extension of charging orders to registered social landlords, this issue was raised by SFHA and Simpson and Marwick (in its written submission). Recovery of housing associations’ costs, which can I understand be substantial, is clearly an important matter, however my Bill could have no legislative effect in this area as the relevant parts of the 2003 Act, which my Bill amends, are principally concerned with local authorities’ cost recovery when carrying out their duties pertaining to defective and dangerous buildings. I did however note from Susan Torrance’s evidence that there might be some possibility of addressing this matter through finding an administrative mechanism to deal with it.

In evidence presented to the Committee (both written and oral) by Dave Sutton of the IHBC, a number of points were raised about the interaction between the 2003 Act defective and dangerous buildings regime and other legislation concerned with conservation of buildings.

While I understand that the IHBC might like to see the Bill embrace other matters these would be well beyond what a Member’s Bill could achieve. Its emphasis is, necessarily,
quite narrow and focused. My Bill is not intended to offer a solution for all building repair issues but offers a possible remedy which may be attractive to local authorities in particular circumstances concerning defective and dangerous buildings.

However, Mr Sutton did raise one point which could perhaps be addressed within the Explanatory Notes to my Bill. The IHBC suggests there is a potential conflict between a dangerous buildings notice under section 29 of the 2003 Act, which if applied to a Listed Building or heritage building in a Conservation Area ‘would be encouraging the owner to carry out a prosecutable offence’, and that the need for relevant consents to be obtained when dealing with such buildings should be highlighted. While those who administer notices under section 29 might be taken to be aware of other relevant legislation to which they may also require to have regard, if the Committee considered it to be useful then I would be willing to make some refinement of my Bill’s Explanatory Notes, so far as they refer to section 29 of the 2003 Act, to point up the possible interaction with other legislation.

Moving on to another operational issue, which has been raised in a few submissions (COSLA, the Law Society of Scotland and East Lothian Council), and which relates to the potential to recover an instalment where it has been defaulted upon.

This concerns in particular the repayment provisions which are being inserted as section 46D(1) of the 2003 Act, by section 1 of the Bill, and it may be helpful therefore to set out how these are intended to operate.

Section 46D(1)(a) provides firstly that the repayable amount is payable by 30 annual instalments. The ‘repayable amount’ is described in section 46C(1) and represents all of the sums which the local authority is looking to recover.

Under section 46D(1)(b), in the event of an annual instalment payment not being made, this would then become separately recoverable as a debt. It could therefore be pursued by means of civil debt recovery procedures. An unpaid instalment, if not pursued by court action, would cease to be recoverable 5 years after it falls due.

Section 46D(1)(c) goes on, however, to provide that any balance of the repayable amount (ie the whole amount secured by the charging order) which remains unpaid after the final instalment falls due, is then repayable, and would be similarly recoverable as a debt.

A distinction is therefore made between recovery of individual instalments under paragraph (b) of section 46D(1), and the provision which is made at paragraph (c) relating to any balance of the repayable amount which remains outstanding. The charging order applies to the whole repayable amount, rather than for 30 separate instalments, and the building concerned remains ‘charged’ with the total amount which is outstanding at any time.

These observations aside, I did indicate at the evidence session this week that I will be looking at providing greater flexibility in setting the duration of a charging order to reflect the level of costs, given the feedback received in that regard from a number of contributors. That will involve consideration being given to the existing provision contained at section 46D(1), and what adjustments might usefully be made to it.
Finally, I would like to take the opportunity to set out my views briefly on a couple of other areas highlighted in written evidence, that of prior ranking of a charging order over other securities and whether a calling-up power should be attached to a charging order.

On prior ranking, there are two reasons why I do not intend to pursue this option. In particular I recognise prior ranking would place local authorities in a stronger cost recovery position, but I also have to balance this view against those of existing fixed security holders such as mortgage lenders. I’d also note that while the most recent comparable charging order which makes such provision for ranking was the ‘repayment charge’ in the Housing (Scotland) Act 2006, this was as the result of an amendment at Stage 3 and therefore would not have been subject to analysis of any issues arising from it as part of the consideration of the general principles of that Bill. Thus far no evidence has been gathered on the relevant merits or otherwise of this approach.

In terms of providing a limited power of calling-up of charging orders I understand there is such a power in the residential care context under the Health and Social Services and Social Security Adjudications Act 1983 and that those powers are understood to be exercisable under that Act in limited circumstances only. I believe my approach, not to attach a similar power is proportionate for the particular circumstances of my Bill, which is concerned with a quite different subject matter. I believe providing a calling-up power would be likely to raise a number of issues, including some of a potentially significant nature with respect to European Convention on Human Rights considerations relating to property rights.

I hope this letter has provided sufficient clarification on some quite technical issues raised in relation to my Bill. A copy of this letter also goes to Claire Menzies-Smith of the Non-Government Bills Unit.

Yours sincerely,

David Stewart MSP
Member in Charge
Dear Kevin,

Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

Further to my oral evidence session on 26 February, I promised to write to you on a couple of points raised by members.

Mr Stevenson asked about whether notice might be given to the institution (I take him to refer here to the relevant local authority) that placed the charging order if the disposal of the property was contemplated; and whether it would be possible for the local authority to be advised that the property was about to be sold. That is, in view of the fact that the purchaser would be aware of the charging order, but without there necessarily being an obligation on the purchaser to do anything about that.

I agree that there might not strictly be an obligation on the purchaser to do anything about the charging order itself, but at the same time I am sure that anyone purchasing property would wish (and indeed may require, depending on any borrowing arrangements they may have) to ensure that they receive a clear title to it. That would mean any existing burden on that title being formally discharged at the point of sale. So, as I said elsewhere in evidence, I would see a sale of the property resulting in the normal course of events and any outstanding amount due under the charging order being repaid, and the order then being formally discharged.

I have sought to keep my Bill as straightforward as possible and am not convinced that what Mr Stevenson has outlined could readily be accommodated in it. It would seem to require some further layer of involvement on the part of others – possibly the Registers of Scotland, or those with an existing or prospective interest in the building. I think the position is sufficiently covered within the Bill at present, and as matters stand I am not persuaded that further provision in the area outlined by Mr Stevenson is necessary or appropriate.
Mr Wilson raised the other point which was in relation to the robustness of the figure for the overall local authority estimated debt of £3.9 million, and whether an average cost of a local authority intervention under the defective and dangerous buildings regime could be established to assist in verifying this figure.

The Committee is aware that this figure was drawn from the Scottish Government’s commissioned “Research Project to Identify a Cost Recovery Mechanism for Local Authorities Dealing with Defective and Dangerous Buildings” which gathered information from eight local authorities. At paragraph 4.4.1, the Research Project acknowledges that it was not possible to collect complete statistics as “local authorities tend not to hold this information in a consolidated fashion”. The Research Project’s methodology in arriving at the £3.9m figure is explained at paragraph 4.4.10. The researchers used the estimated base information of £1.5 million for the eight local authorities and calculated pro rata to population arriving at £3.9m. The Research Project acknowledges this as a “very crude grossing up”.

The Committee heard evidence from local authority witnesses that the average cost of an intervention was around £3,000. Members also shared their knowledge of cases in their constituencies, where some local authorities had expended hundreds of thousands of pounds. This type of expenditure was also highlighted in the research project, with one example given at paragraph 4.3.14 where an authority is owed £400,000.

The Scottish Government does not currently require local authorities to collect information on a cost per case basis, so a Parliamentary Question would not yield any further information in this regard. Therefore, the average cost of a local authority intervention under the defective and dangerous buildings regime could really only be established by writing to each local authority.

I would however draw the Committee’s attention to COSLA’s submission at paragraph 10, which considers the £3.9m figure to be “too low”. This would concur with Mr Wilson’s deduction that the overall level of debt is higher.

Formalising data collection in this area might help to provide a clearer picture of the current position and, in the future, provide an opportunity to monitor the effectiveness of any legislation aimed at improving local authorities’ cost recovery rate.

I hope this letter has provided sufficient clarification on the matters raised in my evidence session.

Yours sincerely,

David Stewart MSP
Member in Charge
Note: (DT) signifies a decision taken at Decision Time.

**Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill:**
David Stewart moved S4M-09391—That the Parliament agrees to the general principles of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill.

After debate, the motion was agreed to (DT).
On resuming—

Defective and Dangerous Buildings
(Recovery of Expenses)
(Scotland) Bill: Stage 1

The Deputy Presiding Officer (Elaine Smith):
Good afternoon. Our first item of business this afternoon is a debate on motion S4M-09391, in the name of David Stewart, on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill.

David Stewart (Highlands and Islands) (Lab):
It is with great pleasure that I open this debate on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill. I thank the Local Government and Regeneration Committee, the Finance Committee and the Delegated Powers and Law Reform Committee for their robust scrutiny of the bill, and all those who worked hard to get it to this point. The non-Government bills unit, the legal team and the drafters have been superb in their support and encouragement. Any errors are, of course, my responsibility alone.

I also thank the Minister for Local Government and Planning, Derek Mackay, and his officials for the open and constructive discussions on my bill. It has always been acknowledged that the Scottish Government and I share the same goal, which is to improve local authorities’ ability to recover their costs, although, of course, we differed slightly in our solutions. I think that the minister recognised that my bill dealt with a non-contentious and non-political subject matter and that agreement and consensual working would be the key to resolving timely the difficulties that local authorities face in dealing with defective and dangerous buildings.

I hope that members will indulge me by allowing me to provide a little context to the development of the bill, not least because it has been four years, two sessions, two proposals and a statement of reasons in the making.

The first proposal on which I consulted was much wider and included issues such as building MOTs, although it also encompassed charging orders, which are important. My second, current proposal in this session focuses solely on charging orders, as I am acutely aware that local authorities need a solution quickly and that a single-issue member’s bill is much more likely to garner support than one that tries to solve too many problems.

We all know, of course, that owners have a responsibility to maintain their properties, but members will be aware of properties in their
constituencies and regions that, as a result of their owners’ neglect, blight their surrounding communities. Local authorities have a statutory obligation under section 29 of the Building (Scotland) Act 2003 to carry out work to dangerous buildings where it appears to the local authority that a building constitutes a danger to persons in or about it, to the public generally, or to an adjacent building or place. A local authority may recover from the owner any expenses that the local authority reasonably incurs.

Section 30 of the 2003 act makes provision for a local authority to serve a dangerous building notice, carry out the necessary work, and recover its costs where that work has not been done by the owner within the specified period. Under section 28 of the act, local authorities may also take action in relation to defective buildings where owners have failed to undertake the work specified in a defective building notice and may recover their expenses similarly.

I know from talking to building standards managers that councils do not recover all their costs. The Scottish Government’s 2012 paper entitled “Research project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings” confirms that cost recovery sits at around 50 per cent. The Local Government and Regeneration Committee heard from witnesses that the average cost of work that is carried out by their particular local authorities was about £3,000, but there are examples of authorities being out of pocket for hundreds of thousands of pounds with little hope of recovering the money with the limited debt recovery tools that are at their disposal.

I will give an example of a case in Fife, which, although it is not an everyday one, perhaps illustrates the range of costs. The council spent £300,000 to demolish a precarious, heavily shored-up building in a tight town centre site. The building was at risk of collapse into the street. Prior to the 2003 act, local authorities relied on the Building (Scotland) Act 1959 to tackle dangerous buildings. Charging orders were available under that act to assist local authorities to recover outstanding costs. However, when the 2003 act repealed and replaced the 1959 act, the charging order mechanism was not carried over. The reason for that omission is not clear, although, suffice to say, it has left local authorities without an effective mechanism to tackle an increasing debt burden that needs to be addressed now.

How do local authorities currently recover any costs they incur when they use sections 28 to 30 of the 2003 act? If the owner is known, the local authority approaches the owner to seek payment of the outstanding sum. The problem lies in recovering sums from owners who do not have the funds, who will not pay or who cannot be traced. If the owner can be located, local authorities can pursue them through the civil courts. That can be expensive, however, costing up to £5,000. Cost issues are more complex and mount up where there are multiple owners. Court action is, of course, not possible where the owner is not known or cannot be traced so, in some instances, the local authority has no alternative but to write off the debt. Building standards managers have told me that they estimate the write-off figure to be around £700,000 since 2005.

The Scottish Government’s research project collated information from eight local authorities. The project estimated that the total unpaid debt for those authorities alone amounted to £1.5 million. That figure, when roughly extrapolated, produced an all-Scotland figure of £3.9 million. However, the Convention of Scottish Local Authorities considers that figure to be “too low”. Those are substantial sums, and they have the potential to impact on the level of service that local authorities can provide.

That brings me to the primary aim of the bill, which is to enhance local authorities’ ability to recover debts that have been incurred when dealing with defective or dangerous buildings by legislating for charging orders. It would perhaps be helpful if I explained that a charging order is a form of statutory charge that attaches to property and is registered in the land register of Scotland or, where appropriate, the register of sasines. My bill, in its simplest terms, provides for a charge to be secured on a property for 30 years and for annual instalments to be paid, and it can be used in relation to both residential and commercial property.

I will illustrate that point. A South Ayrshire night club caught fire. The fire extensively damaged the night club and also some street-level commercial premises. The council had to undertake works to make the buildings safe. There was real difficulty recovering costs, which ran into a couple of hundred thousand pounds. Had charging orders been available, the local authority would have been in a much stronger recovery position.

How will charging orders benefit local authorities? When a local authority registers a charging order against the title of the property, that means that, if the property is sold or transferred—bearing in mind the fact that a purchaser will want to get a clear and unencumbered title—the local authority is likely to be repaid through the proceeds of the sale. Another advantage of charging orders is that the cost of registering one is only about £50, which is significantly lower than the costs involved in pursuing the owner through the courts. Where the owner cannot be traced, a charge can be registered on the title, giving local
authorities some assurance that they will recover their costs at some time in the future.

Charging orders can also benefit those owners who want to pay but who are not in a financial position to do so immediately. A charging order allows them to pay by annual instalment over a manageable term. If, during that period, the owner’s financial circumstances improve, the bill provides for early repayment and, if appropriate, negotiation of an early settlement sum, which, on payment, would result in the charging order against the property being discharged.

Until now, I have concentrated on dangerous buildings. Let us not forget that the bill will also make charging orders available to local authorities when they carry out work on defective buildings. That is an important feature of the bill, because the statistics from the most recent Scottish house condition survey, from 2012, show that 81 per cent of Scotland’s dwellings were in some state of disrepair and 39 per cent were in an urgent state of disrepair.

It is my hope that, by providing local authorities with greater assurance that they will recover their dangerous buildings costs, councils will have more confidence to tackle what I call high-level defective or borderline dangerous buildings at an earlier point, which is less costly and will preserve the value and structure of the property, rather than dealing with the building in a dangerous state. It is notable that local authority action without notice under section 29 of the 2003 act, which is the most urgent action, has more than doubled from 402 instances in 2010-11 to 992 in 2011-12.

I thank the Local Government and Regeneration Committee for its insightful consideration of my bill and for supporting the bill’s general principles, once again demonstrating that the Parliament can come together to deliver solutions where they are needed.

During its scrutiny of my bill, the committee’s main focus was on the term of a charging order. Local authorities queried the long repayment term of 30 years, particularly for smaller sums. The Scottish Government’s memorandum also considered that the “terms of repayment should be flexible”.

I reiterate the commitment that I gave to the committee that, should the bill progress, I will amend the relevant part of it at stage 2.

I also confirm that I have heeded another point of concern related to the registration of the charging order. Local authorities are concerned that a property might be sold or transferred—perhaps to another company—before they can register a charging order. I give a commitment to lodge an amendment to provide a mechanism that will close that gap.

The Delegated Powers and Law Reform Committee suggested that my bill should be amended to allow the Scottish ministers to directly amend new schedule 5A to the 2003 act, to alter the form and content of a charging order, rather than there being the prospect of that being done by way of subordinate legislation. I have confirmed to the Delegated Powers and Law Reform Committee that I am content to amend the bill as suggested.

I again thank everyone for their contributions and their collegiate approach. I look forward to working with the minister and his officials to further refine my bill, should it be supported today. I am delighted to move the motion.

I move.

That the Parliament agrees to the general principles of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill.

14:41
Kevin Stewart (Aberdeen Central) (SNP): I am pleased to speak in the debate on behalf of the Local Government and Regeneration Committee. The committee has heard evidence at stage 1 and this debate follows our report on David Stewart’s bill.

I thank all those who provided the committee with evidence—both written and oral—at stage 1. I also thank the committee’s Scottish Parliament information centre researcher and the clerks for their assistance and support.

Following a call for evidence, we received 30 written submissions, which were mainly from local authorities, but there were also a few from others with interests in issues such as conservation and construction and from housing associations and the legal profession. Thereafter, we held two oral evidence sessions. The majority of the evidence that we received supported amending the Building (Scotland) Act 2003 to introduce, as proposed in the bill, charging orders for use by local authorities.

The bill’s key aim is to allow local authorities to make charging orders for the recovery of expenses incurred when they have carried out work to defective and dangerous buildings. Carrying out such work is a statutory duty imposed on local authorities—they are required to take urgent action to reduce or remove danger to people in and around buildings.

We heard various figures for the scale of the problems facing buildings in Scotland. The highest was that 83 per cent have some disrepair and we were told that around half require urgent repair to
prevent the fabric of the building from degenerating further into a dangerous state.

The bill would allow an additional means by which local authorities can recover costs and expenses that they incur when carrying out their statutory duties in relation to dangerous and defective buildings. They used to have that power but, for some reason that nobody could explain to the committee, it was removed when the Building (Scotland) Act 2003 was passed.

Currently, when a local authority incurs repair costs having served a defective building notice or a dangerous building notice, or having taken urgent action to deal with a dangerous building, it can pursue the debt through civil debt recovery procedures. Charging orders should therefore operate by means of local authorities attaching a formal charge over the building concerned. The charge would be registered in the land register of Scotland or, when appropriate, the register of sasines.

I will concentrate on the committee’s findings, which are set out in our report. We looked closely at the provisions requiring the repayable amount under a charging order to be paid by means of 30 annual instalments.

The consensus from the evidence that we heard was that 30 years is too long a period for the recovery of expenses and that payment in annual instalments is too rigid an approach and might prevent people from paying back costs in a lump sum. The committee agreed that the bill is inflexible and recommended in our report that local authorities should be able to recover expenses over a timescale that relates to the amount that has been incurred and the debtor’s ability to pay. I am glad that David Stewart raised that point today.

The committee received representations on the authorisation of retrospective notices in relation to outstanding debt. Approximately £4 million is due to local authorities as a result of work on defective and dangerous buildings, and some people want the bill to give local authorities the power to apply for retrospective notices. We agreed with the member and the minister on the issue and would not support the addition of retrospective powers to the bill. It is unusual to make retrospective provisions in general, and in this case difficult legal and technical issues would arise.

Evidence from local authorities noted that there was limited capital and revenue immediately available to undertake repair work. A number of authorities suggested that the Scottish Government should set up a national fund and stated that such a resource would allow local authorities to access funds to undertake their statutory duties in relation to urgent repairs of defective and dangerous buildings.

We recognise that local authorities have limited funds available and choices to make in how they prioritise and spend their money. One choice that they have is to undertake repair work but, of course, they will in many cases have to wait for repayments. We acknowledge the concerns and the choices to be made, but we consider a national fund to be an issue for the Scottish Government and local authorities to consider rather than something for which the bill should legislate.

In oral evidence we heard requests for the bill to increase the flexibility of charging orders to allow housing associations to pay building repair costs on blocks of flats in which they have properties and to have those costs recovered by local authorities on their behalf. That would avoid a situation in which housing associations would, in buildings in which they have a majority interest, have to make full payment and then chase other—perhaps private—owners for repayment of their share through the court system.

We note those concerns but do not consider it appropriate to burden local authorities in that way. We would, however, encourage local authorities to work closely with housing associations and to take a flexible approach to assist them when circumstances permit.

We heard a fair bit of evidence about private owners—generally companies or the like—chopping and changing ownership to try to evade repayment. I am sure that many members in the chamber have experienced such situations in their constituencies and regions, as I certainly have. We heard evidence to suggest that a power to make an interim order or a liability order that could be attached at the point at which the repairs were made would help to address the situation.

We sympathise with that suggestion and are keen to minimise avoidance opportunities. We recommend that consideration be given to providing appropriate powers, which we understand the Scottish Government is considering. We look forward to hearing more about that and, perhaps, to considering amendments at stage 2.

