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RESPONSE FORM

DISCUSSION PAPER ON TENEMENT LAW: COMPULSORY OWNERS' ASSOCIATIONS

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Summary of the Questions

1. What information or data do consultees have on the potential economic impact of any option for reform proposed in this Discussion Paper?

(Paragraph 1.35)

Comments on Question 1

We do not have any information or data on potential economic impact.

2. Do consultees envisage any non-economic impact arising from the reforms proposed in this Discussion Paper particularly as that may apply to any individual or group characteristics?

(Paragraph 1.35)

Comments on Question 2

We do not have information with which to answer this question.

3. (a) Should the OA be subject to the following mandatory duties:

(b) To appoint a manager within six months of the position becoming vacant?

(ii) To comply with any registration requirement arising under the legislation?

(iii) To hold an annual general meeting of members within 12 months of the creation of the OA, and in every 15 months thereafter?

(iv) To approve an annual budget?

(b) If not, what changes would you recommend to the mandatory duties suggested above, and/or which additional duties would you propose?

(Paragraph 4.20)

Comments on Question 3

a) i) Yes
ii) Yes
iii) Yes, provided it is understood that the requirement is for an annual meeting, and that the reference to 15 months merely incorporates a grace period of 3 months for holding any one annual meeting.
As an alternative, there could be some benefit in aligning the intended meetings with the calendar year, rather than the meeting obligation for every tenement running from a different start date; there are a number of practical routes by which this could be achieved. Thus, each OA would know that it has to have a meeting in 20xx. This would

have the attraction of simplicity, would avoid a more prescriptive cycle and could increase compliance.
iv) Yes.

b) Whether an additional duty or not, it appears to us that it will be necessary to provide that an assessment of works potentially required should be carried out prior to the annual meeting, preferably with some costings, in order that the meeting can reach agreement on maintenance to be undertaken.

4. Should provision be made for a remedial management scheme through which mandatory duties on the OA can be enforced?

(Paragraph 4.24)

Comments on Question 4

Yes – this seems a useful back-up provision.

5. Should it be possible to appoint a person as a remedial manager only where they are: (i) the owner of a flat in the relevant tenement; or (ii) entered on the Scottish Property Factor Register?

(Paragraph 4.27)

Comments on Question 5

Yes.

6. Should a court order be required for appointment of a remedial manager? If not, why not?

(Paragraph 4.34)

Comments on Question 6

We are uncertain whether this should be required in every case where a remedial manager is needed. Requiring applications to court inevitably involves expense and delay. There could be provision for appointment by the local authority, with it being open to the local authority to seek a court appointment in more complex situations.

7. If a court order is required for appointment of a remedial manager:

(a) Should any person with an interest in the effective operation of the OA be entitled to make an application for a remedial manager order?

(b) Should the local authority be under a duty to apply for a remedial manager order where: (i) the circumstances are such that an application would likely be granted; and (ii) an application has not been made, nor does it appear likely that one will be made, by any other person?

(c) Should a court be empowered to make a remedial manager order where: (i) the OA has failed to adhere to its mandatory duties; and (ii) it is reasonable in all the circumstances of the case?

(Paragraph 4.35)

Comments on Question 7

a) Yes
b) We are unsure if this should be a duty rather than a power. Imposing a duty would require a high degree of attentiveness on the part of local authorities to the management of individual flatted dwellings within their area. In some cases, there could be uncertainty as to whether a particular subdivided building is a tenement. Further, the imposition of a duty on a local authority to remedy inaction may de-incentivise owners from taking responsibility for the appointment of a manager of their OA (though this point would have less force if the local authority had power to make the appointment themselves, in which case the option of applying to court might be utilised in more complex cases). If, however, there is to be a duty on the local authority to apply, then the two stipulated preconditions appear reasonable, though perhaps expressed the other way round.
c) This appears reasonable.

8. Should the application for a remedial manager order be required to identify the proposed remedial manager and confirm their willingness to act?

(Paragraph 4.36)

Comments on Question 8

Yes.

9. (a) Should the local authority be required to act as remedial manager in circumstances where it has not been possible to identify another candidate?

(b) If not, who should be appointed in such circumstances instead?

