Justice Committee

Inquiry into the effectiveness of the provisions in the Title Conditions (Scotland) Act 2003

Written submission from Glasgow Factoring Commission

1. In 2012, I was asked to chair the Glasgow Factoring Commission at the request of Gordon Matheson, Leader of Glasgow City Council. This unique initiative gives everyone involved in property management in the city an opportunity to raise issues not just on factoring but the whole spectrum of repair and maintenance of private properties, and to make suggestions as to how relevant parties can work together. One of the objectives of the Commission is to gather information which may be relevant to the current legal framework governing private housing in Scotland, and it is hoped that our findings will prove of value to the Scottish Government.

2. I am grateful for the opportunity to give evidence on the operation of the Title Conditions (Scotland) Act 2003, which is an important element of the legal framework relating to the management and maintenance of common residential properties.

3. I believe that this is especially relevant to the Scottish Government today because the Commission is also aiming to inform the debate about the types of issues being uncovered in Glasgow, which should lead to the wider development of best practice across the sector.

4. I should say at the outset that the Commission has not completed its deliberations. We are nearing the end of the phase of taking evidence, but have already collated a large number of responses and witness statements. At time of writing, we are entering a phase of summarising and agreeing key findings and possible recommendations, but are not yet in a position to release this material. Therefore in relation to the testimony below, it is important that the Justice Committee is aware that it relates to questions in relation to the existing legal framework which have been raised with the Commission and may not reflect the full range of opinion of members of the Commission or the full range of its deliberations.

5. The Commission has already taken evidence around the legal arrangements in respect of title and how this may be directly or indirectly complicating the route to the resolution of disputes between owners and factors, and between owners who wish to improve and conserve properties and owners who are either unable or unwilling to contribute. The main recurring theme in the evidence received to date regarding title conditions has been that existing arrangements in relation to responsibility clauses in title deeds appear to make it very difficult, if not impossible in some situations, for owners and factors to obtain consensus in order to proceed with necessary works.

6. Witness evidence has highlighted that ‘switching factors’ appears to be another element affected by the legal framework that owners find complex, onerous and expensive to achieve.
7. We have heard that the legal position on title which governs appropriation of repairs costs between owners has been thrown into sharp relief as a result of the changing patterns of tenure emerging in Glasgow. This is having a significant negative effect on the local authority’s ability to meet the requirement for statutory repairs and improvement to protect valuable housing assets by bringing all privately owned property up to the highest external and internal standards.

8. In Glasgow over just two years, the number of privately rented properties has increased by around 10,000 units, with a corresponding reduction in owner occupied stock. There was also a significant increase in private renting through “buy to let” in the period leading up to the credit crunch in 2008, which is having very real negative consequences for owners where there is no prospect of absentee or bankrupt owners paying their share of outstanding (and future) maintenance costs and factoring fees.

9. Local authorities have responsibility for managing the budgets for support to private owners. In Glasgow, for example, the grant allocation for Private Sector Housing Grant (PSHG) schemes in 2011/12 settlement was £9.4m, but has been reduced to £8.36m for 2012/13 and is currently set at £7.98m for 2013/14. This grant is principally aimed at upgrading Below Tolerable Standard properties built before the First World War. There are heavy demands on this budget to pay for voluntary schemes, statutory requirements such as installation of fire escapes, and a growing demand for Care and Repair and disabled adaptations.

10. However, the allocation to do all of this is literally a “drop in the ocean” compared to the scale of the growing problem in particular pockets of the city where multiple occupancy, absentee landlordism and anti-social behaviour have been accelerating. This is mainly as a result of the move away from owner occupation to private renting with a focus on short term lets to generate income for the absentee owner. There is an increasing prevalence towards renting to vulnerable households and migrant workers. Often there is hidden multiple occupancy. The very real consequence of these activities is not just the loss of responsible owner occupiers, but a growing problem of ill health especially for children and elderly people as a direct result of poor internal conditions, water ingress and other issues relating to hygiene – in other words, the possibility that the very problem we thought we had eradicated in the 1960s through the slum clearance programme is returning in another form.

11. The exponential growth in private renting in the city means that its enforcement officers and inspectors are constantly playing catch up. At the last count, there were over 30,000 registered private landlords in the city, renting out over 40,000 properties. There are some 70,000 private properties built before 1919, at least 10% of which are classified as failing the Tolerable Standard, and in spite of the fact that around one third are owned by registered social landlords, this still leaves a substantial number where mixed ownership is now the norm. Traditional properties which benefitted from roof renewal and stone cleaning in the 1980s may need to be revisited simply because of the turnover in ownership leading to failure of agreement on carrying out basic maintenance, and the corresponding demise of common factoring arrangements over the last 30 years. Existing legal arrangements...
for local authorities to provide the “missing share” appear to be appropriate, but the scale of the problem is so great that no local authority can reasonably be expected to bridge the gap between identified need and actual current Public Sector Housing Grant (PSHG).