I congratulate David Stewart on introducing the bill, and we appreciate his flexibility in giving evidence to the committee. The committee supports the bill’s general principles.

14:47

The Minister for Local Government and Planning (Derek Mackay): I am delighted to contribute to the debate, and I too acknowledge the significant amount of work that David Stewart has done in the past four years to get his bill on defective and dangerous buildings to this stage.
His bill proposes considerable improvements to the existing cost recovery powers of local authorities in dealing with defective and dangerous buildings.

The current powers in the Building (Scotland) Act 2003 require local authorities to take action on buildings that they consider to be dangerous. In some cases that will mean undertaking emergency work to secure the building and the surrounding area, and in other cases it will mean carrying out repair works. In certain extreme circumstances, local authorities can decide to demolish all or part of a dangerous building. They also have discretionary powers to deal with buildings that they consider to be defective. Unlike the situation with dangerous buildings, the local authority can, where an owner has not carried out the necessary repair work, undertake the work itself. The powers cover all types of buildings and allow local authorities to intervene to stop buildings deteriorating or to deal at once with immediately dangerous situations.

Those powers are important not only to ensure the safety of people inside and outside buildings, but to help in protecting our built environment for future generations. When a local authority becomes involved, its intervention is usually enough to prompt the building owner to rectify the problems themselves. In cases in which that does not happen and a local authority has to do the work itself, it can seek to recover its costs from the building owner.

As we have heard this afternoon, that currently means using the normal debt recovery methods, which to date have unfortunately not always been successful or adequate. Local authorities need a process for debt recovery that provides them with flexibility and gives them more certainty of recovering any expenses that they may have incurred.

The previous building legislation, up until 2005, included provision for charging orders for dealing with dangerous buildings. I, like many other members in the chamber, do not know why that power no longer exists. It linked the debt to the property and required the debt to be paid by 30 equal annual payments. Although, since 2005, powers have been widened to cover defective buildings, charging orders were not proposed. As such, the proposals in David Stewart’s bill can be seen as reintroducing the system of charging order powers that used to be in place. The Government has acknowledged that the existing powers need to be strengthened. As part of that, it is essential that any changes must include registration of the debt against the property to alert future owners to any existing liabilities. Indeed, having recognised the concerns of local authorities, the Government included proposals for improved powers in the consultation on the proposed community empowerment (Scotland) bill at the end of last year. Important differences to the bill that David Stewart has proposed were the inclusion of flexible repayment terms, the use of notices of liability, and a wider scope to cover all enforcement powers under the Building (Scotland) Act 2003.

We have now had the consultation responses to the community empowerment bill, and the Local Government and Regeneration Committee has taken evidence on David Stewart’s bill. The responses show strong support for improvement, but ask that the payment terms be flexible. Many respondents also requested that the period between the debt being incurred and the registration on the appropriate property register be kept to a minimum to prevent avoidance tactics. Those views were echoed by local authorities at a consultation workshop in January, and by the Convention of Scottish Local Authorities. I am pleased to hear that David Stewart intends to address those two specific issues at stage 2.

As I said earlier, the Government acknowledges that the cost recovery aspect of the legislation should be improved. That important part of the Government’s work is at the core of protecting the built environment, but it requires local authorities to invest time and resources, particularly when owners do not fulfil their legal obligations. Linking the local authority costs to the property would be a welcome improvement that would, in turn, give local authorities more certainty about getting their expenses back.

I am therefore pleased to confirm that the Government supports David Stewart’s bill on the basis that he will address a number of key aspects at stage 2. I also confirm that the Government will work with David Stewart on developing his bill to improve existing local authority cost recovery powers. That will largely satisfy COSLA’s request that we take this approach, as opposed to leaving it to the community empowerment bill that will come later in the parliamentary session.

14:52

Sarah Boyack (Lothian) (Lab): We, too, welcome the proposals for the bill. I congratulate David Stewart on the work that he has done thus far, and echo his thanks to all those who contributed to the discussions and gave evidence to the committee, and to the clerks for taking us this far.

Many properties are not properly looked after and can become dangerous and fall into a state of disrepair, which is bad news for residents, for neighbours and for the regeneration of our communities. Given the Scottish National Party’s
I agree with all the comments that have been made so far about the need for flexibility, and I am glad that David Stewart is keen to accept amendments at stage 2. The evidence shows that the 30-year payback period is too long. It has also been made clear that, for many people, a monthly payment might be a lot easier than an annual payment. It would be sensible to enable councils to be flexible in light of the circumstances of the owner and the size of the payment.

The Scottish Federation of Housing Associations raised a couple of issues in its submission that have not been mentioned this afternoon. First, the SFHA thinks that it would be desirable for housing associations to have similar powers to local authorities, either through possible collaboration with councils or by having the power to issue charging orders themselves. The SFHA argues that that would enable a more practical approach to the restoration of mixed-tenure buildings. I would be interested in the comments of the minister and the member in charge on that suggestion.

Secondly, the SFHA seeks clarification of when action could be taken to repair a dangerous and defective building. David Stewart referred in his opening remarks to his desire for high-level defective or borderline dangerous buildings to be tackled earlier. It would be quite useful to think about how that might be defined, so that people will know when it is appropriate in the future to apply the bill's provisions. The SFHA makes the obvious point that preventive repairs are much less costly and potentially safer in the long run. The issue is to consider how such repairs link with the bill's provisions and to decide at what point they would be triggered.

I cannot comment on the bill without reflecting on the statutory notice system in Edinburgh, because there are lessons to be learned from it. The system has been dogged by mismanagement and allegations of corruption, but the principle underpinning the system is sound. We need to think through Edinburgh's experience of the system in order to make the bill stronger. The City of Edinburgh Council commented in its written submission on potential delays in the sheriff court and costs being successfully challenged where the apportionment between owners is not clear; I know that that is a live issue in Edinburgh. Guidance to ensure fair and clear apportionment between owners would be very useful, particularly in dealing with tenements. Where it is not possible to track down an owner, the capacity to lay a registration or an order on a property's title could mean that money would be recovered—that is an important principle in the bill.

I want to reflect on the linkage between different elements of legislation. I am glad that the minister will look at community empowerment principles being adopted in the bill. The law of the tenement enables owners to undertake repairs and claim back the costs from owners who refuse to pay their share. However, the fact that they have to resort to the courts to claim back that money means, in effect, that it is a possibility that is virtually never used, given the costs and the time delays.

An opportunity that could come from the bill would be to allow the council to step in and pay the contribution of an owner who had refused to take part, even though the law of the tenement had been used in the drawing up of a scheme of works, and then to enable the council to claim that money back from the owner, using the powers in the bill. That would empower neighbours who have come to an agreement but whose repair works have been stalled by an absent or uncooperative owner. It has certainly been the case in Edinburgh that such situations have forced the council to become involved, which has led to lengthy delays, disputes and increased costs.

I would be very keen to introduce at stage 2 a power for local authorities along the lines that I have described, but I would be interested in hearing members' views on it before we get to stage 2. I would be grateful for the view of the member in charge and his advisers on whether the bill as drafted would give local authorities that power. If their view was that it did not, I would be grateful if the minister and David Stewart would look at the proposal before we get to the detail of stage 2, because I believe that the bill presents an opportunity that we should not miss.

I very much welcome the bill. I hope that the motion on its general principles is passed today and that we can move to discuss the detail for stage 2.

14:57

Cameron Buchanan (Lothian) (Con): I tend to start my speeches by welcoming the opportunity to contribute. However, I confess that on this occasion I can say with an unusual amount of sincerity that I am pleased to speak in support of this bill. I have met David Stewart to discuss his bill, and I congratulate him not only on his hard work, but on his persistence. Dangerous and defective buildings are not a subject that is being hotly discussed in many households around
Scotland at this precise moment. However, the member has identified a real problem with the present situation and has come forward with a sensible and straightforward solution. We should be grateful for his efforts in pursuing the matter. Indeed, I suspect that his real and abiding achievement is to have brought forward good legislation that has not been hijacked by the Scottish Government.

The bill presents a fairly neat solution to the problem of recovering costs for repair work by using a charging order where, for instance, civil law routes are not appropriate due to difficulties in tracing the owner. The bill will allow local authorities to tie the debt to the property title as opposed to the owner. Put more simply, the bill will give local authorities another route to claiming back the costs and as such it is most welcome, with 80 per cent of councils indicating their support for it in their responses to our consultation. There are an estimated £3.9 million in outstanding costs for such work, so anything that makes it easier to recover that money is surely a good thing.

Of course, as David Stewart stressed in his evidence, the proposed route is an optional one, so it will not bind local authorities to using a charging order in every circumstance, and in some cases it will not be appropriate. In committee, I raised the example of derelict barns and outbuildings in rural areas where the titles are not clear or are non-existent. John Wilson memorably referred to that problem as a case of raiders of the lost titles, a reference that might explain his penchant for fedora hats. We want to avoid situations in which charging orders become a disincentive for the redevelopment of land, or where they push buildings and sites into negative equity.

Clearly, there are situations in which charging orders will not be a viable solution. There are also situations in which the ownership is not at all clear, and one of the key challenges that I have faced personally was a situation in which an owner simply could not be found. The fact of the matter is that tying a debt to the title of a property is no use when nobody will take responsibility for the ownership of it. Whether or not it is in the bill, there needs to be a review of such situations and of the feasibility of fixed timeframes for establishing ownership.

As members of the Scottish Parliament, we are all familiar with buildings that have sat abandoned for long periods of time and on which work has been required to make them safe. Alex Rowley referred to a derelict hotel in Cowdenbeath High Street in his constituency, where no owner could be found, and I seem to remember that a similar case brought revelations over Stewart Stevenson’s links with the business community in Panama, though not in a personal capacity.

The key to the bill’s success will come from the difference that it makes not just to how effectively costs are recovered, but to how likely councils are to act on dangerous buildings. David Stewart referred to instances in which the decision on whether a building was dangerous or defective was not clear, and noted that in those circumstances it was likely that the decision would be taken not to take action because of the difficulties associated with recovering costs. I hope that the change will spur councils to act.

Another thing that must be considered is whether the remedial work that is to be carried out will be the bare minimum required to ensure that the building is safe and not liable to further or immediate deterioration, or whether local authorities have the confidence to act, knowing that costs could be recovered, to allow for a slight widening of the scope of the works so that they are more robust and longer lasting.

A couple of issues arose in the committee’s evidence sessions about the timeframe for the recovery of moneys and the appeals process. There was near unanimous support for the proposal that the 30-year timescale should be a maximum rather than a set, prescribed collection period, and we now know that moneys will be collected in instalments.

I am pleased that David Stewart has indicated his intention to work to bring forward any necessary amendments at stage 2 to bring in a flexible regime for the collection of moneys over a shorter timeframe, which is particularly relevant given that some costs will be relatively modest. There has to be flexibility in that regard. Likewise, there was some discussion over the appeals procedure, which the member has clarified would be for the purpose of disputing the validity or competence of any order, rather than reviewing the overall cost and associated terms. I note that the minister will consider that issue further, since he requires assurances over the role of the Government and reporters. However those seem to be fairly minor problems and I feel sure that any issues will be resolved at stage 2 and that we can move forward with the bill.

15:02

John Wilson (Central Scotland) (SNP): I offer my congratulations to David Stewart on introducing his bill in such a consensual manner that he has actually brought on board the Scottish Government to lend its support to the bill’s progress.

Many people assume that they understand what is meant by dangerous and defective buildings,
but in practical terms that may not be the case, although the Building (Scotland) Act 2003 offers legal guidance on the matter.

As a member of the Local Government and Regeneration Committee, I must respond to Sarah Boyack’s comment about the Scottish Government and local government finance by reminding her that she was a minister in the Scottish Executive when the 2003 act was introduced and that that act took the charging powers away from local authorities in Scotland.

Sarah Boyack: Will the member take an intervention?

John Wilson: No. I do not have time.

Although Mr Stewart’s bill has helped to provide a context as it has progressed, in that its intention and clear objective is to amend current statute in respect of the Building (Scotland) Act 2003, the general thrust of the bill raises concerns about how local authorities that have served either a defective buildings notice or a dangerous buildings notice, or which have taken alternative urgent action to deal with a dangerous building, can discharge their existing public safety role.

That raises an issue about the charging costs that were presented to the committee. We heard that the average charge was £3,000 for such buildings, but many witnesses indicated that that sum applied only to making the building safe, not to carrying out the necessary repairs that might be regarded as essential to make it habitable.

There is clearly a problem with keeping properties maintained, particularly in an era of buy-to-let owners who can be difficult to trace from title deeds, hence my reference in committee— alluded to by Cameron Buchanan—to the raiders of the lost titles. There are similar difficulties in cases where landowners operate from an offshore base.

As witnessed in the response from the Scottish Government, there is a high level of support for the principle of establishing better cost recovery powers, and the general point of the bill is to bring about an improvement in the current situation.

As has been stated, an overall theme is coming from discussion on the bill on the need to ensure that work takes place to tackle repairs, rather than simply make buildings safe and secure. Importantly, the principles behind the bill would provide certainty to local authorities that the debt should and will be recovered.

Although evidence that was given to committee centred on expenses, as reflected in the committee’s report, there are issues regarding the repayment period. The repayment period in the bill was deemed by some to be somewhat restrictive, principally with regard to costs being repaid annually. It is worth noting that charging orders are not a risk-free option and some respondents raised matters associated with their reintroduction. For example, charging orders are a long-term solution to debt recovery, especially when the period of repayment could be 30 years. That highlights my comments on flexibility.

In addition, a charging order will place a legal burden on the building, which may well impact on the sale of a property. There will no doubt be amendments at stage 2, as David Stewart and the minister intimated, which will take on board points about creating flexibility on the recovery of expenses, so that it is not overly prescriptive.

I thank David Stewart for bringing forward the bill and I commend the consensual manner in which it has been discussed. I look forward to the Local Government and Regeneration Committee’s consideration of amendments at stage 2. I thank everyone who assisted us in considering the bill at stage 1, including those who gave us written and oral evidence, and I thank members for the manner in which they conducted themselves during that stage.

The Deputy Presiding Officer: We turn to the closing speeches.

Cameron Buchanan: We have had a good, constructive debate and found a great deal of consensual support for David Stewart’s bill. We are all agreed on the bill’s merit and necessity and most comments have been on the detail over its implementation. In that respect, it has raised a number of broader issues to do with repairs. However, David Stewart and the committee are right to recommend that we resist some of the suggested amendments and expansion of the scope of the bill.

One of the most obvious cases of that type of proposal was from Susan Torrance of the Scottish Federation of Housing Associations, who noted the appeal of the bill and suggested broadening it to offer some sort of power to local authorities to pursue costs on behalf of housing associations—a point that Sarah Boyack raised. Although David Stewart and the committee understandably rejected that proposal, given the taxpayers’ resources that would need to be used, it is easy to see why the SFHA suggested such a power.

Never far from any discussion on the Local Government and Regeneration Committee is the issue of finance and in particular the fact that resources are scarce for councils at present. The bill is, of course, designed to improve the rate of recovery of funds, but in order to be recovered they have to be spent in the first place. That led some councils to argue in their submissions for a
dedicated fund for the purposes of repairs—that is, to argue for ring fencing. That would add a whole new dimension to the bill regarding extra resources and it is not a matter that should be addressed by the bill.

Linked to that issue, COSLA suggested that the powers could be used retrospectively. However, that struck me as something that would be quite a complex addition to the bill and I note the minister’s comments on the competency of such a provision. Evidence from Alistair MacDonald of North Lanarkshire Council highlighted the administrative costs that would be associated with retrospective charges, and that point cannot be ignored.

The bill’s overriding aim is to give local authorities another tool for recovering the cost of repairs, which is a very welcome and effective proposal. However, the bill understandably attracted a number of suggestions on how it could be tweaked or slightly expanded to address the many other similar problems that go with recovering the cost of repairs. Of course, the danger with such proposals is that if we begin to accept them, the scope of the bill immediately expands and we encounter all sorts of other, unforeseen problems. What starts as a straightforward proposal quickly evolves into a substantive and more far-reaching bill. Accordingly, I commend David Stewart for retaining his narrow focus on the issue of charging notices in relation to dangerous and defective buildings. The bill has exposed the need for a wider look at the broader issues, but for the moment we should support this bill, as it will give some welcome new powers to local authorities.

15:09

Mary Fee (West Scotland) (Lab): I, too, thank David Stewart for his hard work over the past four years to bring his bill to Parliament.

This stage 1 debate has been short, purposeful and very consensual, and I particularly welcome the very supportive comments that have been made by the Minister for Local Government and Planning; Kevin Stewart, the convener of the Local Government and Regeneration Committee; and Cameron Buchanan. Given the issue of local government finance that Sarah Boyack highlighted, the chamber must unite to support and implement the bill. With councils under severe pressure as a result of cost cutting, it is only right that they have the powers to recoup moneys for repairs to buildings for which owners take no responsibility. Indeed, ensuring that such owners do not profit from work that local authorities undertake is one reason why I fully support the bill.

The Local Government and Regeneration Committee’s very thorough and helpful stage 1 report on the bill raises concerns about the period of time for repayment, but I am happy with the broad agreement on the need to review the bill’s overly inflexible drafting.

On the issue of cost recovery, I agree with the evidence suggesting that the fixed-term repayment period is inflexible, and I am keen for that part of the bill to be reviewed. As a result, I welcome the remarks that David Stewart made on the matter in his opening speech. With the average cost of repairs coming in at under £3,000, it would be more beneficial for councils to base their terms on circumstance and the amount owed. I would certainly find it bizarre if someone who owed less than £3,000 had to pay 30 years of annual charges. Given the warning by the Institute of Historic Building Conservation that many one-off repairs costing £3,000 might require further intervention in future, it might, in the interests of public safety, be more beneficial to carry out full works in the first instance. Indeed, as the bill could also have beneficial effects in my area and help to transform and regenerate town centres such as Paisley—I am sure that the minister agrees with me on that point—I hope that things advance and that we get the repayment period right.

Local authorities have quite rightly indicated that without payments from owners their budgets for undertaking work are limited, and they have suggested the possibility of establishing a national loan fund. I hope that the minister will continue his dialogue with local authorities to find a practical solution to this problem. It might well be a result of the economic climate that more and more buildings are being classed as dangerous or defective but, given that councils are recovering only 50 per cent of costs, the Government must change it a priority to find a way of funding repairs without having a detrimental effect on vital services. The SFHA has suggested that housing associations and local authorities collaborate on recovering costs but, like Gillian McCarney of East Renfrewshire Council, I am apprehensive at the use of taxpayers’ money to recover costs for associations.

That area needs to be further explored, as does the question of who can issue a charging order. Moreover, the bill does not address the issue of buildings whose owners are not known, and I look forward to amendments at stage 2 to remedy those points. Similarly, I am unsure where the bill sits in relation to councils and missing shares, and I hope that that, too, will be clarified as the bill progresses.

We fully support the bill and hope that the chamber will do the same. It will be a vital tool in ensuring that our buildings are kept in good repair.
The Deputy Presiding Officer: I call Derek Mackay. Minister, you have six minutes.

15:13

Derek Mackay: That is slightly longer than I had expected, Presiding Officer.

The debate has been very consensual, without much disagreement. Mary Fee was correct to say that, like the bill itself, it has been short, purposeful, consensual and clear. Indeed, I think that David Stewart and I share those attributes: we are both short, purposeful, consensual and clear in what we want to achieve.

The chamber is united on this issue. In fact, if there is any challenge, it might come from the Opposition spokesperson, Sarah Boyack, who, for good public benefit reasons, wants to expand some of the bill’s provisions. However, the bill has been drawn in a very tight way to achieve its expected outcome.

Sarah Boyack: My concern is partly because I know that there may be further legislation coming down the tracks from the Scottish Government. The key problem for our constituents is that having to refer to different acts becomes a legal minefield. It would be useful if we could do simple things, without widening the focus too far, which Cameron Buchanan talked about, or if we could at least have a discussion about that at stage 2, so that the minister could reflect on issues that could be picked up in other pieces of legislation.

Derek Mackay: The member makes a valid point about emerging legislation. I want to be entirely clear, though, that the bill has a clear focus and we engaged with professionals to get the focus of the legislation—both the member’s bill and what was proposed in the community empowerment bill—right, so there may be other opportunities to do what Sarah Boyack suggests.