(c) When acting as the remedial manager of last resort, should the application of the Property Factors (Scotland) Act 2011 to local authorities be suspended? Why or why not?

(Paragraph 4.40)

Comments on Question 9

a) We are unsure that this is the best solution. Having it as a possibility seems sensible, but we reiterate the concern expressed in answer 7b) about de-incentivising owners from taking responsibility for managing the situation themselves. In the analogous field of welfare guardianship for adults with incapacity, it is not unknown for families to decline to take up the role, in the knowledge that it will be undertaken by the local authority. The present proposal does, however, have the benefit of potential recovery of expenses from the owners in the tenement, which will presumably reduce the

likelihood of local authority appointees being required. Were the field of potential appointees of last resort to be widened, there is potential for models of provision of this service to grow up within the property services sector.
Returning to the area of guardianship of adults with incapacity, it is our understanding that, where a financial guardian is required for an individual and no suitable appointee has been identified, an application will be made by the local authority and a solicitor with relevant experience will be appointed to the role. There is therefore a decoupling of the duty to remedy the deficit, and the undertaking of responsibility to perform the role. This may yield some useful pointers towards the remedial manager not requiring to be the local authority.

b) We have already addressed this to some extent in our answer above. Property solicitors and surveyors could be suitable individuals to undertake the role.
c) Yes. The alternative appears unduly onerous when a local authority is being forced to act.

10. (a) Should the function of the remedial manager be to support the OA to meet its mandatory duties?

(b) In order to fulfil this function, should the remedial manager have the same powers and duties as a non-remedial manager? If not, what changes would you suggest?

(c) Are there circumstances other than the appointment of a (non-remedial) manager which should bring the role of the remedial manager to an end?

(Paragraph 4.43)

Comments on Question 10

a) Yes.
b) Yes.
c) We suggest that losing the status which qualified the person to be appointed (for example by ceasing to own a flat in the tenement) should bring the role to an end. It should also be possible for them to resign. Provision will also require to be made for termination and substitute appointment in the event of death or other circumstances rendering the person unable or unsuitable to act (e.g. incapacity, or receipt of a sentence of imprisonment).

11. Do consultees agree that the rules of the OAS should operate as background law, applicable only where provision in the tenement titles is absent or incomplete?

(Paragraph 4.53)

Comments on Question 11

Yes.

12. Following the entry into force of OA legislation, should any deed purporting to create a title condition which would modify the application of the OAS be required to set out in full the amended OAS? If not, why not?

(Paragraph 4.62)

Comments on Question 12

We answer this question in the affirmative, on the basis that such an approach generates the greatest clarity. We suggest, however, that consideration be given to an intermediate route to departure from the applicable provisions of the OAS: that the owners are free to agree amongst themselves a different arrangement of rights and responsibilities in relation to any one repair project. This may be the position which would apply under common law in any event, but that such an approach is valid may require to be made express.

13. (a) After a fixed period, should legislation disapply existing title conditions to the extent that they modify the application of the OA scheme?

(b) What should be the duration of the fixed period?

(c) Should the OA be under a duty to register a preservative deed of conditions on request by any owner, subject to the right of any other owner to challenge this request?

(d) Should members of the OA be able to take a special majority decision to refuse to register a preservative deed of conditions, subject to the same voting threshold as for registration of a deed of conditions?

(e) Do you have any other comments on our provisional proposals in relation to standardisation of existing tenement title conditions?

(Paragraph 4.71)

Comments on Question 13

a) We have some concerns that these particular proposals, though motivated by a commendable desire for standardisation and consequent simplification, would be unduly complex to implement. We are therefore neutral on whether they should be included in the proposed reforms.
b) If these proposals are included, we see the benefit of a long period, and would support the suggestion of 20 years.
c) A step of this nature would seem necessary, though the idea of registering a Deed of Conditions itself implies that a fresh setting out of the existing position takes place. There could arise difficult questions as to whether a restatement was accurate, and as to the scope (if any) for minor changes or clarifications. It might be preferable to provide simply for registration of a notice that the existing position should continue to apply. So far as the process is concerned, notification of intention to register adherence to the existing position could trigger the right to oppose that, and generate the obligation to hold a ballot.
d) If the issue of adhering to the existing position has been raised, it would appear more straightforward for there to be a ballot of all owners on whether that should or should not happen.
e) No.

