This is a preliminary paper only and does not represent the views of the Scottish Law Commission

DISCUSSION PAPER ON TENEMENT LAW: COMPULSORY OWNERS' ASSOCIATIONS
EXECUTIVE SUMMARY

Introduction

1. The Scottish Law Commission has published its Discussion Paper on Tenement law: compulsory owners' associations, which explores the establishment of compulsory owners' associations for tenement buildings in Scotland.

2. A tenement is any building made up of at least two flats divided from each other horizontally and intended to be in separate ownership. Modern apartment buildings, high flats and converted villas all fall within this definition, along with traditional Victorian sandstone tenements and others. A lack of maintenance and improvement works to the fabric of these buildings over the years has left many tenements in a state of disrepair.

3. In March 2018, a Scottish Parliament Working Group was convened to explore what actions could be taken to improve the condition of Scotland's tenements. The Working Group consisted of various individuals and organisations with expertise in building maintenance and management, together with a cross-party set of MSPs. The Working Group made a number of recommendations for changes in legislation and practice, one of which was that every tenement building should have an owners' association (OA) to coordinate work to the building. The owners of all the flats in the building would be members of the OA, which would have legal personality and be able to enter contracts in its own name.

4. On 10 January 2022, the Scottish Law Commission received a reference from the (then) Cabinet Secretary for Social Justice, Housing and Local Government (Shona Robison MSP) under the Law Commissions Act 1965. The reference asks us to make recommendations to implement the Working Group's recommendation that all tenements should have an owners' association. The Discussion Paper which we have now published sets out our provisional proposals for changes to the law. It seeks views on those proposals as well as a number of related questions.

5. Consultation on the paper runs until 1 August 2024, and information on how to respond can be found at the end of this summary. The results of that consultation will be drawn on to produce a Report setting out the Commission's final recommendations to the Scottish Government on the reforms required to implement the Working Group's recommendation. The Report will be accompanied by a draft Bill, encapsulating the recommendations in the form of legislation. The Report and draft Bill are anticipated in 2026.

Background to the Discussion Paper

6. The Working Group mentioned above set out three primary recommendations for action to improve the condition of tenement buildings:

- a requirement for tenements to be subject to a building condition inspection every five years;
- the establishment of compulsory owners' associations; and
- the establishment of building reserve funds.

7. The essence of the second recommendation is that the owner of every tenement flat in Scotland should be required to enter into an association with the owners of the other flats in the same building. The key purpose of the OA would be to manage maintenance and repair of the building fabric.

8. The Working Group described some key features of the proposed OAs as follows:

- the OA would have legal personality which would allow it, among other things, to enter into contracts;
- the OA would be required to hold an annual meeting, which would prevent absent or apathetic owners holding up repairs;
- the OA would have the ability to control an annual repair plan and budget;
- the OA would be empowered to delegate certain rights and responsibilities, including the right to pursue non-paying owners, to a manager.

9. Our project aims to set out an appropriate legislative basis for implementing this recommendation.

Issues for consideration

10. The Discussion Paper is made up of 14 Chapters. The content of the first 13 Chapters is summarised below. The final Chapter provides a list of the consultation questions asked in the earlier Chapters.

Chapter 1 – Introduction

11. In this Chapter, we outline the recommendations of the Working Group. Our project is concerned only with the establishment of OAs and does not address the Working Group's other recommendations.

12. We discuss the policy background to the project and outline the broader context of housing reforms being explored by the Scottish Government, including the *Housing to 2040* strategy, its proposed universal housing standard and the Heat in Buildings strategy.

13. We explain potential difficulties with the competence of the Scottish Parliament to legislate for the introduction of OAs, looking particularly at the reservation of competence to the Westminster Parliament to legislate for "business associations" in Section C1 of Schedule 5 to the Scotland Act 1998.