Kevin Stewart rose—

The Deputy Presiding Officer: Can we have Kevin Stewart’s microphone switched on?

Kevin Stewart: Thank you, Presiding Officer, although, as some of my colleagues are saying, I probably do not need it.

The simplicity of the bill is extremely good. It is when we get overly complex that we run into difficulties. It is perhaps the complexity of the 2003 act that led to charging orders disappearing from statute.

Derek Mackay: That is a fair point, but the bill will be focused and will make the necessary amendments. I will return to the details of those in addressing the points that have been made this afternoon and in the Local Government and Regeneration Committee.

I liked Cameron Buchanan’s clarity in welcoming the opportunity to participate in a debate with sincerity. I am sure that that is the case. It is not the case, however, that the Government is hijacking the bill. Actually, it is a case of great minds thinking alike. Everyone recognised that we needed to do something about this, and I commend David Stewart for taking the opportunity to tackle an issue through a member’s bill that we were dealing with through a community empowerment bill that I absolutely want to get right. We will, of course, reflect on the member’s suggestions and continue to work with him on the necessary amendments. However, the bill will still have the Government’s conditional support if the areas that we have identified can be addressed. We are happy to continue to support the bill and, indeed, offer the support of our officials to get it right, because the recovery of expenses that councils incur in dealing with defective and dangerous buildings is a serious and significant issue. We need to create a culture of proactivity in local government so that councils take the necessary action in the knowledge that they will be recompensed, where that is appropriate.

A wider issue around resources has been raised. I point out that we have made a major effort to de-ring fence resources—the amount that is ring fenced has fallen from £2.7 billion to just less than £200 million—and I do not believe that there is an appetite in local government to return to greater ring fencing of funds by creating a loan fund or something similar, even if the purpose is a good one. I believe that local government would welcome having the financial flexibility to take the approach that is appropriate in each local area, with the checks, balances and safeguards that Sarah Boyack mentioned in her speech, being very mindful of the circumstances in Edinburgh.

The bill has the potential to raise standards, to create a culture of enforcement and proactivity, to give the necessary reassurance and to challenge people. The guidance will be incredibly important in ensuring that there is clarity in the legislation and in the implementation. Again, I say that we look forward to working with David Stewart on amendments on issues such as the term of the charging order, so that there is flexibility, because it would be preposterous for some charges to be stretched over 30 years, where that is inappropriate. We do not want to unintentionally create avoidance and avoidance mechanisms. It would therefore be welcome if the bill could be amended to allow liability for costs to be registered as early as possible, to prevent the possibility of avoidance.

I am mindful of the Local Government and Regeneration Committee’s view on the retrospective allocation of expenses. The member
is aware of the Government's position on that, as well.

The community empowerment bill will proceed without any element of the work that is contained in the member's bill, which will, we hope, deal with the issue with which it is concerned. That will enable the community empowerment bill to focus on the other areas that I have highlighted.

Once again, I commend David Stewart for the four years' hard work that it has taken to get the bill to this stage. I think that it will meet with the approval of members across Parliament. The power that the bill deals with is a necessary one. The lack of the power has been a missed opportunity and its restoration will, I think, be welcomed by local government and the people of Scotland.

15:20

David Stewart: My friend Councillor Jimmy Gray, who is the convener of Highland Council, first drew my attention to the hazards that buildings can pose to the public if they are not maintained properly. He had been unfortunate enough to experience at first hand the danger that is posed by a building in a state of disrepair when he was almost struck by a flying piece of masonry when out walking along Stephen's Brae in Inverness. Thankfully, he was unhurt. However, that prompted me to investigate this matter further with building professionals and local authorities. I readily acknowledge that there are many wider aspects of dangerous and defective buildings that need to be addressed. As a back-bench member, I cannot go as far as ideally I would have liked, though I believe that my bill is an important first step and will make a significant difference to local authority cost recovery powers.

The response from the Edinburgh Conveyancers Forum to the committee's call for evidence sums up the position well:

"Whilst the charging orders proposed are not a full answer to these specific issues in themselves they would hopefully offer a welcome first step to developing a system that can protect our built environment to the advantage both of the population at large and also to individual owners whilst shifting the financial burden back to the owners themselves."

I thank members for all their positive contributions and their hard work in analysing the bill. I share Kevin Stewart's view that it would be wrong for the bill to apply retrospectively. Certainly, the legal advice that I have taken is that it would breach the European convention on human rights if it did, and I share that view. I also share Kevin Stewart's views about the national fund and the housing associations. Although I am very sympathetic to Susan Torrance's position, the point for me is that what she wanted was out of the bill's scope, not that it was incorrect. Obviously, I am keen to do anything I can to look at the notice of liability at stage 2, as I said to the minister earlier.

I share Derek Mackay's views and thank him for the offer to provide Scottish Government officials to work with me on amendments at stage 2—I will certainly do that. The only thing I query is his sizeiest comment earlier, although I remember that my friend Bill McAllister, a well-known Highland journalist, once introduced me at an event by saying, "David Stewart is not old Labour and he is not new Labour—he's just wee Labour."

I also liked Sarah Boyack's contribution. There is a much longer answer to make on the issue of apportionment and I am happy to write to her about that. As members know, Edinburgh has different legislation that went through Westminster. We would generally look at cost recovery according to what the title says, but I would like to make a much fuller response to Sarah Boyack and I shall do so in writing.

Cameron Buchanan also made an excellent contribution. He is quite right to say that charging orders are not there so that they can be used in every single case; that would be nonsense. Clearly, it is a joint decision by the building control officer and the legal team in the local authority. However, these orders would not work in a situation of negative equity or an unclear title. The line about raiders of the lost titles, which I think John Wilson coined, was a good one, and legal assessment is required on that point.

I agree with John Wilson about the worries about offshore ownership. I think that Stewart Stevenson spoke to the committee on that point. I would like to see repayment periods being relative to the amount of funds outstanding. I will certainly pursue that issue.

Mary Fee also made some excellent points. Clearly, with so-called orphaned buildings, where owners are unknown, a charging order would still work if there is a clear title, even though the owner may not necessarily be found. That is important, given that the order would attach to the title of that individual building.

In the few minutes that I have left, I will in summary recap the advantages of charging orders. If there is still time, I would like to mention the case that Stewart Stevenson cited to the local government committee, which was very interesting.

The advantages of charging orders are that they add to the local authority cost recovery toolkit to meet the varied circumstances of debtors. They secure the debt over the property, which creates a priority for the debt that it would not otherwise have as an ordinary, unsecured debt. It also
includes a provision for recovery of expenses that are incurred over and above the basic cost of undertaking the work. That is very important indeed; it refers to local authority administrative costs, registering and discharge fees and, of course, interest. I emphasise that it would be for each local authority to have a mechanism for assessing what interest it would be charging, which would be based on the current bank rate.

As the order is against the property, it avoids the need to pursue an individual in the civil courts, which can be time consuming and costly and, depending on the sums involved and whether the owner is traceable, may not be a viable option.

The charging order would also provide a greater guarantee of the costs being recovered; it would also enable a person who cannot pay a lump sum to make instalment payments. In addition, the charging order would act as an incentive to make those who are liable pay rather than incur the additional costs. Furthermore, the normal requirement to clear the charging order prior to the sale or transfer of the property would give an incentive for property owners to make payment of the outstanding sums to facilitate a sale. It is also likely to be much better to have had repairs carried out and a charging order placed than for a property to fall into further disrepair. Finally, charging orders have an advantage in that their existence and the sums charged are easy to establish from the land register at the point of sale.

Presiding Officer, do I have time to quickly mention the very interesting case that Stewart Stevenson raised at the Local Government and Regeneration Committee evidence session on 26 February?

The Deputy Presiding Officer: I will give you an extra little bit of time.

David Stewart: Thank you.

The case illustrated both the difficulties and the costs involved in attempting to trace the owner of a derelict building in a village in the north-east of Scotland. After five years of attempts to confirm ownership, it turned out that the property was owned by a registered company in Panama, which would deal with the council only through correspondence in Spanish. I understand that the council incurred additional costs because all correspondence had to be translated into either English or Spanish.

Under my bill, local authorities dealing with a defective or dangerous property such as that would have the option of registering a charging order, which would enable the debt to be secured on the property, rather than pursuing an individual or company through the court. When it became apparent that the owner was not traceable or refused to pay, a council could pursue a charging order and thereby reduce its outlay at the outset. If in the future the property was sold, it is likely that the proceeds would go some way to covering the council’s costs.

My bill will improve local authorities’ cost recovery powers. I hope that, come decision time, the whole chamber will unite to take a small but important step in the right direction for the built environment in Scotland.
Decision Time

17:01

The Deputy Presiding Officer (John Scott):
There are five questions to be put as a result of today’s business.

The first question is, that motion S4M-09391, in the name of David Stewart, on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill, be agreed to.

Motion agreed to,

That the Parliament agrees to the general principles of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill.
Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 3  Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Derek Mackay

22 In section 1, page 1, line 14 after <section> insert <25(7)(b), 26(3)(b), 27(7)(b),>

Derek Mackay

1 In section 1, page 2, leave out lines 1 to 6 and insert—

<( ) A charging order, and a discharge of a charging order, are to be in the form prescribed under section 36.>

Derek Mackay

23 In section 1, page 2, line 9, after <section> insert <25(7)(b), 26(3)(b), 27(7)(b),>

Derek Mackay

24 In section 1, page 2, line 9, at end insert—

<( ) a building regulations compliance notice under section 25(3) served after the commencement of this section,

( ) a continuing requirement enforcement notice under section 26(2) served after such commencement,

( ) a building warrant enforcement notice under section 27(2) served after such commencement,>

Derek Mackay

2 In section 1, page 2, line 12, leave out <the commencement of this section and section 46A(1)> and insert <such commencement>

Derek Mackay

3 In section 1, page 2, line 14, leave out <subsection> and insert <section>
Derek Mackay

In section 1, page 2, line 17, leave out <sections 46A, 46C, 46D, and 46E and Schedule 5A> and insert <section 46A and sections 46C to 46G>.

David Stewart

In section 1, page 2, line 33, at end insert—

<(3) The local authority must determine—
   (a) the number of annual instalments, being no fewer than 5 and no more
       than 30, in which the repayable amount is to be paid, and
   (b) the date in each year on which the instalment becomes due.>

Derek Mackay

In section 1, page 2, line 33, at end insert—

<(4) Subsection (5) applies where qualifying expenses are recoverable under subsection (7)(b) of section 27 from a relevant person (as defined in subsection (3) of that section), other than the owner, in relation to a building.

(5) The reference in subsection (2) to the owner of the building concerned is to be read as a reference to the relevant person (as so defined) in relation to the building.>

David Stewart

In section 1, page 2, leave out lines 36 and 37 and insert—

<(a) that the repayable amount is payable in the number of annual instalments
and on the date in each year determined under section 46C(3),>

David Stewart

In section 1, page 3, line 1, leave out <thirtieth> and insert <final>

Derek Mackay

In section 1, page 3, line 7, leave out from <or> to end of line 10

Derek Mackay

In section 1, page 3, leave out lines 15 to 17

Derek Mackay

In section 1, page 3, line 17, at end insert—

<(5) Subsection (6) applies where a charging order relates to qualifying expenses
that are recoverable under subsection (7)(b) of section 27 from a relevant
person (as defined in subsection (3) of that section), other than the owner, in
relation to a building.>
(6) The references in subsection (2) to the owner of any building subject to a charging order are to be read as references to the relevant person (as so defined) in relation to the building.

Derek Mackay

10 In section 1, page 3, line 21, leave out from beginning to <been> on line 22 and insert <On the registration of a charging order, the charge specified in the order is>

Derek Mackay

11 In section 1, page 3, line 24, leave out <any person deriving title to> and insert <the owner of>

Derek Mackay

12 In section 1, page 3, line 26, leave out <a third party> and insert <any person>

Derek Mackay

13 In section 1, page 3, line 29, leave out <third party> and insert <a person>

Derek Mackay

14 In section 1, page 3, line 33 leave out from beginning to <been> on line 34 and insert <On the registration of the discharge of a charging order, the charge specified in the order is>

David Stewart

15 In section 1, page 3, line 34, at end insert—

<46F Liability of new owner for repayable amount

(1) Subsection (2) applies where—

(a) a charging order is registered in respect of a building, and

(b) the order was registered at least 14 days before the date on which a person (the “new owner”) acquires right to the building.

(2) The new owner is severally liable with any former owner of the building for the repayable amount for which the former owner is liable.

46G Continuing liability of former owner

(1) An owner of a building who is liable for the repayable amount does not, by virtue only of ceasing to be such an owner, cease to be liable for the repayable amount.

(2) Where, in relation to a building, a new owner (within the meaning of section 46F(1)(b)) pays the repayable amount, or any part of it, for which a former owner of the building is liable, the new owner may recover the amount, or the part of it, so paid from the former owner.

(3) A person who is entitled to recover an amount under subsection (2) does not, by virtue only of ceasing to be the owner of the building, cease to be entitled to recover that amount.>
Derek Mackay

16 In section 1, page 3, line 34, at end insert—

<46H “Register” and “appropriate land register”

(1) In sections 46C to 46F, “register” in relation to a charging order or a discharge of a charging order, means register the information contained in the order or discharge in the Land Register of Scotland or, as appropriate, record the order or discharge in question in the Register of Sasines; and “registered” and other related expressions are to be read accordingly.

(2) In section 46E, “appropriate land register” means the Land Register of Scotland or the Register of Sasines.>

Derek Mackay

17 In section 1, page 3, line 36, leave out <at the end of subsection (1)> and insert <in subsection (1), after paragraph (g)>.

Derek Mackay

18 In section 1, page 4, leave out lines 9 to 11.

Derek Mackay

19 In section 1, page 4, line 12, leave out from beginning to end of line 8 on page 5.

After section 1

Derek Mackay

20 After section 1, insert—

<Ancillary provision

(1) The Scottish Ministers may by order make such supplementary, incidental, consequential, transitional or transitory provision or savings as they consider appropriate for the purposes of, in consequence of, or for giving full effect to any provision of this Act.

(2) An order under this section may modify this or any other enactment.

(3) An order under this section containing provision which adds to, replaces or omits any part of the text of an Act is subject to the affirmative procedure.

(4) Otherwise, an order under this section is subject to the negative procedure.>

Section 2

Derek Mackay

21 In section 2, page 5, line 10, leave out from beginning to <46D(4),>.
Section 3

Derek Mackay

27 In section 3, page 5, line 15, leave out <Defective and Dangerous>

Long Title

Derek Mackay

28 In the long title, page 1, line 2, leave out <the repair, securing or demolition of defective or dangerous buildings> and insert <connection with notices served or work carried out under that Act>
Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated at Stage 2, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

**Extension of charging order to include expenses under sections 25 to 27 of the 2003 Act**
22, 23, 24, 2, 25, 26, 27, 28

**Form and content of charging orders**
1, 19

**Minor and technical**
3, 4, 17, 18, 21

**Repayable amount: instalments and redemption**
5, 6, 7, 8, 9

**Registration**
10, 11, 12, 13, 14, 16

**Liability of new and former owners of buildings**
15

**Ancillary provision**
20
Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill:
The Committee considered the Bill at Stage 2.

The following amendments were agreed to (without division): 22, 1, 23, 24, 2, 3, 4, 5, 25, 6, 7, 8, 9, 26, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 27 and 28.

The following provisions were agreed to as amended: sections 1, 2, 3 and the long title.

The Committee completed Stage 2 consideration of the Bill.
10:00

The Convener: Agenda item 2 is consideration of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill. I welcome David Stewart, the member in charge of the bill, and Derek Mackay, the Minister for Local Government and Planning, who has portfolio responsibility for the subject matter of the bill.

Before we consider the amendments, it might be helpful if I set out the procedure for stage 2 consideration. Everyone should have with them a copy of the bill as introduced, the marshalled list of amendments, which was published on Monday, and the groupings document, which sets out the amendments in the order in which they will be debated.

There will be one debate on each group of amendments. I will call the member who lodged the first amendment in each group to speak to and move their amendment, and to speak to all the other amendments in the group. Members who have not lodged amendments in the group but who wish to speak should indicate that by catching my attention in the usual way. If the minister and the member in charge have not already spoken on the group, I will invite them to contribute to the debate in that order just before I move to the winding-up speech. The debate on each group will be concluded with the member who moved the first amendment in the group winding up.

Following the debate on each group, I will check whether the member who moved the first amendment in the group wishes to press their amendment to a vote or to withdraw it. If they wish to press ahead, I will put the question on the amendment. If a member wishes to withdraw their amendment after it has been moved, they must seek the committee’s agreement to do so. If any committee member objects, the committee must immediately move to the vote on the amendment. If any member does not want to move their amendment when I call it, they should say, “Not moved.” Please remember that any other MSP may move such an amendment. If no one moves the amendment, I will immediately call the next amendment on the marshalled list.

Only MSPs are allowed to participate in debates on amendments, and only committee members may vote at stage 2. Voting is by show of hands. It is important that members keep their hands clearly raised until the clerk has recorded the vote. The
committee is required to indicate formally that it has considered and agreed each section of the bill, so I will put a question on each section at the appropriate point.

Section 1—Expenses recoverable using charging orders

The Convener: The first group is on the extension of charging orders to include expenses under sections 25 to 27 of the Building (Scotland) Act 2003. Amendment 22, in the name of the minister, is grouped with amendments 23, 24, 2 and 25 to 28.

The Minister for Local Government and Planning (Derek Mackay): Let me outline the rationale for the amendments. Currently, the bill will allow charging orders to be made only for work on defective and dangerous buildings. Local authorities have other enforcement powers under the Building (Scotland) Act 2003 and in some instances have to undertake work when an owner does not comply with notices that are served on them under those powers. Those powers relate to building regulations compliance notices, under section 25 of the 2003 act; continuing requirement enforcement notices, under section 26; and building warrant enforcement notices, under section 27. The need to provide local authorities with greater certainty of cost recovery applies as much to those powers as to the powers on defective and dangerous buildings.

In the consultation on the proposed community empowerment (Scotland) bill, the Government asked whether improved cost recovery powers should be extended to those sections. There was overwhelming support for doing so, and I am pleased that the bill can accommodate that.

Amendments 22 to 24, 27 and 28 widen the application of the bill to cover the other enforcement powers in sections 25 to 27 of the 2003 act.

Amendments 27 and 28 change the short and long title, resulting in the title becoming the Buildings (Recovery of Expenses) (Scotland) Bill.

Amendments 25 and 26 cover an issue that arises from the widening of the application of the bill to those other enforcement powers. The owner is the person who is liable for the local authority’s costs in all sections except section 27. In that case, the 2003 act stipulates that it is “the relevant person”. In most cases that will be the owner, but it could be a tenant. Amendments 25 and 26 clarify that if the relevant person is not the owner, they are still responsible for all the repayable amount. However, under new section 46E of the 2003 act a charging order is enforceable only against the owner of the charged building.

Amendment 2 removes an unnecessary reference and ensures consistency within new section 46B of the 2003 act.

I trust that that explains the rationale for the amendments in the group and the impacts that they will have.

I move amendment 22.

David Stewart (Highlands and Islands) (Lab): I did not consult on this area but I am aware that the Scottish Government sought views on making charging orders available to local authorities when enforcing sections 25 to 27 of the Building (Scotland) Act 2003, which deal with compliance and enforcement.

On a practical level, it makes sense to deal with the matter within a single piece of legislation, as that will assist local authorities when implementing the act. I therefore have no objection to the amendments.

Amendment 22 agreed to.

The Convener: Amendment 1, in the name of the minister, is grouped with amendment 19.

Derek Mackay: The bill currently includes provision that charging orders and discharges have to be in such a form as the local authority may determine and that the content of the charging order includes the information set out in schedule 5 to the bill, unless otherwise required by an order by ministers—under new section 46A(3) of the 2003 act—that specifies the form that charging orders and discharges must be in. The Delegated Powers and Law Reform Committee commented at stage 1 that the provision “should be amended to provide a power to amend new schedule 5A”.