14. (a) Should the OA be named "The Tenement Owners' Association of" followed by the address of the tenement building?

(b) Should the address of the OA be the address of the manager?

(Paragraph 5.11)

Comments on Question 14

Yes

15. Which is the better option for identification of the OA:

(a) The manager should be placed under a duty to verify the details of the OA on request (option 1)?

(b) The OA should be subject to a requirement to enter its details in the Land Register within a short period after the OA's creation (option 2(a))?

(c) The OA should be subject to a requirement to enter its details in the Land Register within a longer period of the OA's creation, tied to registration of a standardised deed of conditions where appropriate (option 2(b))?

(d) No provision for identification of the OA should be made within the legislation introducing the OA scheme?

(e) An alternative option? If so, please provide details.

(Paragraph 5.23)

Comments on Question 15

<u>*Preliminary Points*</u>
Before answering these questions, it is helpful to consider what the purpose behind these particular provisions is. In paragraph 5.7 of the Discussion Paper, it is stated that: "*With the introduction of the OA regime, the limits of this tenement identification process may become apparent, however. The process works at present in large part because the persons who most need to understand the extent of the tenement – namely flat owners – will necessarily be in receipt of legal advice at the point at which they become flat owners. With the introduction of the OA regime, the range of people who wish to identify the tenement will broaden.*" Examples are then given of persons who may wish to enter into a contract with the OA and bodies such as local authorities who may wish to take enforcement action against the OA. It therefore appears that the purpose of these provisions would simply be to facilitate interactions with the OA by third parties (i.e. non-owners). It does not appear that any of these provisions will have any bearing on the constitution of OAs themselves.

<u>*Proposal (a)*</u>
It is unclear how a duty imposed upon an OA manager to verify the details of an OA could facilitate either process.

A third party will likely enter into a contract with the OA by communicating with the OA manager. A duty imposed upon the OA manager to verify the details of the OA would not assist a third party who was unable to identify the OA manager. In any event, in practice, it is likely to be the OA manager that approaches the third party rather than the other way round.
Assuming that the third party and the OA manager are able to enter into communications regarding the conclusion of a contract, it is unclear why the OA manager should come under a statutory duty to provide the third party with a verification of the details of the OA (e.g. its extent and membership). If the third party wished to satisfy itself regarding these matters before contracting with it, it is unclear why that should not remain an entirely voluntary process for the parties (in keeping with the way in which contracts are normally concluded). Placing a statutory duty upon the manager to provide any third party with whom the OA proposes to contract with a verification of the OA's membership and extent has a number of problems:

i) Firstly, any statement by the OA manager of the extent and membership of the OA does not give rise to any legal presumption that the details given in the statement are correct;

ii) Secondly, in practice, issues are likely to arise only where it is unclear whether a particular property (or part of a property) falls within the tenement which is subject to the particular OA. In such difficult cases, it is not clear why the manager (who is unlikely to be legally qualified and in many cases may not even be acting in a professional capacity) should be placed under a statutory duty to verify the position to a third party. In the absence of any statutory exemption, the manager could incur (potentially strict) liability to the third party who relies on it, which could be a very significant liability;

iii) Thirdly, bodies who have statutory duties to provide certain information on request are typically given the right to charge a reasonable administrative fee and to refuse applications which are vexatious. The manager would appear to have no such protections here.

In terms of enforcement action against the OA by third parties (i.e. non-owners), the main example given in the Discussion Paper is of a local authority seeking to appoint a remedial manager of last resort. There may be merit in placing an existing manager under a statutory duty to provide the local authority with certain information to assist the local authority in carrying out its duties. However, it is not entirely clear how a duty upon any existing manager to confirm the extent of the OA would assist that process given that any statement from the manager would give rise to no legal presumption that it is correct.

Proposal (b) and (c)
In some ways these options place a less onerous burden upon the manager. Subject to updates, the manager is only required to provide this information once (to the Register) and not to each and every person who may ask for it. It also has the advantage (unlike option (a)) of enabling a third party who wishes to deal with the OA of being able to find out who the manager is.