Chapter 2 – Current law

14. In Chapter 2, we provide an outline of the current law in relation to maintenance of tenement buildings. This is contained principally in the Tenements (Scotland) Act 2004. Most tenement buildings are owned in parts. Generally, each flat in the building will be owned by a different person or people. However, other parts of the building – particularly the close, stair and/or lift – will be in shared ownership of all the flat owners. The question of who owns which parts of the building in any individual tenement will be determined by the titles to the flats in the building.

15. The 2004 Act imposes certain duties on flat owners in relation to maintenance of parts of the building which they own, including those parts in respect of which ownership is shared. Other maintenance duties on flat owners may arise in terms of conditions, known as "real burdens", set out in the flat titles.

16. The flat titles may set out rules on how decisions can be taken to carry out maintenance or repair work to parts of the building, and how the costs for those works should be divided amongst the flat owners. However, it is often the case that the titles do not provide clear answers to these questions. This is a particular problem in relation to "scheme property", meaning parts of the building which are strategically or structurally important such as the roof, walls and foundations. Where the titles are silent or incomplete on such matters, the rules of the Tenement Management Scheme (TMS), set out in the first Schedule to the 2004 Act, will apply. This Chapter outlines the provisions of the TMS, explaining key rules including what constitutes scheme property, how decisions can be made to carry out work to scheme property, and how scheme costs are allocated.

17. This Chapter goes on to discuss the Development Management Scheme (DMS). This is a model management scheme designed principally for use by developers constructing new housing developments, which may include tenements. The DMS sets out rules on how maintenance of shared areas within the development are to be managed. At the heart of the DMS is an owners' association, with all the owners of houses and flats in the development as members, and a manager who deals with the day-to-day coordination of maintenance in the development.

18. The powers currently held by local authorities to support and/or compel maintenance of tenement buildings are also summarised, though changes to these powers lie beyond the scope of the project.

19. Finally, the chapter provides a brief overview of the regime we propose for the introduction of OAs. We suggest that OAs will be created for each tenement through mandatory statutory provision, and that a new Owners' Association Scheme (OAS) will replace the TMS, setting out rules on how the OA operates to manage maintenance of the tenement building. Our proposals would have no effect on the

law relating to the DMS or the existing powers of local authorities in relation to tenement maintenance.

Chapter 3 – Human rights

20. Chapter 3 provides an overview of the human rights framework with which legislation introducing OAs must comply. A key focus is the rights of flat owners to peaceful enjoyment of their possessions under Article 1 of the First Protocol to the European Convention on Human Rights (A1P1).

21. We note various protections that should be embedded within the OA legislation to help ensure its compatibility with A1P1, particularly the right of individual flat owners to challenge majority decisions taken by the other members of the OA in certain circumstances. We take the view that it will assist in A1P1 compliance if the new scheme does not deviate significantly from provision in the TMS unless there is a clear justification for doing so, and adopt that general approach in the proposals which follow.

Chapter 4 – Legislative framework - mandatory and default aspects

22. Chapter 4 sets out the framework for reform, suggesting that the introduction for OAs will require new mandatory provisions to be inserted into existing legislation, together with a default OAS to replace the TMS. The mandatory aspects will include a small number of duties imposed on OAs to ensure they function at a basic level.

23. We consult on four suggested duties:

- To appoint a manager within 6 months of the OA being created or the position becoming vacant;
- To comply with any requirement to register the OA;
- To organise an annual general meeting of members;
- To approve an annual budget.

24. We also ask whether any further mandatory duties are needed.

25. We seek views on a remedial management scheme, under which an OA which failed to comply with its mandatory duties would have a manager appointed to it by the court. We ask who could apply for a remedial manager to be appointed and who could act as the remedial manager. We also suggest that the local authority should act as the remedial manager of last resort.

26. This Chapter goes on to consider why the OAS must operate as a background set of rules, applicable only where the titles to flats in the tenement do not make provision on relevant matters. We note the difficulties for flat owners and others arising from the fact the maintenance rules in every tenement may be different. We consult on standardisation of the deeds in which maintenance rules are

set out in flat titles, looking first at future deeds, and then at whether the conditions in existing titles should require to be rewritten in the new, standardised form.