The member in charge confirmed that he would amend the provision accordingly. However, the Government has subsequently discussed that with Registers for Scotland, which expressed its preference for local authorities to use standard forms for a charging order and a discharge of a charging order. That view is shared by the Government. Having heard the Delegated Powers and Law Reform Committee’s concerns, and being supportive of the bill, the Government has gone with a different route to meet those concerns, preferring to rely on the powers that exist under the 2003 act. By bringing forward an amendment to the Building (Forms) (Scotland) Regulations 2005, the Government wishes to develop standard forms alongside the standard forms that are already set out in the 2005 regulations, such as the building warrant and completion certificate. Those would be subject to the usual legislative scrutiny and consultation and, importantly, are not expected to delay the commencement of the act.
I move amendment 1.

David Stewart: I thank the minister for his explanation of amendments 1 and 19. The amendments displace my commitment to amend the bill to address the point that was raised by the Delegated Powers and Law Reform Committee in its 6th report 2014, as the Government will rely on section 36 of the 2003 act to specify the form and content of charging orders and discharges.

I am reassured that development of standard forms alongside the forms that are already set out in the Building (Forms) (Scotland) Regulations 2005 is not expected to delay commencement. I support the amendments.

Amendment 1 agreed to.

Amendments 23, 24 and 2 moved—[Derek Mackay]—and agreed to.

The Convener: Amendment 3, in the name of the minister, is grouped with amendments 4, 17, 18 and 21.

Derek Mackay: The amendments can be considered as minor drafting changes. If members thought that the previous amendments were technical, they should wait until they hear these ones.

The most significant amendment in the group is amendment 4. Once a building has been demolished, only the land or site remains. Amendment 4 will ensure that, where a charging order for expenses is made in respect of demolishing a building, references to the building in the new sections to be inserted in the 2003 act—section 46A and sections 46C to 46G—are to be read as references to the site of the demolished building.

Amendment 18 is consequential to amendment 9, which seeks to remove delegated powers for Scottish ministers to make further provisions on the repayment or early redemption of repayable amounts. Amendment 18 removes an amendment to section 54 of the 2003 act, as found in section 1(d) of the bill, which makes provision in respect of orders and regulations and is now no longer required.

Amendment 3 is a minor drafting amendment that seeks to change “subsection” to “section” in section 46B(1)(b) of the 2003 act. Amendment 17 is similarly a minor amendment that seeks to clarify the insertion point of subsection H in section 47. Amendment 21 is another minor drafting amendment and is consequential to amendments 8 and 9, which seek to remove the role of Scottish ministers in the repayment or early redemption of repayable amounts.

I move amendment 3.
Amendments 8 and 9 remove the powers for ministers to determine cases in which the owner and local authority cannot agree on the settlement amount. I am aware that a similar power in the Housing (Scotland) Act 2006 in relation to repayment charges has not been used—it is not known why that is the case. With that in mind, and given that the bill should be straightforward to operate, I am content to support amendments 8 and 9, which make clear that the repayable amount is a matter for the building owner and the local authority.

I move amendment 5.

Derek Mackay: I am pleased that Mr Stewart lodged amendments 5, 6 and 7, which will provide flexibility on the term of a charging order, and I support the amendments. Key stakeholders such as the Convention of Scottish Local Authorities, local authorities and the Law Society of Scotland expressed concern that a 30-year standard term represents a long time before costs can be recovered and is inflexible.

The range of costs that local authorities incur can vary significantly, as is evident when we compare the cost of minor work on a defective building with the cost of demolishing a number of dangerous buildings. Amendments 5, 6 and 7 will allow local authorities, when determining the term of a charging order, to consider, depending on the cost of the works that they had undertaken, the appropriate level of annual instalments and the owner’s ability to pay.

Amendments 8 and 9, which are Government amendments, will remove an additional, unnecessary level of bureaucracy. When a local authority has done enforcement work, it will determine the amount that is repayable by the owner and instigate a cost-recovery mechanism. If the local authority decides to make a charging order, the owner has the right to appeal to the sheriff. Even when a charging order has been registered, the owner can settle their liability at any time and even agree a lower settlement amount with the local authority, if that is appropriate.

Amendments 8 and 9 will remove the power for ministers to determine cases when the owner and local authority cannot agree on the settlement amount, thereby removing the possibility that owners would use ministers to delay or frustrate the repayment of their debt. The repayable amount is a matter between the building owner and the local authority.

Stuart McMillan (West Scotland) (SNP): Mr Stewart, I assume that COSLA supports amendments 5, 6 and 7.

David Stewart: COSLA was keen that there be more flexibility in the charging order. Many local authorities thought that 30 years was far too long a repayment period for a relatively small sum. I think that the amendments in my name in this group are in accordance with the views of COSLA and the local authorities to which I have spoken over the past couple of years.

Amendment 5 agreed to.

Amendment 25 moved—[Derek Mackay]—and agreed to.

Amendments 6 and 7 moved—[David Stewart]—and agreed to.

Amendments 8, 9 and 26 moved—[Derek Mackay]—and agreed to.

The Convener: Amendment 10, in the name of the minister, is grouped with amendments 11 to 14 and 16.

Derek Mackay: The amendments in this group cover various registration issues. Amendment 10 clarifies that a charge is created when a charging order is registered in respect of a building.

Amendment 14 covers the discharge of a charging order in a similar way: the charge is discharged when discharge of a charging order is registered—I hope that members followed that.

Amendment 11 clarifies who a registered charging order is enforceable against. It will amend proposed new section 46E(3) of the Building (Scotland) Act 2003 so that a registered charging order will be enforceable by the local authority against the owner of the charged building, rather than against “any person deriving title to the charged building.”

“Owner” is the term used throughout the Building (Scotland) Act 2003 and is defined in section 56 of that act.

For similar reasons, amendments 12 and 13 amend paragraphs (a) and (b) of new section 46E(4) of the 2003 act. A charging order is not enforceable against a third party who acquires the right to the charged building in good faith and for value before the charging order is registered. Amendments 12 and 13 are intended to clarify that a charging order is not enforceable against “any person”, rather than “a third party”. The amendments also clarify that a charging order is not enforceable against any person who
subsequently derives title from such a person. That avoids any doubt arising as to what is meant by “a third party”.

Amendment 16, by inserting new section 46H into the 2003 act, will provide definitions for “register” and “appropriate land register”, which are terms used in the new sections.

I move amendment 10.

David Stewart: The amendments in this group deal with consistency of terminology. They provide further clarification in the bill in relation to the process of registering a charging order. As such, I welcome the amendments.

Amendment 10 agreed to.

Amendments 11 to 14 moved—[Derek Mackay]—and agreed to.

The Convener: Amendment 15, in the name of David Stewart, is in a group on its own.

David Stewart: During stage 1, I indicated that I would consider ways of closing the gap between a local authority carrying out work and the registration of a charging order. With the assistance of the Scottish Government—which, in turn, sought advice from Registers of Scotland—I investigated whether there was potential to register a notice of potential liability in advance of the charging order being registered. I have concluded that a mechanism that was intended to close a gap would in fact create a layer of bureaucracy. That would detract from the simplicity of the bill and would incur additional costs to local authorities.

The crux of the problem appears to be timing. It should be possible for the local authority to register a charging order very soon after work has been carried out. Local authorities would not view charging orders as a tool of last resort, but would be proactive in using them to secure the debt. However, I recognise that liability might become an issue over the longer term, as property changes hands. That is why I have lodged an amendment to clarify liability and to ensure that those who seek to avoid their responsibilities cannot do so.

Amendment 15 represents a significant addition to the bill. It provides that the buyer of a property, where a charging order has been registered, is to be severally liable, with the seller, for any unpaid amounts due by the seller under the charging order. Payment might be made by the seller or the buyer at the point of sale. However, if the liability is discharged by the buyer, the provision enables the buyer to pursue the seller for the debt. That might happen where the outstanding liability has not been factored into the sale price of the property in question.

New section 46F of the 2003 act, which amendment 15 would introduce, deals with the liability of a new owner for the repayable amount. Proposed new section 46F(1)(b) provides an important safeguard for the new owner. The buyer would not be liable if the charging order had been registered within 14 days of the new owner acquiring the property. That is to take account of the possibility that the conveyancing search process would not necessarily uncover a very recently registered charging order and that a buyer would not, therefore, be aware of it and could not take that factor into account when negotiating the purchase. It is appropriate that, where a charging order has been registered within 14 days of purchase, the new owner should not be liable along with the former owner. As far as a local authority is concerned, the proposed measures would encourage registration of the charging order at the earliest opportunity.

Proposed new section 46G deals with the continuing liability of the former owner following a sale. It provides that the original owner cannot escape liability by selling the property on, and that they can be pursued by a subsequent owner for the repayable amount, if it is not paid, or for any part of the repayable amount that is paid by the subsequent owner.

I believe that the new severally liable provision will strengthen the existing debt recovery powers in the bill.

I move amendment 15.

John Wilson (Central Scotland) (SNP): Mr Stewart referred to searches on titles in relation to any works that have been carried out and specifies a 14-day period for registration of a charging order in the amendment. I am trying to work out the legal aspects between the buyer and seller of a property and when the provision becomes relevant.

Could we end up in another legal dispute between the buyer and the seller if charging orders have been placed against a building? As I understood it, part of the idea behind the changes that the bill introduces was that, particularly if there was a 30-year repayment period, the repayment would be against the building. The question is how we secure that repayment against the building if we get involved in a legal dispute between the buyer and seller about what charging orders were put in place, when they were put in place and the notification of those charging orders if they had not been registered appropriately when solicitors carried out searches.

David Stewart: I thank Mr Wilson for that comment. There is quite a lot in it so I will go into a little bit of detail, if the convener does not mind.
The main point that I stress to the committee is that charging orders are a well-recognised and well-rehearsed technique that goes back to, I think, 1959. The great beauty of them is that they are attached to the title of the building and it is normally hard to escape the fact that there is a charge on the title of the building.

For example, if Mr Wilson bought a property from me, his lawyers would do a search through the conveyancing procedure. That search would normally identify whether a charging order was attached to the title of the building. Most new purchasers would rather have a clean title—no complications on it—so, if anything was outstanding, that would be taken into account in any negotiations. If the property was worth £200,000 and there was a £50,000 charging order on it, the price that Mr Wilson and I would negotiate would reflect the fact that there was an outstanding charging order.

Normally, it is not possible to escape a charging order because it is clearly registered in the register of sasines and the various other registers that are available. However, if a sale was made within a short time—for example, two weeks—the fact that there was a charging order would not normally be picked up because of the issue about registration.

The key point is that notices are flagged up in conveyancing. If Mr Wilson’s solicitors checked my property, there would be a red light saying that the property had an outstanding charging order. That is the key in the conveyancing procedures. We have taken clear legal advice and think that the bill is fairly rock solid. However, if a sale was made within two weeks, that red-light issue might not be picked up. The amendment would ensure that the new owner, which would be Mr Wilson in my example, would not be liable if a sale was made within two weeks of the charging order of being registered, because it would not be picked up.

The general advice that I give the committee is that charging orders are an extremely good way for local authorities to recover moneys. As I said at stage 1, I am not suggesting that they be used in every situation. My advice to local authorities is that assessments should be made jointly by building control officers and a legal team. Where it is clear that there is a clean title, it may be a good candidate for a charging order. I certainly recommend that if the bill is passed, local authorities do not sit on their hands on the issue. It is important that they get a charging order in place as soon as possible on any works that are carried out if they think that that is appropriate.

The amendment reinforces the bill and makes it much stronger than it was before. It would make it very difficult to avoid a charging order and the debt. Even if somebody was selling a property, the order would be flagged up by the lawyer because that is the nature of the conveyancing system.

Stuart McMillan: Has any work been undertaken on the number of instances in which the provision would have been used over, say, the past couple of years had it already been implemented?

The Convener: That is a difficult question for Mr Stewart to answer.

10:30

David Stewart: I can answer it by talking about charging orders in general terms; I will then respond on the specifics of the two-week issue.

If memory serves me right, local authorities have £4 million-worth of outstanding debt. I am not suggesting that charging orders are the only game in town, but they would do a huge job in ensuring that local authorities have less outstanding debt on any work that is carried out.

There is precedent for the several liability approach: the Tenements (Scotland) Act 2004, the Historic Environment (Amendment) (Scotland) Act 2011 and, most recently—the act with which Mr McDonald will be most familiar—the High Hedges (Scotland) Act 2013 all contain provision for several liability. I am totally convinced, Mr McMillan, that in two or three years’ time, were you to look at where local authorities have used charging orders on dangerous and defective buildings, the outstanding debt of local authorities in the whole of Scotland would be reduced dramatically. I would be very happy at that stage to return to the committee, if it carries out post-legislative scrutiny, to make further comments on the issue.

As the convener said, it is very difficult for me to give a categoric assessment of the impact of amendment 15. However, it would close an exception that some more devious owners might use to get around paying local authorities. Amendment 15 is another way to capture debt and to ensure that if local authorities carry out work, it is incumbent on owners to pay any outstanding debt to the local authority.

Derek Mackay: I am pleased to see amendment 15 lodged by Mr Stewart to provide a mechanism to ensure that the original owner does not escape liability if the property is sold or transferred. The amendment will also ensure that, subject to certain conditions in respect of registration of the charging order, a new owner is severally liable with any former owner.

The Government supports the amendment, as Mr Stewart has mentioned. The amendment follows the approach taken in the recent High Hedges (Scotland) Act 2013 and the Historic
Environment (Amendment) (Scotland) Act 2011 to make former and new owners severally liable. That is the right way forward. It also follows the approach taken in the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004. That approach was also included in the proposals in the community empowerment (Scotland) bill consultation.

In considering the application of the bill’s provisions, the most influential factor in reducing the likelihood of an owner using avoidance tactics is there being no unnecessary delay in a local authority registering a charging order. Therefore, it is essential that a local authority manages effectively the enforcement process from initial investigation through to final cost recovery.

Charging orders should be registered at the most appropriate time and should not be seen simply as a last resort. Although early registration of an order turns that into an annuity with annual payments, an owner can still repay the full amount early and can even agree a reduced settlement with the local authority, thereby allowing the charging order to be discharged earlier than the full term.

Amendment 15 agreed to.

Amendments 16 to 19 moved—[Derek Mackay]—and agreed to.

Section 1, as amended, agreed to.

After section 1

The Convener: Amendment 20, in the name of the minister, is in a group on its own.

Derek Mackay: This last group features only one amendment. Amendment 20 introduces standard ancillary provisions to enable ministers to give effect to the bill’s provisions and, in particular, to enable ministers to make any consequential amendments that may not yet have been identified.

The ancillary provisions follow the approach taken in, for example, the High Hedges (Scotland) Act 2013 and the Historic Environment (Amendment) (Scotland) Act 2011. Without such a power, it could be necessary to turn to Parliament to deal through subsequent primary legislation with a matter that is clearly within the original bill’s scope and policy intentions. That would not be an effective use of the resources of Parliament, the committee or Government.

The power is limited: it can be used only in relation to the bill. Importantly, it is also limited by providing the appropriate level of parliamentary scrutiny. Any order made under this section will be subject to the negative procedure. I hope that that explains the rationale behind the amendment.

I move amendment 20.

David Stewart: I note the minister’s point that the power is limited and can be used only in relation to this act and that any order which adds to, replaces or omits any part of the text of the act will be subject to the affirmative procedure. I therefore support the amendment.

Amendment 20 agreed to.

Section 2—Commencement

Amendment 21 moved—[Derek Mackay]—and agreed to.

Section 2, as amended, agreed to.

Section 3—Short title

Amendment 27 moved—[Derek Mackay]—and agreed to.

Section 3, as amended, agreed to.

Long title

Amendment 28 moved—[Derek Mackay]—and agreed to.

Long title, as amended, agreed to.

The Convener: That ends stage 2 consideration of the bill. The bill will now be reprinted as amended and will be available in print and on the Parliament website tomorrow morning.

The Parliament has not yet determined the date on which stage 3 proceedings will take place but members can now lodge stage 3 amendments at any time with the legislation team. Members will be informed of the deadline for amendments once it has been determined.

I thank David Stewart and the Minister for Local Government and Planning for attending and I thank members for their participation. The next committee meeting is next week, on Wednesday 11 June, at 11.30 am.

Meeting closed at 10:37.
Buildings (Recovery of Expenses) (Scotland) Bill
[AS AMENDED AT STAGE 2]

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Buildings (Recovery of Expenses) (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to amend the Building (Scotland) Act 2003 to provide for expenses incurred by local authorities in connection with notices served or work carried out under that Act to be recovered by way of charging order.

1 Expenses recoverable using charging orders

The Building (Scotland) Act 2003 (asp 8) is amended as follows—

(a) in section 44—

(i) at the end of subsection (1) insert “or makes a charging order under section 46A”,

(ii) at the end of subsection (2)(b) insert “or the whole of the repayable amount due under the charging order”,

(b) after section 46 insert—

“Charging orders

46A Charging orders

(1) A local authority entitled to recover any expenses under section 25(7)(b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3) or 30(4)(b) that are qualifying expenses may make in favour of itself an order (a “charging order”)—

(a) specifying the building concerned and the repayable amount calculated in accordance with section 46C, and

(b) providing that the building concerned is charged with the repayable amount.

(1A) A charging order, and a discharge of a charging order, are to be in the form prescribed under section 36.
46B Qualifying expenses

(1) Qualifying expenses are expenses recoverable by a local authority under section 25(7)(b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3) or 30(4)(b) and which relate to—

(za) a building regulations compliance notice under section 25(3) served after the commencement of this section,

(zb) a continuing requirement enforcement notice under section 26(2) served after such commencement,

(zc) a building warrant enforcement notice under section 27(2) served after such commencement,

(a) a defective building notice under section 28(1) or, as the case may be, a dangerous building notice under section 29(6), in either case served after such commencement, or

(b) notice under section 29(3) or, as the case may be, works under that section without notice, in either case given or carried out after such commencement.

(2) Where a charging order is made in respect of expenses incurred by a local authority in demolishing a building, references in this section, section 46A and sections 46C to 46G to a building are to be read as references to the site of the demolished building.

46C Repayable amount

(1) The repayable amount is the lower of—

(a) the total of the qualifying expenses and any sum recoverable under subsection (2), and

(b) any amount determined by the local authority.

(2) A local authority may, in addition to any qualifying expenses, recover from the owner of the building concerned—

(a) the amount of any fee payable in respect of registering a charging order or the discharge of a charging order,

(b) any administrative or other expenses incurred by it in connection with the charging order or discharge, and

(c) interest, at such reasonable rate as it may from time to time determine, from the date when a demand for payment is served until the whole amount is paid.

(3) The local authority must determine—

(a) the number of annual instalments, being no fewer than 5 and no more than 30, in which the repayable amount is to be paid, and

(b) the date in each year on which the instalment becomes due.

(4) Subsection (5) applies where qualifying expenses are recoverable under subsection (7)(b) of section 27 from a relevant person (as defined in subsection (3) of that section), other than the owner, in relation to a building.
(5) The reference in subsection (2) to the owner of the building concerned is to be read as a reference to the relevant person (as so defined) in relation to the building.

46D Core terms of charging orders, repayment and discharge

(1) A charging order must provide—

(a) that the repayable amount is payable in the number of annual instalments and on the date in each year determined under section 46C(3),

(b) that in default of such payment each instalment, together with any amount recoverable in respect of that instalment under section 46C(2)(a) or (b), is to be separately recoverable as a debt, and

(c) that if immediately after the final instalment falls due any balance of the repayable amount remains unpaid, that balance is immediately due for repayment and is recoverable as a debt.

(2) The owner of any building subject to a charging order may at any time redeem the repayable amount early by paying to the local authority the repayable amount in full or such lower sum as the owner may agree with the local authority.

(3) The local authority must, on receiving—

(a) payment in full of the repayable amount, or

(b) a sum redeeming the repayable amount under subsection (2),

register a discharge of the charging order in accordance with section 46E(5).

(5) Subsection (6) applies where a charging order relates to qualifying expenses that are recoverable under subsection (7)(b) of section 27 from a relevant person (as defined in subsection (3) of that section), other than the owner, in relation to a building.

(6) The references in subsection (2) to the owner of any building subject to a charging order are to be read as references to the relevant person (as so defined) in relation to the building.

46E Registration

(1) The local authority must register a charging order in the appropriate land register.

(2) On the registration of a charging order, the charge specified in the order is created in respect of the building specified in it.

(3) A registered charging order is enforceable at the instance of the local authority against the owner of the charged building.