However, the benefit of even this limited administrative step is not entirely clear. In most cases it will be the OA manager who will approach any third party with whom the OA seeks to contract, as discussed above. In relation to difficulties surrounding the existence, extent and membership of the OA, as the Keeper's indemnity will be excluded, third parties (whether they be seeking to contract with the OA or take enforcement action against it) will not be able to rely on the entries in the Land Register in any event. Indeed, the fact that the information is contained in the Land Register may give such third parties a misplaced sense of confidence in it.

Proposal (d)

In light of the comments above, this would appear to be the preferred option. In these circumstances, it will be left to any third party who wishes to deal with the OA, or take enforcement action against it, to satisfy itself of the OA's existence, extent and membership. In practice, the OA may find itself having to provide the necessary information to the third party in any event (e.g. a bank or a contractor), as part of the normal process of entering into any commercial contract. A party seeking to take enforcement action against the OA will also, in practice, likely have to carry out its own due diligence. The position would be similar to that which exists where a party wishes to contract with, or take enforcement action against, a Scottish partnership (the proposed OA would, like a Scottish partnership, be a legal person brought into existence in any case where the factual position meets the statutory requirements). Placing a statutory duty on the manager to verify the OA's constitution, or placing entries in the Land Register which purport to define it, risks misleading third parties into relying upon the information, that is disclosed or registered, despite the fact that, in each case, the information carries no legal significance at all (unlike for example the legal presumptions which arise in company law from a certificate of incorporation, an entry in the register of members, or a shareholder's certificate issued by the a company secretary).

16. (a) Which option do you prefer:

(i) The OA legislation should apply to small tenements, subject to modification or disapplication of inappropriate mandatory duties;

or

(ii) The OA legislation should not apply to small tenements, except where owners of flats in a small tenement "opt in" to the legislation subject to modification or disapplication of inappropriate mandatory duties?

(b) Should a "small tenement" be defined as a tenement building of three flats or fewer? If not how should a "small tenement" be defined and why?

(Paragraph 5.34)

Comments on Question 16

a) In our view the option 16.(a)(ii) appears unattractive in that it would result in the concurrent application of two separate statutory regimes (the OA regime and the existing TMS). Option 16(a)(i) would appear to be the preferable one. It would allow for the operation of one scheme but with provisions which are inappropriate to small tenements being disapplied in the same way that the companies legislation disapplies certain requirements which are inappropriate for smaller companies.

This, however, is subject to a caveat which concerns the wider operation of the scheme as a whole. Where there is an existing Development Management Scheme, the manager is invariably a professional property manager, constituted as a company or limited liability partnership and subject to regulation under the laws relating to those entities. Such professional property managers are also regulated by both statute and professional rules as well as codes of practice. In the context of small tenements, the manager is more likely to be one of the owners rather than a professional property factor. This will result in a separate legal entity being created (the OA) which has financial responsibilities but is apparently subject to none of the regulation and/or publicity requirements which such separate legal entities are usually subject to (e.g. fiduciary duties, statutory regulation, professional ethics etc). We can foresee problems here in terms of third parties who are

expected to contract with it (e.g. are members liable for the debts of the OA?) or where disputes arise between members as to the financial management of the OA (e.g. do members owe fiduciary duties to the OA and/or each other)?

b) Three flats or fewer would be an appropriate definition.

17. (a) Which option do you prefer:

(i) The OA legislation should apply to tenements in single ownership, subject to modification or disapplication of inappropriate mandatory duties;

or

(ii) The OA legislation should not apply to tenements in single ownership, except where the owner "opts in" to the legislation subject to modification or disapplication of inappropriate mandatory duties?

(Paragraph 5.36)

Comments on Question 17

Option (i) is preferable essentially for the same reasons as given in the Answer to Question 16

18. Where a tenement is managed as part of a wider development, should the mandatory duties imposed on the OA be satisfied where they have been met for the development as a whole, rather than for the tenement in particular?

(Paragraph 5.40)

Comments on Question 18

Yes, for the reasons given in paragraphs 5.38 and 5.39 of the Discussion Paper

19. Should the OA legislation be disapplied from tenements subject to a DMS?

(Paragraph 5.43)

Comments on Question 19

Yes, for the reasons given in paragraph 5.42 of the Discussion Paper

20. Are there other circumstances in which the OA legislation should be disapplied, or its application modified, in relation to particular categories of tenement? If so, please provide details.

