

TENEMENT LAW: COMPULSORY OWNERS' ASSOCIATIONS

KEY ISSUES

Form of the Compulsory Owners' Association (COA)

1. The COA is intended to be an entity with legal personality, but the nature of that entity must be determined. An owners' association established as part of a development management scheme is an obvious option, but others may be considered. Account should be taken of the complexity, cost, transparency and potential insolvency and tax implications of the form chosen. It should also be borne in mind that the creation, operation, regulation and dissolution of types of business associations is a matter reserved to Westminster under schedule 5 to the Scotland Act 1998, meaning that any recommendation to introduce a new form of body corporate is likely to require legislation by that Parliament. Further analysis of the boundaries of the Scottish Parliament's legislative competence in relation to the proposal will be required, however.

2. Depending on the form ultimately chosen, consideration should be given to whether the COA should be regulated by the Property Factors (Scotland) Act 2011.

Creation

3. The interim recommendations of the Scottish Parliamentary Working Group on Tenement Maintenance ("the working group") suggested that COAs should be created by force of statute, but the final report was less definitive on this point and human rights issues may arise. If the COA is not created by statute, who will be responsible for setting up the COA and how will this be enforced?

Membership

4. The policy intention is for every owner of any part of the tenement to be a member of the COA, but thought must be given to how owners can be identified and contacted, and to the position of others who may have an interest such as heritable creditors.

Powers and duties

5. Statute must provide a set of powers available to the COA and consider the extent to which these powers should be variable by agreement amongst members or in the title deeds. It must also set out the duties imposed on COAs in connection with the proposed inspection reports and reserve funds, and consider any other duties owed by the COA to members (for example, reporting requirements). The rights and duties of owners towards the COA must also be considered. These questions may be addressed to some extent by the form taken by the COA.

Operation

6. The Working Group report envisages that COAs should be required to hold, at a minimum, an annual meeting. Legislation must make provision for how such meetings are to be organised and run, including provisions on voting and notification requirements. Legislation should also consider processes for decision-making and reporting outside of the annual meeting. By what mechanisms may members participate if they are, for example, companies or Registered Social Landlords? Should provision be made to enforce participation (or penalise non-participation) and if so, how?

7. Thought must also be given to: (i) whether and how decisions can be appealed or otherwise challenged; (ii) whether minority protection rules are required, and if so, in what circumstances; (iii) what form of dispute resolution may be most appropriate for COAs.

Enforcement

8. The Working Group looked at possible enforcement options available to the COA where a member fails to comply with an obligation to contribute to the building reserve fund or otherwise to the cost of works, with one suggestion being registration of a form of charge (security) against the relevant owner's property, allowing for the debt to be repaid from the proceeds of the property when it comes to be sold. Consideration must be given to the detail of how such a charge may be created and exercised, including questions of ranking. Other enforcement mechanisms may also be considered.

Insolvency and termination

9. The COA is intended to have the power to enter contracts, and as such is at risk of becoming insolvent. Thought must be given to what insolvency processes, if any, should be available to a COA which finds itself in this position. Similarly, it may be necessary for a COA to be brought to an end, for example if the tenement is demolished and the land sold. Legislation must provide for an appropriate termination/winding up procedure and distribution of assets.

COAs with incapacity

10. Where a COA is incapable of functioning due to non-participation of members, the Working Group report recommends that a factor should be appointed to exercise the powers of the COA on its behalf. The legislation should provide for this outcome, including provision on who has the power and/or the responsibility to appoint a fallback factor, and the process by which this can be done. A power to appoint a fallback factor would, however, require consideration of what would happen if no commercial factors were willing to take on the management of a building.



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Exemptions

11. Questions arise as to whether certain tenements may be exempt from the requirement to have a COA, for example where the tenement is composed of two flats only, where all the flats are owned by the same person, or where a DMS is in place which covers the tenement as part of a broader development. Consideration should be given to which forms of exemption, if any, are appropriate bearing in mind the policy goals underlying the introduction of COAs.

Challenges

12. There are two overarching and interconnected challenges to the introduction of new legislation dealing with the issues outlined above. First, many tenements in Scotland are subject to title conditions regulating how repairs and maintenance are undertaken. It is necessary to determine how COA rules will interact with these conditions. If COA powers are variable to any extent, can existing conditions operate to vary those rules? If COA powers are not variable, are existing conditions to be suspended or terminated? How can these changes be reflected on the Land Register?

13. Second, the introduction of COAs will engage the rights of flat owners under Article 1 of the First Protocol to the ECHR, and may also engage other rights including Articles 6 and 8. As our reform proposals are developed, consideration must be given to the human rights implications to ensure that any legislation ultimately recommended to government is Convention compliant.

Consequential amendments

14. The project will have to keep under review the need for consequential amendments to legislation other than the Tenements (Scotland) Act 2004 due to the introduction of COAs.