(4) But it is not enforceable against—

(a) any person who acquires right to the charged building (whether title has been completed or not) in good faith and for value before the charging order is registered, or

(b) any person deriving title from such a person.
(5) The local authority must register a discharge of the charging order in the appropriate land register as soon as reasonably practicable after a charging order has been discharged.

(6) On the registration of the discharge of a charging order, the charge specified in the order is discharged.

46F Liability of new owner for repayable amount

(1) Subsection (2) applies where—

(a) a charging order is registered in respect of a building, and

(b) the order was registered at least 14 days before the date on which a person (the “new owner”) acquires right to the building.

(2) The new owner is severally liable with any former owner of the building for the repayable amount for which the former owner is liable.

46G Continuing liability of former owner

(1) An owner of a building who is liable for the repayable amount does not, by virtue only of ceasing to be such an owner, cease to be liable for the repayable amount.

(2) Where, in relation to a building, a new owner (within the meaning of section 46F(1)(b)) pays the repayable amount, or any part of it, for which a former owner of the building is liable, the new owner may recover the amount, or the part of it, so paid from the former owner.

(3) A person who is entitled to recover an amount under subsection (2) does not, by virtue only of ceasing to be the owner of the building, cease to be entitled to recover that amount.

46H “Register” and “appropriate land register”

(1) In sections 46C to 46F, “register” in relation to a charging order or a discharge of a charging order, means register the information contained in the order or discharge in the Land Register of Scotland or, as appropriate, record the order or discharge in question in the Register of Sasines; and “registered” and other related expressions are to be read accordingly.

(2) In section 46E, “appropriate land register” means the Land Register of Scotland or the Register of Sasines.

(c) in section 47—

(i) in subsection (1), after paragraph (g) insert—

“(h) any charging order made under section 46A.”,

(ii) in subsection (3)—

(A) after “applies” insert “, or a charging order made under section 46A or any decision in connection with such a charging order,“,

(B) after “the date of the decision or notice” insert “, or the charging order or connected decision,“,

(iii) after subsection (3) insert—
“(3A) On any appeal made by virtue of subsection (1)(h) no question may be raised which might have been raised on an appeal against the original notice or decision requiring the execution of the works to which the charging order relates.”,

(iv) in subsection (4), after “applies” insert “, or a charging order made under section 46A or any decision in connection with such a charging order,”.

1A Ancillary provision

(1) The Scottish Ministers may by order make such supplementary, incidental, consequential, transitional or transitory provision or savings as they consider appropriate for the purposes of, in consequence of, or for giving full effect to any provision of this Act.

(2) An order under this section may modify this or any other enactment.

(3) An order under this section containing provision which adds to, replaces or omits any part of the text of an Act is subject to the affirmative procedure.

(4) Otherwise, an order under this section is subject to the negative procedure.

2 Commencement

(1) This section and section 3 come into force on the day after Royal Assent.

(2) The remaining provisions of this Act come into force at the end of the period of 6 months beginning with the day of Royal Assent.

3 Short title

The short title of this Act is the Buildings (Recovery of Expenses) (Scotland) Act 2014.
Buildings (Recovery of Expenses) (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to amend the Building (Scotland) Act 2003 to provide for expenses incurred by local authorities in connection with notices served or work carried out under that Act to be recovered by way of charging order.

Introduced by:  David Stewart
On:           30 October 2013
Bill type:     Member's Bill
BUILDINGS (RECOVERY OF EXPENSES) (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Buildings (Recovery of Expenses) (Scotland) Bill (introduced in the Scottish Parliament on 30 October 2013 as the Defective and Dangerous Buildings) (Recovery of Expenses) (Scotland) Bill), as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sideling in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Non-Government Bills Unit in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

4. The Bill amends the Building (Scotland) Act 2003 (“the 2003 Act”) to provide the framework for local authorities to make charging orders for recovery of expenses incurred where local authorities have carried out work under the 2003 Act.

5. The principal reference points for the amendments to the 2003 Act are Part 3, (sections 25, 26 and 27), and Part 4, (sections 28, 29 and 30) of that Act, which deal, respectively, with matters concerning compliance and enforcement, and defective and dangerous buildings. It may therefore be useful, by way of context, to provide some detail on those sections.

6. The term “building” has the meaning given in section 55 of the 2003 Act. Essentially, it comprises any structure or erection, whether temporary or permanent. Further, where reference is made to a building, this includes reference to a part of the building.
7. Under section 25 of the 2003 Act, where the Scottish Ministers consider it essential that certain types of existing building should be required to comply with building regulations, they may direct local authorities to take action to secure that these buildings are made to comply. If directed to so, the local authorities must serve on an owner of an identified building a “building regulations compliance notice” identifying the provision of the regulations, any particular steps the owner must take, when the notice takes effect and when the building must be made compliant by. Where the owner has not complied with the notice, then under section 25(7)(b) the local authority can carry out any necessary work to secure compliance, and may recover from the owner any expenses reasonably incurred by it in doing so.

8. A verifier, appointed under section 7 of the 2003 Act, may impose a continuous requirement under section 22 of the 2003 Act on building owners to ensure that, after the completion of a building, the purposes of building regulations are not frustrated. Under section 2 of the 2003 Act, the Scottish Ministers can also impose a continuous requirement, including on existing buildings. Under section 26, where it appears to a local authority that the owner of a building is failing to comply with a continuing requirement imposed on the owner, the local authority can serve a “continuing requirement enforcement notice”. Where the owner has not taken the required steps to comply with the notice by the specified date, then under section 26(3)(b) of the 2003 Act the local authority can undertake any necessary work to secure compliance, and can recover from the owner any expenses reasonably incurred by it in doing so.

9. Under section 27, where it appears to a local authority that work which requires a building warrant has been carried out, without, or not in accordance with, a building warrant or that a limited life building has not been demolished by the expiry of the period of its building warrant, the local authority can serve on an owner a “building warrant enforcement notice”. Where the owner has not complied with the notice by the specified date the local authority can carry out any necessary work to secure compliance, and can recover any expenses reasonably incurred by it in doing so, under section 27(7)(b).

10. Section 28 enables a local authority to serve on the owner of a building a notice (a “defective building notice”) requiring the owner to rectify such defects in the building as the notice may specify. Where the owner has not carried out the work, then under section 28(10)(b) the local authority can do so, and can recover from the owner any expenses reasonably incurred by it in doing so.

11. Where it appears to a local authority under section 29(1) that a building (a “dangerous building”) constitutes a danger to persons in or about it or to the public generally or to adjacent buildings or places then the local authority must carry out such work (including, if necessary, demolition) as it considers necessary to prevent access to it and to protect the public (section 29(2)). It can also recover expenses incurred in that regard. Subsection (3) recognises that it may not be possible to give prior notice to the owner, and that the local authority may require to take urgent action. It may also, in that situation, recover expenses incurred from the owner.

12. Section 30 of the 2003 Act sets out what is to be contained within a dangerous building notice. Where an owner has not carried out work by the dates specified for compliance under
the notice, subsection (4) enables the local authority to carry out the required work and to recover expenses incurred by it from the owner.

COMMENTARY ON SECTIONS

The structure of the Bill

13. The Bill has four sections. Section 1, which represents the main part, comprises insertions to the 2003 Act, to make provision for charging orders under that Act. Section 1A deals with ancillary provision. Section 2 deals with commencement and section 3 sets out the Bill’s short title.

THE BILL – SECTION BY SECTION

Section 1(a) – limitation on recoverable expenses

14. Section 1(a) amends section 44 of the 2003 Act. While, generally, the 2003 Act provides for a local authority to recover expenses for work carried out by them in connection with notices served or work carried out under that Act, section 44(2) restricts liability for expenses in certain circumstances. For example, where the person is not the owner but simply a trustee and where the funds held by the trustee are insufficient to meet the whole demand. Where this twofold test set out in section 44(2) is met, liability is limited to the total amount held by the person concerned.

15. Section 1(a) extends this restriction on the general entitlement to recover expenses to charging orders where the interest of the person involved is limited to that of trustee, or someone acting in any of the other capacities set out at section 44(2)(a). These matters are dealt with at section 1(a)(i) and (ii) of the Bill, by means of adjustments to section 44(1) and 44(2)(b) of the 2003 Act, respectively.

Section 1(b) - charging orders

16. Section 1(b) contains the main provisions of the Bill dealing with charging orders. It takes the form of insertion of several sections at Part 5 (General) of the 2003 Act, immediately after section 46. These sections cover the following matters: 46A (Charging Orders); 46B (Qualifying expenses); 46C (Repayable amount); 46D (Core terms of charging orders, repayment and discharge); 46E (Registration); 46F (Liability of new owner for repayable amount); 46G (Continuing liability of former owner); and 46H (“Register” and “appropriate land register”).

46A – Charging Orders

17. Under section 46A(1), a local authority entitled to recover any expenses under the relevant provisions contained within sections 25(7)(b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3) and 30(4)(b) which represent “qualifying expenses” (as detailed in section 46B) can make a charging order. Section 46A(1) then sets out some of the basic elements of a charging order, namely that it is to specify the building concerned, the repayable amount (as detailed in section 46C), and is to provide that the building is charged with the repayable amount.
18. Section 46A(1A) makes provision relative to the form which charging orders, and discharges, are to be in. The effect of the provision is that the form and content of charging orders and any discharges are to be in the manner provided for by regulations made by the Scottish Ministers under section 36 of the 2003 Act.

46B – Qualifying expenses

19. Section 46B(1) provides that “qualifying expenses” represent the expenses which are recoverable by local authorities for works carried out under sections 25(7)(b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3) and 30(4)(b) of the 2003 Act, and relating to notices, or works without notice, detailed in the specific subsections concerned. Section 46B(1) further provides that it applies only to notices served, or works carried out, following commencement of new section 46B of the 2003 Act to be inserted by section 1(b) of the Bill, which is brought into force six months after Royal Assent.

20. Section 46B(2) provides that where the Bill refers to a building, then in the event of a charging order being made for expenses incurred in demolishing a building, references in section 46A and 46C to 46G are to be read as references to the site of the demolished building.

46C – Repayable amount

21. Section 46C(1) provides that the repayable amount under a charging order is the lower of the two amounts set out at paragraphs (a) and (b) of section 46C(1). That is, (a), the total of the qualifying expenses (as provided for at section 46B(1), and relating to the expenses incurred by the local authority in carrying out works), together with any additional amounts recoverable under section 46C(2), and (b), such amount as the local authority determines.

22. In addition to the qualifying expenses, local authorities may also recover other costs from the owner, as set out at section 46C(2). These cover registration fees on charges and discharges, administration or other expenses incurred in that connection, and interest. The rate of interest can be varied, but must be reasonable.

23. Section 46C(3)(a) requires local authorities to determine the number of annual instalments which must be no fewer than 5 and no more than 30. Paragraph (b) provides that local authorities must also specify the date on which annual instalments are due.

24. Subsection (4) applies subsection (5) in certain circumstances. This is to ensure that where appropriate the repayable amount can be recovered from the “relevant person” as building enforcement notices under section 27 of the 2003 Act are served on the “relevant person” and not the owner, for example a tenant (although the relevant person could be the owner).

46D – Core terms of charging orders, repayment and discharge

25. Section 46D(1) sets out certain matters that a charging order must provide for. It contains details of how the repayable amount under a charging order is to be paid, what happens where an instalment payment is missed, and makes provision for dealing with any outstanding balance due at the end of the instalment period.
26. Section 46D(1)(a) provides for the repayable amount under a charging order to be paid in
the number of annual instalments, and being due on the same date each year, as determined by
local authorities under 46C(3). Section 46D(1)(b) confirms that where an annual instalment is
not paid, then normal civil debt recovery procedures can be taken by local authorities to pursue
recovery of that instalment, together with charging order fees and connected administrative or
other expenses. Inserted section 46D(1)(c) confirms that any outstanding balance remaining
after the final payment falls due is similarly recoverable by means of civil debt recovery
procedures.

27. A mechanism for early repayment of the repayable amount is provided for at section
46D(2). Firstly, section 46D(2) confirms that an owner can at any time redeem the repayable
amount early by paying to the local authority the repayable amount in full. Further, an owner
can redeem the repayable amount early if they are able to reach agreement with the local
authority on a lower acceptable sum. Section 46D(3) obliges the local authority to discharge the
charging order where payment in full of the repayable amount is made, or where payment of
some other amount is made following agreement with the local authority.

28. Subsection (6) applies subsection (5) in certain circumstances. This is to ensure that a
“relevant person” subject to a charging order can redeem the repayable amount early in the
same way as an “owner” under 46D(2). A “relevant person” in relation to building enforcement
notices is defined at section 27(3) of the 2003 Act.

46E – Registration

29. Section 46E details the registration process for charging orders and discharges, in particular
the local authority’s obligations in that regard (46E(1) and (5)), the effect of registration
(46E(2),(3) and (6)), and enforceability of charging orders (46E(4)). A charging order (and
discharge of such an order) requires to be registered by the local authority in the “appropriate
land register”, (as defined in section 46H(2)).

30. In regard to enforceability the general position is that a charging order which has been
registered can be enforced by the local authority against the owner of the charged building. An
exception is provided in the circumstances described in section 46E((4). That is, where any
person (or any person deriving title from that person) has acquired right to the charged
property, whether or not title has been completed, in good faith and for market value, before the
charging order is registered. In those particular circumstances, a charging order would not be
enforceable against the person concerned, or anyone whose title to the charged building derives
from that person.

46F – Liability of new owner for repayable amount

31. Section 46F deals with the liability of an incoming or new owner of a building. Subsection
(2) provides that the new owner is severally liable with any former owner for the repayable
amount for which the former owner is liable under section 46C. However, this is only the case
where subsection (1) applies. Subsection (1)(b) provides that a new owner is liable only if a
charging order is registered in the appropriate land register on or before a date 14 days prior to
the new owner becoming the owner. If no charging order has been so registered then the new
owner is not liable.
46G – Continuing liability of former owner

32. Section 46G provides that an owner of a building who is liable for the repayable amount under section 46C does not cease to be liable by virtue of no longer being the owner of that building. If the new owner has paid the repayable amount, or any part of the repayable amount for which the former owner is liable to the local authority then the new owner can recover that amount from the former owner. This remains the case even if the new owner does not continue to own the building.

46H – “Register” and “appropriate land register”

33. Section 46H(1) sets out the meaning of “register” and related expressions (e.g. “registered”) for the purpose of sections 46C to 46F. Section 46H(2) clarifies that “appropriate land register” in relation to registration of a charging order, or a discharge under section 46E, means either Land Register of Scotland or the Register of Sasines.

Section 1(c) – Appeals

34. Section 1(c) of the Bill provides that charging orders can be appealed in certain circumstances. It does so by way of insertions to the existing appeal provisions in the 2003 Act, which are set out at section 47. Section 47(1) lists various actions under the 2003 Act (relating to specified decisions or notices) which under section 47(3) an aggrieved person can appeal. Such appeals are made to the sheriff, by way of summary application made within 21 days of the relevant decision or notice. Section 1(c)(i) and (ii) extend this appeal right to charging orders made under section 46A or any decision in connection with such a charging order. By way of example, an appeal might arise in circumstances where there has been a recent change of owner, in the period following repair works being carried out and a charging order being sought. If that change is not acknowledged by the local authority then an owner may decide to appeal, under reference to section 46E(4).

35. Section 1(c)(iii) places certain restrictions on the right of appeal against a charging order. Inserted subsection (3A) provides that questions cannot be raised about matters which might have been raised earlier, on an appeal against the original notice or the decision requiring the works to be carried out.

36. Section 1(c)(iv) provides that a charging order or a decision in connection with a charging order does not take effect until the appeal period has elapsed or an appeal which is brought has been concluded.

Section 1A – Ancillary provision

37. This section enables the Scottish Ministers to make a range of ancillary provisions in order to give full effect to anything contained in the Bill. It includes power to make, by order, such supplementary, incidental, consequential, transitional, transitory provision or savings as they consider appropriate. Under subsection (2), the power can be used to modify the new Act or any other existing legislation, primary or secondary.
38. Subsections (3) and (4) provide that an order made under subsection (1), which adds to, replaces or omits any part of the text of an Act is subject to the affirmative procedure. Any other order is subject to the negative procedure.

Section 2 – Commencement

39. This section provides for commencement of the Bill. The commencement section, together with section 3, which sets out the short title, come into force on the day after Royal Assent. The remaining provisions of the Bill come into force 6 months after Royal Assent.
BUILDINGS (RECOVERY OF EXPENSES) (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Non-Government Bills Unit on behalf of David Stewart MSP, to assist the Delegated Powers and Law Reform Committee (‘the Committee’) in its consideration of the Buildings (Recovery of Expenses) (Scotland) Bill. It may be noted, in passing, that the title of this Bill has been amended at Stage 2, from the ‘Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill’, to the ‘Buildings (Recovery of Expenses) (Scotland) Bill’.

2. The memorandum refers to provisions in the Bill conferring power to make subordinate legislation which were amended, introduced or removed at Stage 2. The memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

Outline of Bill provisions

3. The Bill amends the Building (Scotland) Act 2003 (‘the 2003 Act’) to provide the framework for local authorities to make charging orders for recovery of expenses incurred by them where they have carried out work under Part 3, Compliance and Enforcement, and Part 4, Defective and Dangerous Buildings, under the 2003 Act.

4. The Bill provides for recoverable expenses to include the cost of the work itself, plus fees and administrative expenses incurred in connection with the charging order and discharge of it. Provision is made for the registration, repayment (including early redemption), and discharge of a charging order. The Bill also enables charging orders to be appealed in certain circumstances, and for the form of a charging order, and a discharge, to be prescribed.

5. The Bill as amended at Stage 2 contains two new powers to make subordinate legislation which are delegated to the Scottish Ministers, one of these replacing a power in the Bill as introduced, the other being wholly new. The one other power in the Bill as introduced has been removed. All of these powers are commented on below.
This document relates to the Buildings (Recovery of Expenses) (Scotland) Bill as amended at Stage 2 (SP Bill 39A)

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 1(b) (inserting section 46A(1A) (form of charging orders) into the Buildings (Scotland) Act 2003)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative

Provision

6. New section 46A(1A) provides that a charging order, and a discharge of a charging order, are to be in the form prescribed under section 36 of the Building (Scotland) Act 2003 (‘the 2003 Act’). Section 36 relates to forms used under the 2003 Act. It enables the Scottish Ministers, by means of regulations, to make provision as to the form and content of any application, warrant, certificate, notice or document authorised or required to be used under the 2003 Act. Such items, if used, must be used in the form provided for in the relevant regulations.

Reason for taking this power

7. This provision effectively replaces the order making power contained within the Bill at introduction, in terms of which charging orders (and discharges) were to be in such form as the local authority determined to give effect to, and to state the information required by, Schedule 5A to the Bill. This schedule, which is removed from the Bill in consequence of the approach now taken at section 46A(1A), set out detailed provision about the contents of charging orders (and discharges). In addition, provision was included to enable the Scottish Ministers, by order, to make alternative provision in regard to the form which charging orders (and discharges) are to be in.

8. At Stage 1 the Delegated Powers and Law Reform Committee (“the Committee”) sought clarification as to how this power might be exercised. The Committee considered that it would be clearer and simpler to provide the Scottish Ministers with an express power to amend Schedule 5A, rather than to allow the schedule to be supplemented by subordinate legislation.

9. Having taken account of the Committee’s concerns, the member indicated that in the event of the Bill proceeding further an appropriate amendment would be brought forward to address them. It is considered that the amendment which has now been provided deals with those concerns, while adopting a different route to achieve that outcome. The amended provision reflects input provided by the Registers of Scotland, which expressed a preference for the use of standard forms, and relies on the powers already contained within section 36 of the 2003 Act. This will ensure the use of standard forms, rather than local authorities being responsible for developing their own forms. In consequence, the Bill is simplified, with Schedule 5A no longer required, and having been removed by means of related Stage 2 amendments.

10. The intention is that the Building (Forms) (Scotland) Regulations 2005 (SSI 2005/172), made under section 36 of the 2003 Act and covering a number of existing notices and forms, will
be amended to provide for the forms required under the Bill in regard to charging orders (and discharges).

Choice of procedure

11. Regulations made under section 36 are subject to the negative procedure, in terms of section 54(5) of the 2003 Act. That is considered to afford an appropriate level of scrutiny in relation to the form of a charging order (and discharge), in line with that applied to any other regulations which are brought forward under the power contained within section 36.