(Paragraph 5.45)

Comments on Question 20

No

21. (a) Should the OA be a bespoke body corporate created in any new legislation?

(b) If not, what form should the OA take?

(Paragraph 6.17)

Comments on Question 21

21. (a) Should the OA be a bespoke body corporate created in any new legislation? (b) If not, what form should the OA take?

In the view of the Faculty of Advocates the function of an OA is analogous to the work of co-operative associations, and the Faculty of Advocates considers that this presents a useful model as the basis for a new corporate body. The Faculty of Advocates notes that in France tenement buildings operate as co-operatives for the purposes of maintenance of the building and other matters of common interest to the building owners), and have their own bank accounts for holding co-operative funds. Where necessary the courts have power to appoint a judicial factor to manage the co-operative whose administration has failed. The co-operative continues to exist under the court appointed administration of the court until such time as the owners can appoint a manager (usually a business offering a property factoring service).
The Faculty of Advocates considers that a bespoke body corporate should be created. The Faculty of Advocates also recommends that the purposes for which a compulsory owner's association is created ought to be set out in the legislation as the purposes for which the body exists.

22. Should legislation provide that an OA is created:

(a) For tenements completed prior to the introduction of the OA legislation, on the date when the relevant provisions of the OA legislation are brought into force?

(b) For tenements completed following the entry into force of the relevant provisions of the OA legislation, on the date when the building completion certificate is approved?

(Paragraph 6.21)

Comments on Question 22

22(a) – Yes
22(b) – The Faculty of Advocates consider that as the intention is that the OA is to be established to maintain buildings in multiple ownership, the date for the creation of the OA for a new tenement building should be the date on which two or more parts of the tenement building are held by two different persons (legal or natural).

23. (a) Should the members of the OA be the registered owners, unregistered holders and heritable creditors in possession of flats in the tenement?

(b) Do you have any comments on the position of non-owner occupiers of flats in the tenement?

(Paragraph 6.28)

Comments on Question 23

23(a) – Yes
23(b) – The Faculty of Advocates agrees that there would be considerable practical and legal difficulties which would arise if membership of an OA was to be extended to non-owner occupiers, and that there are other potential means that can be used to protect the interests of non-owners.

24. (a) Should the "scheme property" to be managed by the OA be defined in the same way as "scheme property" in the TMS?

(b) If not, what changes would you suggest?

(Paragraph 6.36)

Comments on Question 24

Whilst the definition of "scheme property" in the TMS is useful, we note that there is a legal distinction between common property and common interest. The Faculty of Advocates considers that if there is to be a compulsory owners' association it would be logical for the OA to be responsible for all matters common to the management of the tenement building regardless of whether they might be defined as common parts or common interest. For example, a load-bearing wall might not be common property, but other properties in the building would have an interest in the maintenance of that wall. It would make sense for the OA to have the right to take action to protect the common interests of other owners rather than require individual owners take separate action on their own.

25. (a) Should the manager be under a duty to maintain a list of names and contact details of members of the OA?

(b) Should members of the OA be under a duty to provide the first manager with their name and contact details within three months of the manager's appointment, and to inform the manager of any changes to their name and contact details within one month of their occurrence?

(c) Should a member, on disposal of their flat, be obliged to notify the manager of (i) any change to their contact details; (ii) the name and contact details of the new owner; (iii) the name and address of the agent acting for the new owner; (iv) the date on which the new owner will be entitled to take entry?

(d) Should a member of the OA be entitled to obtain the name and contact details of another member or members where necessary in connection with the management and maintenance of the building or the operation of the OA?

(Paragraph 6.39)

Comments on Question 25

Yes to all.

26. Should the manager have power to sign documents and execute deeds on behalf of the OA?

(Paragraph 6.41)

Comments on Question 26

Yes.

27. Where the OA regime requires information to be sent:

(a) Should it be competent to send by post, by delivery or by any reasonable electronic means used by the recipient in connection with the business of the OA in the previous year?

(b) Should sending information to the agent of a member be deemed to meet any requirement to send it to the member?