12. The Commission has heard that that the current legal arrangements in respect of Title were produced in good faith at the time and were an attempt to bring the law of the tenement into the 21st Century. However, political focus in the late 1990s and early 2000s in respect of housing policy was on large scale stock transfer and raising of standards within the public and housing association sectors, with less emphasis on the condition of private sector stock. These social rented issues appear to have been comprehensively addressed and systems are in place to protect and conserve mainly post 1919 social rented housing, where title generally appears to be less complex and where there appears to be adequate resources to fund grants for owners. There are exceptions - the Commission has heard that there are still situations where a majority obstruct repairs or improvements, e.g. where a social landlord’s property is the minority share.

13. In relation to the staggered amendment process to existing law in relation to property in mixed ownership, the Commission has heard that the current range of acts of parliament and other regulations and orders relating to private property have been developed on a less structured and occasional basis over a period of time and tend to deal with only a small number of fairly technical issues. The legal framework is complex and is too daunting for owners to navigate their way through.

14. What this suggests is that owners, factors, self- factors, property managers and other parties such as private landlords and housing associations may need to take legal counsel in order to interpret these various pieces of legislation. This is especially true in the older private sector, but increasingly in relation to recently built large scale flatted developments along the River Clyde frontage and on inner city brownfield sites. It is also now apparent that there are issues relating to title where new development is being constructed on vacant land adjacent to existing properties. The Commission therefore may argue for a rationalisation and simplification of the various property laws operating in Scotland which addresses the very significant changes which have been outlined above.

15. The Justice Committee has already received detailed written commentary from a wide variety of directly affected parties on the operation of the Title Conditions (Scotland) Act 2003. I do not intend to address this in detail, but would bring the Committee’s attention to two specific matters which have arisen in the course of the Commission’s enquiry.

a) On “related burdens”, where adjacent properties (usually whole tenement closes) are jointly responsible for common repairs to each tenement, but one close is well maintained and the other is deteriorating, it can lead to a stalemate when expensive repairs are necessary.

b) On data protection, the view of the Office of Fair Trading that contact details should be given for the purpose of “lobbying” is of great interest. It would be logical to allow contact details to be given of owners who have chosen not to
pay for common repairs. Factors tell us that they are bound by the Data Protection Act to refuse this information, yet it is reported to the Commission as a major cause of failure to agree repairs as other owners obliged to supply the deficit cannot recover their outlay, or even try to resolve or discuss the matter with the owner in question. The loophole should be addressed in the Act. s70 is not broad enough.

16. The Factoring Commission’s main focus has, to date been on gathering a large cross section of views both on the day to day operation of factoring in the private, public and voluntary housing sectors, and on non-factored property, with a focus on barriers to good management and maintenance. Our experience is that there is within the law, a strong presumption of upholding of individual rights. The Commission may come to the conclusion that the time may be right to review the balance between individual rights (as enshrined in the legislation) and addressing the immediate problem for individual owners who are denied the right to carry out necessary works which will protect valuable buildings and associated heritage value, save considerable cost or even demolition.

17. The Commission has considered how other nations have addressed this issue. The Republic of Ireland has recently introduced the Multi-Unit Development Act 2011 designed to address short comings in legal structures used in multi-unit development. The model in use here is designed to lock all new purchasers into management agreements and funding of common areas. For example, when a buyer purchases a property in any multi unit development, the buyer signs a lease contract setting out the legal responsibilities and obligations, as well as those of the developer and the “Owners’ Management Company” (OMC). The OMC is part of the agreement and the purchaser automatically becomes a member of the OMC and is therefore bound by its rules. In the Scottish context, there is a possibility that this could be introduced for all new developments, but this would still leave a very large majority of properties labouring under the current more complex system.

18. In the longer term, property law and the need to address the pressing necessity of property repair to ensure the sustainability of the private housing stock has a bearing on the success of other government policies such as reduction of carbon emissions through energy management schemes. (Insulation is pointless if the roof needs repair)

19. Review of the Titles Act should take into account existing related statutes, such as the Tenement (Scotland) Act, without weakening the intentions of the law. A concern about the Titles Act and other legislation would arise if they were to invalidate existing satisfactory arrangements in title deeds. Property law should enable, rather than hinder the way that the long term sustainability of all private housing stock is managed and protected for this and future generations. If part of the Government’s agenda is a change to a co-ordinated property law, with clear guidance which reflects the law and does not modify it (a source of confusion), it is likely to receive widespread support.