Section 1A –Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative if amending an Act, otherwise negative

Provision

12. New section 1A enables the Scottish Ministers to make a range of ancillary provisions considered appropriate for the purposes of, in consequence of, or for giving full effect to any provision in the Bill. The power can be used to modify the new Act and any other existing legislation, primary or secondary.

Reason for taking this power

13. The power to make ancillary provision is considered necessary in order to ensure that the policy intentions of the Bill are achieved. This power has been taken to ensure that there is adequate flexibility to give effect to the provisions of the new legislation. It is possible that unforeseen issues will arise which require further provision to be made or that consequential amendments to the existing law will be required which have not yet been identified. In the absence of such provision there might otherwise be a need to return to the Parliament, by means of subsequent primary legislation, to deal with a matter of an ancillary nature, which is plainly within the policy intentions of the legislation. It is considered that this would not be an effective use of the resources of the Parliament.

14. The power, while potentially wide, is limited to the extent that it can only be used as the Scottish Ministers consider appropriate for the purposes of, in consequence of, or for giving full effect to any provision of the new Act. Any supplementary use of the power would be strictly construed. This represents an important control on the use of the power. It is however considered important to ensure workability in practice.

Choice of procedure

15. Where the power is used to add to, replace or omit any part of an Act then exercise of it is subject to the affirmative procedure. It is considered that in such circumstances the highest level of Parliamentary scrutiny is appropriate. In other circumstances, the negative procedure will
apply, again ensuring that the Parliament has an appropriate opportunity to consider any exercise of this power.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION REMOVED AT STAGE 2

Section 1 on introduction (inserting section 46D(4) (repayment or early redemption of amounts payable under a charging order) into the Buildings (Scotland) Act 2003)

Power conferred on – the Scottish Ministers
Power exercisable by –order made by statutory instrument
Parliamentary procedure –affirmative

Provision

16. This order making power has been removed, following amendment of the Bill at Stage 2. The power concerned enabled the Scottish Ministers by order to determine the repayable amount under a charging order, where the building owner is unable to agree this with the local authority, and to make further provision about the repayment or early redemption of amounts repayable under a charging order.

17. The Bill as amended at Stage 2 removes the role of the Scottish Ministers in relation to the process of agreeing the redeemable amount, that now being a matter which can be agreed between the owner and the local authority, only. There is accordingly no requirement now for the power conferred on the Scottish Ministers and it has therefore been removed by virtue of amendments made to section 46D of the Bill at Stage 2.
Delegated Powers and Law Reform Committee

42nd Report, 2014 (Session 4)

Buildings (Recovery of Expenses) (Scotland) Bill

Published by the Scottish Parliament on 17 June 2014
Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
      (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
      (ii) [deleted]
      (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
   (c) general questions relating to powers to make subordinate legislation;
   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
   (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
   (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
   (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
   (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson
Committee Clerking Team:

**Clerk to the Committee**
Euan Donald

**Assistant Clerk**
Elizabeth White

**Support Manager**
Daren Pratt
Delegated Powers and Law Reform Committee

42nd Report, 2014 (Session 4)

Buildings (Recovery of Expenses) (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meeting on 17 June 2014, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Buildings (Recovery of Expenses) (Scotland) Bill as amended at Stage 2 (“the Bill”)\(^1\). The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Bill is a Member’s Bill, sponsored by David Stewart MSP. On introduction, the Bill was titled the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill and it made specific provision by way of amendment to the Building (Scotland) Act 2003 (“the 2003 Act”) enabling local authorities to recover expenses incurred in carrying out alterations and repairs to defective and dangerous buildings by way of a charging order, enforceable against anyone deriving title to the property and payable in annual instalments.

3. The Bill has been substantially amended at Stage 2, and is now titled the Buildings (Recovery of Expenses) (Scotland) Bill. It now has a wider application, enabling local authorities to recover expenses incurred by virtue of either Part 3 or Part 4 of the 2003 Act. Part 3 of the 2003 Act deals with compliance and enforcement, and Part 4 relates to defective and dangerous buildings. The Bill enables a local authority to recover not only the cost of the work carried out under either of those Parts of the 2003 Act, but also fees payable in respect of registering a charging order as well as administrative expenses and interest.

4. The member in charge has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill (“the SDPM\(^2\)).

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\(^2\) Buildings (Recovery of Expenses) (Scotland) Bill Supplementary Delegated Powers Memorandum available at: http://www.scottish.parliament.uk/S4_Bills/20140605_SDPM_FINAL.pdf
5. The Committee reported on certain matters in relation to the delegated powers provisions in the Bill at Stage 1 in its 6th report of 2014.

DELEGATED POWERS PROVISIONS

6. The Committee considered each of the new, removed or substantially amended delegated powers provisions in the Bill after Stage 2.

7. After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the new, removed or substantially amended delegated powers provisions listed below and that it is content with the Parliamentary procedure to which they are subject:

- Section 1(b) (inserting section 46A(1A) (form of charging orders) into the 2003 Act) (new power)

- Section 1A – ancillary provision (new power)

- Section 1(b) (on introduction inserting section 46D(4) (repayment or early redemption of amounts payable under a charging order) into the 2003 Act) (removed power)

8. The Committee reports that it is content with the provisions in the Bill which have been amended at Stage 2 to insert, remove or substantially alter provisions conferring powers to make subordinate legislation and other delegated powers.
Buildings (Recovery of Expenses) (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 3  Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Derek Mackay
1 In section 1, page 2, line 9, after <27(2)> insert <relating to a building>

Derek Mackay
2 In section 1, page 2, line 9, after <served> insert <on the owner of the building>

Derek Mackay
3 In section 1, page 2, line 39, leave out from beginning to end of line 3 on page 3

Derek Mackay
4 In section 1, page 3, leave out lines 18 to 21

Derek Mackay
5 In section 1, page 3, leave out lines 22 to 28

Derek Mackay
6 In section 1, page 3, line 31, at end insert—

<( ) A charging order may be registered in any period during which the order is of no effect by virtue of section 47(4).> 

Derek Mackay
7 In section 1, page 3, line 35, after <building> insert <(but subject to section 46F)> 

Derek Mackay
8 In section 1, page 3, leave out lines 36 to 40

Derek Mackay
9 In section 1, page 4, line 1, leave out second <the> and insert <a>
Derek Mackay

10 In section 1, page 4, line 2, leave out <a charging order has been discharged> and insert <it has received—

( ) payment in full of the repayable amount, or
( ) a sum redeeming the repayable amount under section 46D(2)>

Derek Mackay

11 In section 1, page 4, leave out lines 36 to 39 and insert <, for the words “or notice” in both places where they occur, substitute “, notice or order”.

Derek Mackay

12 In section 1, page 5, line 1, leave out <(1)(h)> and insert <(3) in relation to a charging order made under section 46A,>

Derek Mackay

13 In section 1, page 5, line 4, leave out from <after> to end of line 5 and insert <for the words “or notice” substitute “, notice or order”.


Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated at Stage 3, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

**Group 1: Liability of owner for expenses under section 27(2) of the Building (Scotland) Act 2003**
1, 2, 3, 5

**Group 2: Duty to register a discharge of a charging order**
4, 9, 10

**Group 3: Appeals in relation to charging orders**
6, 11, 12, 13

**Group 4: Enforceability of charging orders**
7, 8

Debate to end no later than 15 minutes after proceedings begin
EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol 4, No. 17 Session 4

Meeting of the Parliament

Thursday 19 June 2014

Note: (DT) signifies a decision taken at Decision Time.

Business Motion: Joe FitzPatrick, on behalf of the Parliamentary Bureau, moved S4M-10372—That the Parliament agrees that, during stage 3 of the Buildings (Recovery of Expenses) (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

   Groups 1 to 4: 15 minutes.

The motion was agreed to.

Buildings (Recovery of Expenses) (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to (without division): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13.

Buildings (Recovery of Expenses) (Scotland) Bill: David Stewart moved S4M-10335—That the Parliament agrees that the Buildings (Recovery of Expenses) (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
Buildings (Recovery of Expenses) (Scotland) Bill: Stage 3

The Deputy Presiding Officer (John Scott): The next item of business is stage 3 proceedings on the Buildings (Recovery of Expenses) (Scotland) Bill. In dealing with the amendments, members should have the bill as amended at stage 2, the marshalled list and the groupings. The division bell will sound and proceedings will be suspended for five minutes for the first division of the afternoon. The period of voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate. Members who wish to speak in the debate on any group of amendments should press their request-to-speak button as soon as possible after I call the group.

Section 1—Expenses recoverable using charging orders

14:30

The Deputy Presiding Officer: Amendment 1, in the name of the minister, is grouped with amendments 2, 3 and 5.

The Minister for Local Government and Planning (Derek Mackay): I will outline the rationale behind amendments 1, 2, 3 and 5.

At stage 2, the application of the bill was widened beyond defective and dangerous buildings, allowing a local authority to make a charging order in relation to its other enforcement powers under sections 25 to 27 of the Building (Scotland) Act 2003. Those powers cover building regulations compliance notices under section 25; continuing requirement enforcement notices under section 26; and building warrant enforcement notices under section 27.

When a local authority takes enforcement action under sections 25 to 30 of the 2003 act, it can recover its reasonable expenses from the owner of the building. The exception to that is where it has served a building warrant enforcement notice under section 27, in situations in which work is being done without a building warrant or is not being done in accordance with the technical aspects of building regulations. In such a case, the local authority would serve a section 27 notice on the “relevant person”. Usually, the relevant person is the owner of the building, although that might not always be the case. For example, the relevant person could be a tenant who is doing the work themselves or employing a builder to carry out the work for them. In a situation in which the owner was not responsible for having the work carried out, it would be unreasonable for any liability of the tenant to be attached to the title of the building.

Amendments 1 and 2 expand new section 46B(1)(zc) of the 2003 act and clarify that the qualifying expenses recoverable by a local authority are only those expenses that relate to a building warrant enforcement notice that has been served on the owner of the building. The effect of the amendments is that the local authority can make a charging order under new section 46A only where the person liable for expenses in relation to enforcement under section 27 is the owner of the building.

Amendments 3 and 5 are consequential on amendments 1 and 2. They remove subsections (4) and (5) of new section 46C and subsections (5) and (6) of new section 46D—I hope that members are getting all this. Those subsections make provision for references to an “owner” that occur earlier in the sections to be read as references to a “relevant person” other than an owner. The four subsections are no longer required, as expenses under section 27(7) are only qualifying expenses and hence recoverable under a charging order where the original building warrant enforcement notice was served on the owner of the building.

I move amendment 1.

David Stewart (Highlands and Islands) (Lab): The bill has always focused on owners of buildings. This package of amendments ensures that the local authority cannot make a charging order under new section 46A of the 2003 act if the person liable for expenses relating to enforcement under section 27 is not the building owner—for example, if they are a tenant. The amendments also clarify that qualifying expenses for a building warrant enforcement notice under section 27 are limited to when the local authority has served a notice on the owner of the building. In essence, the amendments are of a tidying-up nature, following the extension of the bill to section 27 of the 2003 act. I therefore support the refinement of the bill.

Amendment 1 agreed to.

Amendments 2 and 3 moved—[Derek Mackay]—and agreed to.

The Deputy Presiding Officer: Amendment 4, in the name of the minister, is grouped with amendments 9 and 10.

Derek Mackay: Amendments 4, 9 and 10 can be considered to be minor technical or drafting amendments.

The bill provides that, where a charging order has been registered, the local authority must register the discharge of the order as soon as reasonably practicable after the charging order has been discharged.
Amendment 10 makes it clear that the discharge of a charging order must be registered by a local authority when it has received either the full repayable amount or any agreed lower amount that redeems the repayable amount.

Amendment 4 removes new section 46D(3), which is no longer required, as a consequence of amendment 10.

Amendment 9 simply changes the term “the charging order” to “a charging order” in section 46E(5).

I move amendment 4.

David Stewart: These are minor and technical amendments that involve some repositioning of provisions that deal with registering a charging order and a discharge. They seek to ensure further clarity and consistency in the application of the bill, and we are therefore content to support them.

Amendment 4 agreed to.

Amendment 5 moved—[Derek Mackay]—and agreed to.

The Deputy Presiding Officer: Amendment 6, in the name of the minister, is grouped with amendments 11 to 13.

Derek Mackay: This group of amendments concern the appeal and registration of a charging order.

The bill adds charging orders to the list of matters that are appealable under section 47 of the Building (Scotland) Act 2003. Where a local authority makes a charging order, the owner has 21 days to appeal, by summary application to the sheriff. As a result of section 47(4) of the 2003 act, as amended by the bill, the charging order does not take effect until either the 21-day period has passed without an appeal being made, or, where an appeal has been made, the appeal has been determined or withdrawn.

Concerns have been raised that an owner might use the appeal mechanism as a delaying tactic while they try to change the ownership of the building. It is therefore important that a charging order can be registered in the appropriate land register as soon as possible.

At stage 2, the bill was amended to introduce provisions for future owners to become severally liable with the former owner—those amendments introduced new sections 46F and 46G.

Amendments 11 and 13 are technical amendments, concerning subsections (3) and (4) of section 47 of the 2003 act.

Amendment 11 amends subsection (3), which creates a right of appeal against a charging order, and clarifies that any appeal must be made within 21 days of the date of the charging order.

Amendment 13 clarifies that a charging order, as with the other appealable matters in the 2003 act, is of no effect until either the appeal period has passed without one being made, or any appeal has been determined or withdrawn.

Amendment 6 makes it clear that the local authority can register the charging order as soon as it has made it. The local authority does not have to wait until after the 21-day appeal period has passed or any appeal has been determined or withdrawn.

New subsection (3A) of section 47 of the 2003 act makes provision limiting the questions that may be raised in appeals in relation to charging orders. The effect of amendment 12 is that the correct subsection that creates the right of appeal is referred to in new subsection (3A).

I move amendment 6.

David Stewart: These amendments seek to further refine the appeals system to ensure that it cannot be used to frustrate the intended operation of the bill. They also clarify that local authorities do not need to wait until after the appeal period has elapsed to register a discharge.

The amendments are in line with my policy on appeals and, as such, I support them.

Amendment 6 agreed to.

The Deputy Presiding Officer: Amendment 7, in the name of the minister, is grouped with amendment 8.

Derek Mackay: Amendments 7 and 8, which comprise the last group, result from an amendment to the bill at stage 2.

New sections 46F and 46G of the 2003 act were added at stage 2 and make the new owner and former owner severally liable for the local authority's expenses when the building changes ownership.

The first of those sections, new section 46F, provides for the liability of the new owner. The second, new section 46G, provides for the continued liability of the former owner.

Amendment 7 makes it clear, in new section 46E(3), that although a registered charging order is enforceable by the local authority against the existing owner of the charged building, that is subject to new section 46F, which was inserted at stage 2.

The effect of new section 46F is that, where a building changes hands, in certain circumstances, a new owner is severally liable with any former owner of the building. That maintains safeguards...
for new owners who have acquired rights in relation to a charged building within 14 days of the registration of a charging order. New section 46E(4) also makes provision for certain circumstances in which a charging order is not enforceable. Amendment 8 removes new section 46E(4), which is no longer required due to the insertion of new section 46F at stage 2.

I move amendment 7.

David Stewart: As the minister explained, the bill was amended at stage 2 to clarify liability on the sale or purchase of a property where a charging order has been registered. Amendments 7 and 8 will ensure accurate linkage between new sections 46F and 46G and the pre-existing sections by adding a necessary cross-reference and removing an unnecessary provision. As they are consequential amendments, I am content to support them.

Amendment 7 agreed to.

Amendments 8 to 13 moved—[Derek Mackay]—and agreed to.

The Deputy Presiding Officer: That ends consideration of amendments.

Buildings (Recovery of Expenses) (Scotland) Bill

The Deputy Presiding Officer (John Scott): The next item of business is a debate on motion S4M-10335, in the name of David Stewart, on the Buildings (Recovery of Expenses) (Scotland) Bill.

I call the cabinet secretary to signify Crown consent to the bill.

The Cabinet Secretary for Training, Youth and Women's Employment (Angela Constance): For the purposes of rule 9.11 of the standing orders, I advise Parliament that Her Majesty, having been informed of the purport of the Buildings (Recovery of Expenses) (Scotland) Bill, has consented to place her prerogative and interests, so far as they are affected by the bill, at the disposal of Parliament for the purposes of the bill.

The Deputy Presiding Officer: Many thanks.

Now to the debate. I call David Stewart to speak to and move motion S4M-10335. Mr Stewart, you have 10 minutes or thereby.

14:42

David Stewart (Highlands and Islands) (Lab): It is with great pleasure that I open the debate. The bill was introduced on 30 October 2013, and stage 1 concluded with a parliamentary debate on 3 April 2014. The Local Government and Regeneration Committee considered the bill at stage 2 on 4 June, and today the Parliament debates whether to pass it. It is very much my hope that members will come together to welcome the bill and support it at decision time.

When I last stood in the chamber to talk about my member’s bill, it was known as the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill. A lot has changed since stage 1, including the bill’s title, but I believe that change is good. My bill now delivers a more comprehensive approach to local authority debt recovery, encompassing not just local authorities’ work in relation to defective or dangerous buildings under part 4 of the Building (Scotland) Act 2003 but their work under part 3, in relation to compliance and enforcement.

An estimated £4 million of debt has been accrued during the period for which charging orders have not been available to local authorities. As I explained in the stage 1 debate, prior to the 2003 act, local authorities relied on charging orders under the Building (Scotland) Act 1959 to tackle debt associated with dangerous buildings. However, when the 1959 act was repealed and replaced with the 2003 act, the charging order mechanism was not carried over, which left local
authorities with an increasing debt burden that needs to be addressed now.

Local authority debt recovery can be problematic for myriad reasons. A couple of examples that were given in evidence to the Local Government and Regeneration Committee at stage 1 demonstrate the diverse circumstances that can be encountered.

John Delamar, from Midlothian Council, talked about the
"deterioration of a chimney stack that is directly above a neighbouring single-storey property and above a public footpath right beside a bus stop”.

Because of the danger involved, there was a requirement for the local authority
"to fix the chimney by putting up scaffolding."

He explained that the owner on the first floor of the property with the deteriorated chimney stack was "happy to pay", whereas the person on the ground floor was not. He said to the committee:

"We are now in difficulties because the person on the ground floor, who had a business and other property, died, unfortunately. Therefore, we can no longer pursue the costs involved under our civil debt recovery methods."

Gillian McCarney of East Renfrewshire Council told us about an example from her area. She said:

“We have a site with an absentee owner—I believe that he lives in Antigua. The council has incurred substantial costs in keeping the building safe. We understand that the owner is in discussions with several people to buy the site, and we have to continually check to see whether it has been sold.”—[Official Report, Local Government and Regeneration Committee, 19 February 2014; c 3119.]

Both council officers noted the advantages that charging orders would have had in those situations—they would have helped them to recoup their expenses on the sale of the buildings concerned. I have no doubt that most councils will be able to recount cases in which charging orders would have made a difference.

Before I move on to discuss the main changes that were made at stage 2, I put on record my thanks to those who have helped to shape and develop the bill. In particular, I thank the Local Government and Regeneration Committee for its scrutiny of my policy, the Delegated Powers and Law Reform Committee for its continued scrutiny of the subordinate legislation powers and, of course, those who have worked diligently to support me prior to the bill’s introduction and through its parliamentary stages. I particularly thank Claire Menzies Smith from the non-Government bills unit and Neil Ross from the legal team for all the help and advice that they have provided. Last, but certainly not least, I express my gratitude for the assistance that I have received from the Minister for Local Government and Planning, Derek Mackay, and his officials.

When I set out on this journey, I very much doubted that my member’s bill would get beyond stage 1, let alone one day make it on to the statute book. I did not allow myself to believe that that would happen. I believe that it will now happen because politicians have decided to set aside their political differences to collectively address the problem of local authority debt recovery. Congratulations must therefore go not to me, but to the Parliament as a whole.

I want to focus on the main changes that arose from the stage 2 consideration. The bill was amended in three main areas: it was extended so that local authorities’ actions would be encompassed under sections 25, 26 and 27 of the Building (Scotland) Act 2003, and it was amended to allow variation of the term of a changing order and to provide clarification of the liability of owners.