Chapter 5 – Applying the legislation – which tenements?

27. In Chapter 5, we consult on how OAs should be named and what address they should take.

28. We also ask how the OA should be identified. While the Working Group recommended against there being any registration requirement for establishing OAs, we think a public record of the existence and identity of the OA may be needed to facilitate transactions and ensure mandatory duties can be enforced. In particular, we think a record is necessary to easily identify the flats which make up the tenement. We consult on various options, including relying on the manager to confirm details, and registration in the Land Register.

29. Separately, we ask if the OA legislation should be disapplied in some cases. We consult on whether certain categories of tenement - including small tenements, tenements in single ownership, and tenements that form part of a wider development - should have OAs which are subject to modified mandatory duties. We suggest that the OA legislation should not apply to tenements subject to the DMS.

Chapter 6 – The owners' association

30. Chapter 6 focuses on the form of the OA, its membership and certain administrative matters around its operation. We consider which type of legal entity (for example, a company or a partnership) would be appropriate for an OA, suggesting the OA should be a new, bespoke entity rather than trying to fit within an existing form.

31. We consult on which parts of a tenement should be managed by the OA and ask whether "scheme property" should be defined as it is in the TMS, subject to certain possible clarifications. We also consult on certain matters concerning administration of the OA, including a duty on the manager to keep a list of OA members' names and contact details.

Chapter 7 – Powers of the owners' association

32. Chapter 7 is concerned with which powers the OA can exercise. We suggest that the function of the OA should be to manage the tenement for the benefit of its members. We ask whether the OA should have a general power to do anything necessary for or in connection with that function.

33. We suggest that this general power could be supplemented with a non-exhaustive list of key powers. We consult on the content of this list, which includes powers to:

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

34. We ask whether the OA should have the power to instruct demolition of the tenement and also whether it should be able to modify the application of the OA legislation to the tenement. We further suggest that the OA should be prohibited from carrying on a trade or owning heritable property.

35. We also consult on how “maintenance” should be defined.

Chapter 8 – Running the OA: members

36. The OA can exercise its powers only where members decide that it should do so. In Chapter 8, we consider how members can take those decisions.

37. We suggest that decisions should be taken by vote, and that there should be one vote per flat. We consult on the voting thresholds that should be required for different types of decision, suggesting that for most decisions, a simple majority is appropriate. We seek views on whether 50% of votes should constitute a simple majority.

38. We suggest that some decisions should require a special majority of 75% of votes. We suggest a special majority should be required for the following decisions:

- Improvement and alterations to, or replacements of, scheme property;
- Demolition of a part of scheme property;
- Making payments from any reserve fund maintained by the tenement; and
- Execution of a deed which modifies the application of the OA legislation to the tenement.

39. We also consult on the process of decision making. We ask who should be able to cast a vote, suggesting that it should be the owners or any person nominated by an owner to act on their behalf. We consider how members’ meetings should be called, the quorum required, and other procedural questions. We ask whether the option of decision making by discussion outside of meetings should, as under the TMS, be available under the OAS.

40. Finally, this Chapter consults on two minority protection measures: first, that a member or members with responsibility for 75% or more of the cost of works can veto a decision taken to carry out those works; second, that a member who has not voted in favour of a majority decision can challenge it before a court or tribunal. We consult on the factors to be taken into account when such a challenge is made.

Chapter 9 – Running the OA: the manager

41. Chapter 9 considers the role of the manager, who will exercise the powers of the OA on a day-to-day basis. We first consider whether there should be any restrictions on who is eligible to act as a manager, and look at the interaction between the OA manager role and the Property Factors (Scotland) Act 2011.