At the start of my speech, I referred to the change to the bill’s title. The reason behind that change represents one of the most significant changes to the bill. Local authorities have other enforcement powers under the 2003 act and, in some instances, they have to undertake work when an owner does not comply with notices that are served on them under those powers. Those powers relate to building regulations compliance notices under section 25 of the 2003 act; continuing requirement enforcement notices under section 26 of the 2003 act; and building warrant enforcement notices under section 27 of the 2003 act. The bill was extended to provide local authorities with greater certainty that they would be able to recover their costs in carrying out their duties under those sections of the 2003 act.

Action under those sections might not be as common as local authority action in relation to dangerous buildings, but it is no less important that local authorities have access to appropriate cost recovery tools when they have to step in to undertake work for compliance, enforcement or safety purposes.

The second area of change relates to the fixed 30-year repayment term. During stage 1, it became apparent that a number of local authorities had concerns about the fixed 30-year repayment term, particularly for lower sums. I readily acknowledged those concerns, so I brought forward a package of amendments to enable local authorities to determine the number of annual repayments that an owner must pay. The bill now provides for local authorities to determine the number of annual repayments, which must be no less than five and no more than 30. As well as addressing the point about the size of the debt, that change allows local authorities to take into account the debtor’s ability to pay.
The third area that I wish to touch on relates to the liability of owners. During stage 1, local authorities expressed concern that a property might be sold or its ownership transferred before a charging order could be registered, and they suggested that a notice of liability might help in that respect. On further investigation, it became clear that the crux of the problem related to timing. It should be possible for a local authority to register a charging order very soon after work has been carried out. Local authorities should not view charging orders as a tool of last resort, as they may have viewed them under the 1959 act; rather, they should be proactive in using them to secure the debt.

In conjunction with the Scottish Government, I looked into the possibility of the registration of a notice of potential liability in advance of a charging order but found that that would serve only to create a layer of bureaucracy that would detract from the simplicity of the bill. It would also have incurred additional costs for local authorities.

However, I recognised that liability might become an issue over the longer term as a property changed hands, which is why I lodged an amendment to clarify liability by ensuring that those who seek to avoid their responsibilities cannot. It provides that the buyer of a property, where a charging order has been registered, is to be severally liable with the seller for any unpaid amounts due by the seller under the charging order.

I will mention briefly the subordinate legislation powers. The Delegated Powers and Law Reform Committee suggested that my bill should be amended to allow Scottish ministers to directly amend schedule 5A to the 2003 act to alter the form and content of a charging order, rather than leave the prospect of that being done by way of subordinate legislation. At stage 2, the Scottish Government decided to make use of existing powers under the 2003 act to prescribe the form and content of a charging order and a discharge. Therefore, my commitment to address the point has been somewhat overtaken, as it has been addressed by other means. I will leave it to the minister to explain the new subordinate legislation provision in section 1A.

The stage 2 process and today’s amending stage have been crucial to ensuring that the bill delivers an effective and modernised charging order mechanism for local authorities to recover from owners sums owed when local authorities have stepped in to carry out work under parts 3 and 4 of the 2003 act. Looking to the future and the bill’s implementation, I understand that the Scottish Government will be producing guidance to underpin the bill’s operation and that it will also prescribe the standard form and content of a charging order and a discharge to ensure consistency of operation across local authorities. The bill will come into force six months after royal assent.

I move,

That the Parliament agrees that the Buildings (Recovery of Expenses) (Scotland) Bill be passed.

14:51

The Minister for Local Government and Planning (Derek Mackay): It gives me great pleasure to contribute to the debate on the Buildings (Recovery of Expenses) (Scotland) Bill. I, too, thank all the relevant committees for their hard work and careful scrutiny of the bill. I also thank MSPs for their comments as the bill has progressed through Parliament, and express my thanks to the organisations that provided oral and written evidence, which has assisted us with our deliberations. I acknowledge the significant amount of work that Mr Stewart has done over the past four years or so to get the bill to this stage.

As Mr Stewart explained, his bill proposes considerable improvements to the existing enforcement powers for local authorities under the Building (Scotland) Act 2003. The bill will improve the recovery of expenses incurred by local authorities under parts 3 and 4 of the 2003 act by enabling a charge for the repayable amount to be registered against the title of the building concerned.

The bill as introduced was targeted at defective and dangerous buildings. I am extremely pleased that it now covers the other local authority enforcement powers under part 3 of the 2003 act on work resulting from statutory notices under sections 25, 26, and 27.

Under the Building (Scotland) Act 2003, local authorities must take action on buildings that they consider to be dangerous. That might be by taking urgent action to secure the building and the surrounding area, or it could mean getting the building repaired. In extreme cases, a local authority may decide to demolish all or just part of a dangerous building.

For a defective building, local authorities’ powers are discretionary, as is the case for their other enforcement powers. In all enforcement cases, when an owner has not carried out the work required by the relevant notice, the local authority can step in and undertake the works.

The enforcement powers allow local authorities to intervene—I hope that they will be more proactive in doing so—and, importantly, deal with immediately dangerous situations, stop buildings deteriorating and rectify building work that does not meet building regulations.
Normally, when the local authority becomes involved, the building owner will rectify any problems themselves but, as we know, that does not always happen. Where the local authority decides to step in and do the work in default of the owner, it can recover its costs, but normal debt recovery methods are sometimes proven to be problematic. Therefore, the lack of certainty of recovering its costs could influence whether a local authority decides to do the work in the first place.

The Government has acknowledged that the existing powers needed strengthening, and it has listened carefully to the views of local authorities. It is clear that any changes must include registration against the titles of buildings. That will alert future owners to any existing liabilities.

Last year, the Government included proposals for improved powers in the Community Empowerment (Scotland) Bill consultation, which took a slightly different approach from the bill as introduced by Mr Stewart and covered all the enforcement powers. In January, the consultation closed and the Local Government and Regeneration Committee took oral and written evidence on Mr Stewart’s bill.

The Government held a workshop with all local authorities to explore both sets of proposals. The common message from that workshop was that there should be strong support for improvements, that repayment terms must be flexible and that all enforcement powers should be covered. In fact, the Convention of Scottish Local Authorities went on to ask us to use Mr Stewart’s bill, because of timing and other factors, rather than the Community Empowerment (Scotland) Bill. Being the reasonable man that I am, I opted for that course of action. [Interruption.] As the First Minister said, the Government does not have a monopoly on wisdom, so I am delighted by the cross-party approach that we have taken. Judging from the banging of a table to my right, I think that we even have Conservative support in this new consensus between Labour and the Scottish National Party.

Taking on board all those comments, and having made the necessary provisions, we are delighted to give our support to Mr Stewart’s bill as amended at stage 2. There were 28 amendments at stage 2, four of which were lodged by Mr Stewart and 24 by the Government. They covered the key aspects that had been identified at stage 1, including flexibility in the number of annual payments, liability for new owners and widening the application of the bill to include local authority enforcement powers, as previously described. There were also technical amendments.

The Government lodged 13 amendments for stage 3 today. They were intended to provide clarification and to pick up some technical and minor changes following the stage 2 amendments. The stage 3 amendments sought to make it clear that a charging order can be made in respect of a building warrant enforcement notice only where that notice was served on the owner; that a charging order can be registered as soon as it has been made, without having to wait for any appeal to be made or be determined; and that new section 46F of the 2003 act, as introduced at stage 2, will operate as intended by removing inconsistent provision. That means that a new owner will not become liable if they acquire a right to the building within 14 days of the charging order being registered. I am delighted that those amendments have all been agreed to this afternoon.

I will now explain some aspects of the bill. The owner of a building is responsible for ensuring that their building is safe and in good repair. A local authority can step in and take emergency action on a dangerous building, or it can carry out work when an owner has not complied with a statutory notice. The bill allows authorities to make a charging order to help them recover their expenses from the owner. The order sets out the repayable amount, the appropriate number of annual instalments—between five and 30—and the date each year for payment. That allows the local authority to consider the repayable amount and the owner’s ability to pay when deciding on the number of instalments. The repayable amount that is due to the local authority includes construction-related expenses, any registration fees relating to the charging order, any administration expenses and interest—at a reasonable rate. The local authority must register the charging order in the appropriate land register, which creates the charge on the affected property.

The charging order provides that the repayable amount is to be repaid in annual instalments. However, an owner can still pay the debt in full at any time or, if the local authority agrees, they can redeem it by paying a lower settlement figure. At that point, the local authority must register a discharge of the charging order as soon as practicable in the appropriate land register.

The owner can appeal a charging order within 21 days of its being made, so it will not come into effect immediately. However, the owner may try to change ownership of the building and use the appeal mechanism as a stalling tactic. I believe that we have addressed a number of those issues in the course of the debate.

As I said earlier, the Government fully acknowledges that the cost recovery aspects of parts 3 and 4 of the Building (Scotland) Act 2003 should be improved. Enforcement is an important part of local authority work. It is at the core of
ensuring the safety of people inside and outside buildings and protecting the built environment. Local authorities must invest time and resources when owners do not fulfil their legal obligations, so it is important that they have certainty that they will be able to recover their costs and expenses.

The Government will update all relevant guidance in the online “Scottish Building Standards Procedural Handbook” and will continue working with all local authorities so that they are fully aware of the new provisions. I can assure Parliament that those pieces of new guidance will all be in place in time for commencement of the bill, six months after royal assent.

I urge Parliament to agree that the Buildings (Recovery of Expenses) (Scotland) Bill be passed.

14:59

Sarah Boyack (Lothian) (Lab): I thank my Labour colleague David Stewart for choosing to champion this issue. As members have seen this afternoon, for a minister in another party to have all the amendments that he has lodged accepted by the mover of the bill is not actually a usual occurrence in this place. I congratulate David Stewart on his commitment to the issue and on his success in steering his member’s bill through the committee and past the minister—and for enlisting us all in the process, as the issue is an important one.

The evidence sessions that the committee held were invaluable in teasing out the issues from a wide range of stakeholders, including in particular local authorities, which clearly experience a gap in their powers. In the current financial climate, it is important that local authorities do not subsidise repairs to buildings that should properly be carried out by their owners. I thank the committee for its work, and I also thank all the stakeholders who submitted evidence. I hope that the bill that we will pass this afternoon captures all the sensible contributions that were made in the Parliament.

My party is keen to support the bill, and I am politically and personally keen to support it not only because of my knowledge of buildings in the city of Edinburgh and the Lothians, but because of the impact that it will have across the country. The bill is important for the character of our towns and cities and for the quality of our built environment. We are all aware of the negative message that decaying, unlooked-after buildings send out in our local communities. They can have a social and an economic impact, and there is also the issue of safety that David Stewart mentioned. Buildings that are in disrepair and are not properly looked after can be exceedingly unsafe for both users and the public. Last night, I spoke in a members’ business debate on the Rana Plaza disaster, which is a tragic example of what happens when buildings are not looked after and are not used for the right purpose.

The bill is a practical piece of legislation and an important one. In my region of the Lothians alone, 46 dangerous building notices were issued in 2011-12—in just one year—so I very much welcome the practical provisions in the bill that will enable local authorities to recoup the costs of dealing with dangerous buildings.

The minister mentioned a couple of provisions that have changed between the initial proposals and the final bill that we will pass today. I particularly welcome the change on the 30-year payback issue, which has been addressed in the final bill. There should be scope for sensitivity to an owner’s circumstances, and local authorities should be able to address that. I flag up that issue because it was addressed in the equality impact assessment that accompanies the bill. It is particularly important for people on low incomes, who will now have a different opportunity to pay the bill on the sale of their property. The change to the attachment of orders to the property rather than the person is important in that respect.

The amendments that the minister successfully moved are also important. In particular, amendment 7 will prevent owners from dodging their liability and trying to ignore their responsibility for buildings that they have profited from. For that reason, it is good that we were able to amend David Stewart’s bill this afternoon.

At present there is about £3.9 million of outstanding debt and only 50 per cent of local authority costs are recouped. We need to address that. The bill will plug that gap and address the problem by ensuring that local authorities, which are currently cash strapped, will be able to recoup their costs from the owners who have benefited from owning the buildings. I hope that this afternoon, across the parties, the Parliament is sending out a message that we all believe that owners need to take proper responsibility for maintaining their properties in good order.

I reiterate David Stewart’s view that the provisions in the bill should be a last resort and not a first resort. I say that in the knowledge that, in Edinburgh, the statutory repairs notice has become a first resort rather than last resort for far too many owners, with negative consequences. Next week we will debate the Housing (Scotland) Bill and we will again strengthen the scope for local authorities to step in where individual owners will not pay their share. The two bills represent important and beneficial changes in legislation that aim to ensure that we have well-maintained, safe buildings.
I look forward to David Stewart's bill being passed today and to its becoming law, and I look forward to local authorities across the country being able to use the provisions in the bill in practical ways to improve the quality and safety of our built environment.

The Deputy Presiding Officer: I call on Alex Johnstone. You have five minutes, Mr Johnstone.

15:04

Alex Johnstone (North East Scotland) (Con): Thank you, Presiding Officer. Would that be a whole five minutes?

I begin by offering Cameron Buchanan’s apologies. He has been involved in the process of considering the bill in committee, but sadly he has been called away on personal business today. As a result, he has asked me to step in at the last minute. I was handed the papers and told that the bill is uncontroversial. That has happened before and I have seen it as a challenge, but on this occasion I assure David Stewart, whose bill it is, that I will try not to stir up unnecessary controversy.

In fact, I pay tribute to David Stewart. Guiding a member’s bill through the Parliament is a complex and difficult process that requires a great deal of effort on the part of the bill’s sponsor, and we should congratulate David Stewart on his achievement. I have never taken a member’s bill to completion but, many years ago, I produced a proposal for a bill that would have had the effect of requiring country-of-origin labelling for meat. I had several meetings on the subject and met Jim Walker, the then president of NFU Scotland. At a quiet moment during the meeting, he whispered to me, “Country-of-origin labelling would be a good idea but, to be honest, species-of-origin labelling would be just as useful.” That perhaps prefigured a story that hit the news some 10 years later and should encourage us to take a long-term view on a number of subjects.

The bill is an uncontentious piece of legislation that is ideally suited to being a member’s bill and will have a significant impact in many areas of Scotland. Nevertheless, we should be concerned about the subject of the legislation. We should always be concerned about the quality of the built environment, and safety is an issue when buildings in some of our town centres are in such a state that bits can drop off and do damage to people as they pass in the street. Sarah Boyack talked at length about her experience in Edinburgh. In many of our county and market towns, which were once prosperous but are now somewhat less so, buildings can often fall into disrepair. Given the difficulties in bringing together owners to achieve the objective of repair, it is important that local government has the powers of last resort to achieve what we want to achieve. The bill delivers the powers and the process. It delivers the opportunity for local government to ensure that the criteria are fulfilled, and it is a sound example of what the Parliament can achieve.

Looking at the general issues surrounding the process that we have gone through, we see that the bill has been uncontroversial. No member contested any of the amendments, and the bill’s sponsor and the Government minister and his department have worked together seamlessly to bring the legislation to fruition for the benefit of all. There are some days when the Parliament does not distinguish itself, but there are other days when, in an unspectacular way, it does. I think that this is one of the latter.

15:08

Kevin Stewart (Aberdeen Central) (SNP): I, too, pay tribute to Mr Stewart for his four-year struggle to get the bill to where it is today. Other members have talked about the co-operation that there has been between Mr Stewart, the Government, the parliamentary committees and others. One of the reasons why the process has been so successful is the fact that Mr Stewart entered it in a spirit of co-operation, with a great degree of gumption and a hell of a lot of civility. That is the way to push things forward.

We have heard about the £4 million or thereabouts of outstanding debt. However, throughout the country, there are buildings in a state of disrepair whose owners councils have to chase up on a regular basis, often failing to do so. As has been pointed out, owners may be anywhere in the world and can be difficult to contact. A witness spoke about an owner in Antigua, and a number of years ago, when I was a councillor, I was involved in a case in which the owner lived in Gibraltar and it was almost impossible to get that person to co-operate with the council.

We all know of buildings that blight communities across the country. I hope that the bill, as well as allowing councils to recover costs, will persuade owners who have allowed their properties to become derelict and unsightly to get on with the job of fixing them without councils having to step in to do so. As well as dealing with a difficulty, the bill might prevent some unscrupulous property owners from allowing buildings to go to wrack and ruin.

Unfortunately, buildings that have major historical significance and are part of our heritage are often left to rot. Probably the best example of that in my constituency at present are the Broadford works buildings, where there is planning...
permission to do a number of things. Time and again, however, there have been acts of fire raising, which have led to the buildings becoming more and more dangerous, and steps have to be taken to deal with that. There is probably not one member who could not name buildings in their patches that have suffered similar fates. Although the provisions on the recovery of costs are extremely worthy, I hope that the bill will also result in prevention.

We had good information from the folks who submitted evidence during the process. I know that David Stewart thought long and hard about what others said and amended the bill accordingly or agreed to amendments. As Mr Johnstone says, we can do things well if we enter into things in the spirit of co-operation and with gumption and civility. I pay tribute to Mr Stewart for approaching the bill in that manner.

15:12

Alex Rowley (Cowdenbeath) (Lab): I, too, congratulate David Stewart on bringing the bill through its stages and getting it here today. I pay tribute to the minister, Derek Mackay, and the Scottish Government for their approach to the bill and for taking it on board. That is a sign of the way in which we can work together in the interests of our communities and of Scotland. I hope that, once we get past the landmark date in September, regardless of the outcome, parties across the chamber will start to work much more closely together for communities and for Scotland. I also pay tribute to the convener of the Local Government and Regeneration Committee, Kevin Stewart, for the way in which the committee engaged with the minister and with David Stewart as the bill progressed.

With measures such as these, I always ask myself what they mean for my constituents. As Kevin Stewart said, all members could talk about buildings in their areas. When the bill first came to the committee, I talked about the former Crown hotel building on Cowdenbeath High Street, which is in a terrible state of dereliction.

The Scottish Government’s memorandum to the committee states:

“It is hoped that successful use of the new powers in the early years would give local authorities the confidence to be more proactive in dealing with defective buildings in the longer term. This may take some time and will need investment by the local authority from the start.”

The key point is that the bill will, we hope, allow local authorities to be more proactive. Cowdenbeath is the largest shopping area in my constituency and the former Crown hotel building sits at the end of the High Street blighting it. Despite continued pressure from local councillors and others, the council seems to think that it is powerless to act.

I met the council recently and asked whether it thought that it would be able to use the proposed new legislation to move things forward, and I wrote to the council last week. The council says that it will continue to put pressure on the building’s owners. I think that the bill will also put pressure on the council to act, so that the derelict building is pulled down.

At a time when the economy is starting to move and town centres are starting to see improvement, and at a time when local authorities are putting in more resources, it is important that the bill is used to force owners to take action and, if an owner fails to take action, to enable action to be taken on the owner’s behalf.

That is why I am pleased about the definition of “defective building”. The Scottish Parliament information centre briefing on the bill says:

“A defective building notice specifies particular defects in a building that must be rectified to bring it up to a reasonable state of repair for its age, type and location.”

An obsolete building on the edge of a major high street, which has no roof and has partly caved in, is a blight on the community and needs to be tackled, even if it is not a danger to the public.

I hope that the bill will help us in Cowdenbeath, and I hope that it will help communities throughout Scotland. I congratulate Mr Stewart on sticking in there and introducing his bill.

15:16

Roderick Campbell (North East Fife) (SNP): I congratulate David Stewart on having brought his member’s bill this far. I am not a member of the Local Government and Regeneration Committee, but I have read the bill with interest. I note that David Stewart is a man of many talents, which he displayed earlier this afternoon and last night, when I watched with interest the proceedings of the cross-party group on diabetes, which he convenes. He is a busy man.

It is fair to say that, from an architectural point of view, Scotland has a lot of history. Edinburgh, our capital, is an architect’s dream, with medieval buildings standing side by side with Victorian terraces, Georgian town houses, and modern homes, offices and retail outlets made from glass and steel.

Buildings are made from perishable materials and they begin to crumble over time. As David Stewart’s consultation paper pointed out, we are sometimes reminded of that in the most tragic circumstances. The case of Australian student Christine Foster, who was working in Edinburgh’s west end in 2000 when she was killed by falling
masonry, is a sad reminder that buildings in a poor state of repair can be fatal.

The fatal accident inquiry that followed the incident asked the City of Edinburgh Council to carry out

"an immediate audit of those buildings within the city thought to constitute a risk to public safety".