42. We suggest the manager should be an agent of the OA, with a general capacity to exercise its powers, supplemented by a duty to manage the tenement for the benefit of members. We also suggest a non-exhaustive list of specific duties and ask for consultees' views as to whom the manager should owe such duties. The provisional list of manager duties is as follows:

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

43. Finally, we consult on the issue of the manager exceeding their authority. We suggest that agency law will be applicable, assuming consultees support the manager's designation as an agent of the OA, but seek views as to whether the OA legislation requires additional provision to deal with this situation.

Chapter 10 – Liability for costs and financial administration

44. Chapter 10 consults on the suggestion that liability for costs under the OAS should replicate the provisions on liability for costs under the TMS. The basic rule under these provisions is that the costs of maintenance to scheme property should be divided equally amongst flats in the building, although various exceptions apply as discussed further in the Chapter.

45. We consider circumstances in which an owner's share of costs may not be paid, because other owners have voted to exempt them from payment or because even after enforcement action, they have been unable to pay. We consult on how liability for such shares should be redistributed amongst other owners.

46. We consult on a potential budgeting system as per the Working Group's recommendation, which would require the OA to prepare an annual budget for maintenance works, with flat owners making regular "service charge" payments to cover the costs set out in the budget. We ask whether the budgeting system used in the DMS should be adopted and if any changes are required to adapt it for the OAS.

Chapter 11 – Enforcement of maintenance obligations

47. In Chapter 11, we consider how obligations connected with tenement maintenance can be enforced.

48. First, we summarise the maintenance obligations set out in the 2004 Act, and ask whether this legislation should be amended to include an explicit duty on owners to maintain any part of the tenement so as to prevent damage to any part of the tenement or in the interests of health and safety. We also ask whether legislation should include a non-exhaustive list of works covered by the maintenance obligations set out in the 2004 Act and, if so, what that list should include.

49. We consider how the manager and members of the OA might enforce maintenance obligations owed by members. We suggest (in line with the recommendation of the Working Group) that the OA manager should have power to enforce any obligation owed by one tenement owner to another under the 2004 Act or the management scheme applicable in the tenement.

50. We ask if enforcement of maintenance obligations should be dealt with by summary application to the sheriff court or application to the Housing and Property Chamber of the First-tier Tribunal. We also consult on whether there should be any provisions made on alternative dispute resolution in regard to enforcing maintenance obligations.

51. We suggest that the manager should be able to seek court approval of a budget for works to ensure that owners comply with their duties to provide support and shelter to other parts of the tenement building (the duty under section 8 of the 2004 Act). Furthermore, we consult on whether the diligence of land attachment should be brought into force for the enforcement of debts owed by owners to the OA. This would allow the OA to place a "charge" (effectively a security or mortgage) against the title to the flat of the owner who has not paid, and to recoup the debt from the proceeds of the flat when sold. We also ask if land attachment should allow the OA to force a sale of the flat when it is not the owner's home.

52. We consult on the rights that third party contractors should have against the OA. This includes whether a third party should have a right of recourse against the members of the OA individually in certain circumstances.

Chapter 12 – Insolvency

53. In Chapter 12, we consult on which insolvency processes should be available to an insolvent OA, suggesting that sequestration may be appropriate.

Chapter 13 - Termination and winding up

54. In Chapter 13, we seek views on how an OA should be wound up, which would usually be required only where a tenement is demolished. We suggest the manager should have responsibility for the winding up process, and consult on how any outstanding funds held by the OA should be distributed to members.

Consultation period

55. The Commission is very keen to hear from everyone with an interest in the issues raised in the Discussion Paper. Comments on all or some of the questions raised can be made until 1 August 2024, and will help shape our final recommendations and Report. A response form can be found at: https://www.scotlawcom.gov.uk/law-reform/consultations/.

56. Further information can be obtained by contacting the project manager Stephen Crilly, Scottish Law Commission, Parliament House, 11 Parliament Square, Edinburgh EH1 1RQ; Tel: 0131 244 6605; email: info@scotlawcom.gov.uk.