Next Saturday it will be exactly 14 years since Christine Foster was killed. We owe it to the many people who have been killed or who have suffered injury as a result of defective and dangerous buildings to ensure that the legislation that we design to prevent such incidents is robust and effective. I hope that the bill will play a part in that regard.

The Building (Scotland) Act 2003 gave local authorities powers to repair dangerous buildings, under sections 29 and 30, and to repair defective buildings, under section 28. As we know, if a building is considered to be dangerous to its occupants, a council must require the occupants to leave the building and can subsequently carry out any work that it deems necessary to make the building safe. Alternatively, the council may serve a dangerous building notice on the owner, if it does not intend to carry out repairs itself.

Likewise, a council can issue a defective building notice, requiring the owner of a defective building, which is defined as a building that requires repair to prevent significant deterioration of its fabric, to make repairs in a defined timescale.

It is of course the case that we are living in an age of huge financial constraint, if not austerity, and councils cannot possibly carry out a significant volume of building repairs without recouping the outlays that they incur in the process. David Stewart rightly pointed out that in that regard the 2003 act has not been effective. Charging order provisions under the 1959 act were not carried forward and the enforcement regime did not work as well as it might have done. Councils face significant monetary losses as a result of unrecovered debts.

I listened to Alex Rowley, and I note that Fife Council, in its submission on the financial memorandum, noted the lack of a proactive approach to defective buildings and said that there was a large repairs backlog to contend with. There are challenges.

It is true that perhaps the biggest barrier to councils exercising their powers to repair dangerous buildings are the legal difficulties that they face when it comes to recovering debts. I am pleased that the charging order provisions in section 1 of the bill will mark a significant improvement on the existing situation. Undoubtedly they will give more flexibility to the council and to the building owner with the aim of ensuring that the debt is repaid.

It is fair to point out that there was criticism of the initial 30-year repayment period and term of the charging order, and I am pleased that some flexibility was given to local authorities at stage 2. However, it must be the case that a gradual recovery over several years is far better than no repayment at all. I am also pleased by the amendments at stage 2 and at stage 3, the effect of which will be to encourage local authorities to register charges promptly. It must not be forgotten that arrangements can be made to allow charging orders to be discharged earlier.

I am pleased to support the bill at stage 3 and welcome its progress into legislation.
Anne McTaggart (Glasgow) (Lab): I am keen to contribute to the closing of today's stage 3 debate on the Buildings (Recovery of Expenses) (Scotland) Bill for the Scottish Labour Party. I, too, thank David Stewart for all his hard work in making these important proposals in the Parliament. Huge thanks are also due to the convener and members of the Local Government and Regeneration Committee, of which I am a member.

In response to the minister, Derek Mackay, I am pleased to note that the Scottish Government continues to broadly support the bill and I welcome his amendments. I agree that the majority of them were procedural and served to strengthen our shared aims.

Ultimately, the bill will provide the power for local authorities to carry out modifications on defective or dangerous buildings and pass the cost on to the owner of such a building. Sarah Boyack rightly raised the concern that local authorities are paying for repairs to derelict properties in times of budget constraints. That is unfair and unsustainable. The bill will help to address that issue and provide a commonsense answer to the question of improving our town and city centres.

I welcome the reintroduction of charging orders as a means of ensuring that the local authority is able to recover its expenses before the building changes ownership. To clarify, in cases in which owners fail to respond to the local authority's notice of liability that their residence is unsafe and must be altered—Sarah Boyack mentioned an owner in Antigua and I think my colleague on the committee Kevin Stewart mentioned one in Gibraltar—the bill will facilitate repayment for authorities that undertake the modifications.

David Stewart's member's bill amends the Building (Scotland) Act 2003 in order to introduce a more efficient and flexible cost-recovery process for local authorities. It grants local authorities the power to make charging orders that will attach to the properties in question and recover some of the outstanding debt when the property is eventually sold.

It creates flexibility in allowing property owners to negotiate with the local authority and possibly pay a reduced amount, which improves debt recovery rates, while also allowing for a settlement that is acceptable to both parties.

I believe that the bill will significantly increase rates of recovery of expenses from building owners, given that the current recovery rate is low, at only 50 per cent. By expanding cost-recovery mechanisms, the bill encourages local authorities to fix defective buildings preventively before the likely costs would increase.

Currently, there is a large disparity in how local authorities are issuing notices; certain councils issue a high number of notices each year while others issue very few or none. In addition, notices are issued per owner, not per building, so the number of notices issued per year does not necessarily account for the true number of buildings falling under the bill's jurisdiction. The bill will standardise the process.

The bill creates a provision for individuals to make appeals against incorrect charging orders, thereby establishing a mechanism of accountability for local authorities carrying out the repairs. I am reassured to note that the right to appeal against a charging order has remained an important part of the bill. I believe that its incorporation will serve to strengthen the process of recovering expenses from the building owners.

I have considered the contributions of most of the members who have spoken this afternoon—apologies to those I did not mention. I thank members for sharing their fine examples of how the bill will ultimately benefit our communities. I am confident that there exists a broad level of consensus on the aims of the bill. I believe that local authorities will find a way to exercise the new powers in a manner that reflects local priorities and improves the safety and aesthetics of our communities. I look forward to voting in favour of the bill.
approval of this year’s budget. Mr Stewart seized that moment of cross-party consensus to ensure that his bill was also supported by the Government. That is the inside track on the moment at which I surrendered to Mr Stewart, for all the very positive reasons that we have discussed.

The Parliament can be tribal, but there is absolutely a time to set aside our party-political differences. It does not matter whose name the bill is in, as long as the right bill is built and can deliver for the people of Scotland, and I believe that the bill will do that.

Alex Johnstone made very supportive comments on behalf of the Conservatives, and Kevin Stewart was absolutely right to touch on the power of prevention in the agenda. The bill will assist local authorities in that respect, with their building control function.

Alex Rowley is another bridge-builder in the Parliament in respect of what we can do when we work together, being pragmatic and using the powers that we have. He was absolutely correct: there are existing powers that local authorities could use for defective and dangerous and neglected buildings. However, the bill will give them the reassurance that they will be able to receive recompense for taking the necessary action on dangerous and defective buildings.

Alex Rowley posed an even more interesting point. Is that a sign of the post-referendum future, of the Labour Party and the SNP working together? Is it a sign of the brave new world of Scottish politics? Who knows what sort of coalition might come in future? Suddenly, the stock of some Labour members is not quite so high, but we would like to continue their consensual approach.

Public sector proactivity, even where there is private ownership, is very much required. I cite the Community Empowerment (Scotland) Bill’s ability also to tackle neglected and abandoned land and buildings. We have made quite radical proposals in that bill to give communities the right to take over land and properties that have been abandoned and neglected, using compulsion, along lines that perhaps Mr Rowley would support. I look forward to that bill making its way through the Parliament.

Roderick Campbell was absolutely right about costs to councils. Councils will be more proactive if they are certain that they will be able to have their costs recompensed. That is not just the cost of the work itself, but the costs of administration and any necessary interest charges, so that when the public sector takes action, it does not pay the price for private neglect.

First and foremost, this bill is about public and individual safety. We believe that its powers, with all the necessary amendments, will help to deal with immediately dangerous situations; allow the required interventions; stop buildings deteriorating; and rectify building work that does not meet building regulations. That is all very necessary.

That poses the question: why were some of those powers removed in 2003? I have had no satisfactory explanation of that. That is not a partisan point, but we will remedy that in a constructive way when the bill is passed, which I hope it will be.

The bill will give councils a mechanism to take correct and timely action with the confidence that they will be supported. That can also empower communities and raise the culture of expectation of public sector intervention when and where that is required. We know that the current normal civil debt recovery methods were problematic and had to be improved. Attaching the notice and charging order to the titles is exactly the right thing to do, as we know that that will be preventative and will, through the nature of conveyancing, clear up the responsibility of owners not to have that liability hanging around their neck for any future owner, unless that is by agreement.

There are enough appeal, flexibility and financial mechanisms to ensure that the approach is appropriate, proportionate and pragmatic. Ensuring that, through working in partnership with them, our local authorities are empowered to make the right interventions to keep the people of Scotland safe is absolutely the right thing to do.

I am happy once again to give the Government’s support to the bill.

15:34

David Stewart: I thank each and every member who has spoken in the debate. That is probably the first time that I have ever said those words in the Parliament over the past seven years, but I am very grateful for the personal support that I have been given and the support that has been acknowledged from the Minister for Local Government and Planning, the Delegated Powers and Law Reform Committee and every single member who has provided advice and support. Again, I flag up the help that I have received from the non-Government bills unit, the legal team and everyone else involved. Without that support, which is not available at Westminster, it would be impossible to achieve a successful member’s bill.

If we need one reason to pass the bill today, we have only to look back to what happened in Glasgow last week, when masonry from a sandstone building collapsed on to a street. That brings the bill into sharp focus. One of the bill’s main drivers is to provide local authorities with a greater assurance that they will recover their
dangerous building costs. With that, I hope that councils will have more confidence to tackle high-
level defective buildings or borderline dangerous buildings earlier—which will be less costly and will
preserve the value and structure of properties—
rather than have to deal with more dangerous
buildings in the longer term.

I make no apologies for referring again to the
statistics, which show that instances of action
without notice under section 29 of the 2003 act—
the most urgent action—more than doubled from
402 in 2010-11 to 992 in 2011-12. That clearly
demonstrates the need for local authorities to have
effective cost-recovery tools at their disposal.

Steering the bill through the Parliament has not
been altogether straightforward. Ordinarily,
financial issues cause some concern in relation to
a member’s bill, but the bill achieves a lot for very
little. It could be described as a bill that punches
above its weight.

It was more the technical vagaries that made
the process more difficult. Although I developed
the bill on the basis of existing relevant statutory
frameworks, local authorities’ approach to debt
recovery can vary. However, as a result of the
parliamentary process and with the Scottish
Government’s support, the bill does more than just
recreate what went before in the 1959 act; it
creates a modern version of a charging order that
local authorities can use in their building
compliance, enforcement and public safety work
under the 2003 act.

Members have made excellent and informed
speeches. I appreciated Derek Mackay’s positive
comments and Sarah Boyack’s comments, given
her background in planning, her knowledge of
Edinburgh and the Lothians, her strong knowledge
about the quality of the built environment and her
understanding of the bill’s practical provisions.

I emphasise that the bill is not just about local
authorities. Charging orders will be of great benefit
to owners on a low income, such as those who are
retired and are staying in a larger house after their
family have left.

We all know that the debt across Scotland is
running at about £4 million, which is a horrendous
sum.

I was bemused when my colleague Alex
Johnstone—is he paying attention? [Interruption.] I
was bemused when he talked about being
uncontroversial and I wondered whether he was
the same Alex Johnstone as I know. Nevertheless,
he ended on a positive point about bringing the
Parliament together. I share his view on the wider
philosophical point. Kevin Stewart also made a
statesmanlike comment about the spirit of co-
operation. We can do more together.

Alex Rowley has great knowledge of local
government from his experience in Fife. He gave
good examples from that area and I praise the
work that he has done not only as an MSP but as a
prominent councillor for many years.

Roderick Campbell is a knowledgeable
advocate who has a tremendous understanding of
the issue. He referred to the tragic case of
Christine Foster and I acknowledge the points that
he made. I thank Anne McTaggart for her
comments about standardisation across Scotland.
That will be very important in the longer term.

I will quickly run through the advantages of
charging orders, which are crucial. They add to
the local authority cost-recovery toolkit to deal with
large and small repayable amounts. They secure
the debt over the property, which creates a priority
for the debt that it would not have as an ordinary,
unsecured debt.

A point that has not been made is that provision
is included to recover expenses that are incurred
over and above the basic cost of undertaking the
work. Local authority administrative costs,
registering and discharge fees and interest are all
things that can be added to a charging order.

As the order is against the property, it avoids the
need to pursue an individual in the civil courts. As
members will know, that is not always successful
and can be time consuming and expensive. It
might also not be a viable option—that depends
on the sums that are involved and being able to
trace the owner, whether they are in Antigua or
elsewhere.

A charging order provides a greater guarantee
of the costs that are to be recovered. It enables a
local authority to determine the number of annual
instalments while—as Sarah Boyack said—taking
into account the person’s ability to pay.

The bill will act as an incentive that will make
those who are liable pay, rather than incurring the
additional costs. The normal requirement to clear
the charging order prior to the sale or transfer of
the property will give an incentive for property
owners to make payment of the outstanding sums
to facilitate a sale.

The introduction of several liability means that
an owner cannot avoid their responsibilities. It is
likely to be much better to have had repairs carried
out and a charging order placed, than for a
property to fall into further disrepair, which is a
problem not just for the owner, but for their
neighbours and the value of property in the street
in question.

Charging orders have an advantage in that their
existence, and the sums to be charged, are easy
to establish from the land register at the point of
sale.
In conclusion, the bill is a first for the current session of the Parliament as it is the first Opposition member's bill to reach this stage in the parliamentary process. A fair wind at decision time will mean that it is a first for me too, as I have attempted on a few occasions, as an MP at Westminster and as an MSP here, to promote a member's bill.

With great pleasure, I commend to the Parliament the Buildings (Recovery of Expenses) (Scotland) Bill. [Applause.]

The Deputy Presiding Officer: Well done.
Decision Time

The Presiding Officer: The next question is, that motion S4M-10335, in the name of David Stewart, on the Buildings (Recovery of Expenses) (Scotland) Bill, be agreed to.

Motion agreed to,

That the Parliament agrees that the Buildings (Recovery of Expenses) (Scotland) Bill be passed.

The Presiding Officer: The Buildings (Recovery of Expenses) (Scotland) Bill is passed. Congratulations, Mr Stewart.

Meeting closed at 17:06.
Buildings (Recovery of Expenses) (Scotland) Bill
[AS PASSED]

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Buildings (Recovery of Expenses) (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to amend the Building (Scotland) Act 2003 to provide for expenses incurred by local authorities in connection with notices served or work carried out under that Act to be recovered by way of charging order.

1 Expenses recoverable using charging orders

The Building (Scotland) Act 2003 (asp 8) is amended as follows—

(a) in section 44—

(i) at the end of subsection (1) insert “or makes a charging order under section 46A”,

(ii) at the end of subsection (2)(b) insert “or the whole of the repayable amount due under the charging order”,

(b) after section 46 insert—

“Charging orders

46A Charging orders

(1) A local authority entitled to recover any expenses under section 25(7)(b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3) or 30(4)(b) that are qualifying expenses may make in favour of itself an order (a “charging order”)—

(a) specifying the building concerned and the repayable amount calculated in accordance with section 46C, and

(b) providing that the building concerned is charged with the repayable amount.

(1A) A charging order, and a discharge of a charging order, are to be in the form prescribed under section 36.
### Qualifying expenses

(1) Qualifying expenses are expenses recoverable by a local authority under section 25(7)(b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3) or 30(4)(b) and which relate to—

(za) a building regulations compliance notice under section 25(3) served after the commencement of this section,

(zb) a continuing requirement enforcement notice under section 26(2) served after such commencement,

(zc) a building warrant enforcement notice under section 27(2) relating to a building served on the owner of the building after such commencement,

(a) a defective building notice under section 28(1) or, as the case may be, a dangerous building notice under section 29(6), in either case served after such commencement, or

(b) notice under section 29(3) or, as the case may be, works under that section without notice, in either case given or carried out after such commencement.

(2) Where a charging order is made in respect of expenses incurred by a local authority in demolishing a building, references in this section, section 46A and sections 46C to 46G to a building are to be read as references to the site of the demolished building.

### Repayable amount

(1) The repayable amount is the lower of—

(a) the total of the qualifying expenses and any sum recoverable under subsection (2), and

(b) any amount determined by the local authority.

(2) A local authority may, in addition to any qualifying expenses, recover from the owner of the building concerned—

(a) the amount of any fee payable in respect of registering a charging order or the discharge of a charging order,

(b) any administrative or other expenses incurred by it in connection with the charging order or discharge, and

(c) interest, at such reasonable rate as it may from time to time determine, from the date when a demand for payment is served until the whole amount is paid.

(3) The local authority must determine—

(a) the number of annual instalments, being no fewer than 5 and no more than 30, in which the repayable amount is to be paid, and

(b) the date in each year on which the instalment becomes due.
46D Core terms of charging orders, repayment and discharge

(1) A charging order must provide—

(a) that the repayable amount is payable in the number of annual instalments and on the date in each year determined under section 46C(3),

(b) that in default of such payment each instalment, together with any amount recoverable in respect of that instalment under section 46C(2)(a) or (b), is to be separately recoverable as a debt, and

(c) that if immediately after the final instalment falls due any balance of the repayable amount remains unpaid, that balance is immediately due for repayment and is recoverable as a debt.

(2) The owner of any building subject to a charging order may at any time redeem the repayable amount early by paying to the local authority the repayable amount in full or such lower sum as the owner may agree with the local authority.

46E Registration

(1) The local authority must register a charging order in the appropriate land register.

(1A) A charging order may be registered in any period during which the order is of no effect by virtue of section 47(4).

(2) On the registration of a charging order, the charge specified in the order is created in respect of the building specified in it.

(3) A registered charging order is enforceable at the instance of the local authority against the owner of the charged building (but subject to section 46F).

(5) The local authority must register a discharge of a charging order in the appropriate land register as soon as reasonably practicable after it has received—

(a) payment in full of the repayable amount, or

(b) a sum redeeming the repayable amount under section 46D(2).

(6) On the registration of the discharge of a charging order, the charge specified in the order is discharged.

46F Liability of new owner for repayable amount

(1) Subsection (2) applies where—

(a) a charging order is registered in respect of a building, and

(b) the order was registered at least 14 days before the date on which a person (the “new owner”) acquires right to the building.

(2) The new owner is severally liable with any former owner of the building for the repayable amount for which the former owner is liable.
46G Continuing liability of former owner
(1) An owner of a building who is liable for the repayable amount does not, by virtue only of ceasing to be such an owner, cease to be liable for the repayable amount.

(2) Where, in relation to a building, a new owner (within the meaning of section 46F(1)(b)) pays the repayable amount, or any part of it, for which a former owner of the building is liable, the new owner may recover the amount, or the part of it, so paid from the former owner.

(3) A person who is entitled to recover an amount under subsection (2) does not, by virtue only of ceasing to be the owner of the building, cease to be entitled to recover that amount.

46H “Register” and “appropriate land register”
(1) In sections 46C to 46F, “register” in relation to a charging order or a discharge of a charging order, means register the information contained in the order or discharge in the Land Register of Scotland or, as appropriate, record the order or discharge in question in the Register of Sasines; and “registered” and other related expressions are to be read accordingly.

(2) In section 46E, “appropriate land register” means the Land Register of Scotland or the Register of Sasines.”,

(c) in section 47—

(i) in subsection (1), after paragraph (g) insert—

“(h) any charging order made under section 46A.”,

(ii) in subsection (3), for the words “or notice” in both places where they occur, substitute “, notice or order”,

(iii) after subsection (3) insert—

“(3A) On any appeal made by virtue of subsection (3) in relation to a charging order made under section 46A, no question may be raised which might have been raised on an appeal against the original notice or decision requiring the execution of the works to which the charging order relates.”,

(iv) in subsection (4), for the words “or notice” substitute “, notice or order”.

1A Ancillary provision
(1) The Scottish Ministers may by order make such supplementary, incidental, consequential, transitional or transitory provision or savings as they consider appropriate for the purposes of, in consequence of, or for giving full effect to any provision of this Act.

(2) An order under this section may modify this or any other enactment.

(3) An order under this section containing provision which adds to, replaces or omits any part of the text of an Act is subject to the affirmative procedure.

(4) Otherwise, an order under this section is subject to the negative procedure.
2 **Commencement**

(1) This section and section 3 come into force on the day after Royal Assent.

(2) The remaining provisions of this Act come into force at the end of the period of 6 months beginning with the day of Royal Assent.

3 **Short title**

The short title of this Act is the Buildings (Recovery of Expenses) (Scotland) Act 2014.
Buildings (Recovery of Expenses) (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to amend the Building (Scotland) Act 2003 to provide for expenses incurred by local authorities in connection with notices served or work carried out under that Act to be recovered by way of charging order.

Introduced by:  David Stewart
On:  30 October 2013
Bill type:  Member's Bill