(c) Where a member cannot be identified or found after reasonable enquiry, should it suffice to send information to the flat they own in the tenement addressed to "the owner" or equivalent term?

(Paragraph 6.45)

Comments on Question 27

Despite the widespread use of electronic means of communication, there will be those owners who do not wish to use electronic communication, or who have difficulty doing so.

The Faculty of Advocates proposes that service of documents follows the provisions set out in section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010. In short, the document may be served on the person by being delivered personally to them; by being sent to the proper address of the person by either registered post or recorded delivery; or by electronic communication, but only where there is written agreement in place between the parties that documents can be communicated by electronic means.

There are specific issues to be addressed at the beginning of an OA and also at the joining of a new owner. There is a "threshold point" where a new OA is formed, or a new owner buys one of the properties, which triggers the requirement to obtain contact details of owners. There requires to be set out a method for the new OA to get contact details of the owners; and further the "new owner" should have some form of compulsory duty to provide contact details to the OA.

We consider that there should also be a duty on owners to keep address and contact details updated.

Where an owner employs an agent, the owner should be able to request that communication is sent to the agent. Where the address of an owner is not known, but it is known that they have used an agent in connection with the property, it should be possible to send communications to the agent.

Where an owner cannot be identified, communication should be sent to "The Owner" at the relevant tenement property.

28. Do you agree that OAs should be excluded from the definition of "property factor" in the Property Factors (Scotland) Act 2011? If not, why not?

(Paragraph 6.49)

Comments on Question 28

The Faculty of Advocates agree that OA's should be excluded from the definition of "property factor" in the 2011 Act.

29. (a) Should the function of the OA be to manage the tenement for the benefit of members?

(b) Should the OA have the general power to do anything necessary in connection with that function?

(c) If you answered "no" to (a) or (b) above, what alternative would you suggest?

(Paragraph 7.9)

Comments on Question 29

(a) We think that the function of the OA should be to manage the tenement for the benefit of its members. But there is a general point to be made about the interpretation of this core function. In using 'benefit', the formulation is creating potential difficulties in application depending on whether an individual flat is someone's home or a buy to let investment. The need to spend money to preserve the building is likely to be analysed differently by these categories of owner. Accepting that this is stereotyping, the owner of a property let commercially may wish to spend only the minimum amount to keep the building intact, whereas major expenditure, for example on a new roof, will sometimes be required. It is our understanding of this law reform project that benefit is intended to encapsulate a notion of maintenance of the built environment, rather than the possibly shorter term commercial success of a property letting business. That distinction may need to be expressly articulated.

(b) We think that the OA should have the general power to do anything necessary in connection with that function but subject to a "reasonable owner" test and with a right of appeal by Summary Application against a decision made in the exercise of such power. The foregoing suggestion has taken cognisance of "anything necessary" in question (b). For example, does a tenement require a new roof or just competent repairs to its roof to make it wind and watertight?

(c) N/A.

30. In the OAS:

(a) Should the general power of the OA be supplemented by a non-exhaustive list of specific powers which it may wish to exercise?

(b) If a non-exhaustive list is provided, should it include the list of key powers set out in paragraph 7.10? If not, what changes or additions to this list would you suggest?

(Paragraph 7.14)

Comments on Question 30

(a) We agree that the general power of the OA be supplemented by a non-exhaustive list. It appears to work well in other jurisdictions and would reduce the scope for misunderstanding on what the OA's powers are.

(b) We disagree with the range of non-exhaustive powers suggested or defined at 7.10. Will a layperson understand what is meant by "moveable property"? We suggest "garden and other maintenance equipment". We are disinclined to include investment within these key powers. It over complicates the OA's function and may have unforeseen tax implications.

31. In legislation introducing the OA regime:

(a) Should maintenance be defined to include: (i) any work to scheme property required to comply with the duty currently set out in section 8 of the 2004 Act; and (ii) routine maintenance as currently defined by TMS r 1.5?

(b) Are any other changes to "maintenance" as defined in TMS r 1.5 required? If so, what changes are required and why?

(Paragraph 7.19)

Comments on Question 31

(a) We agree with the suggested definition under reference to section 8 of the 2004 Act; and (ii) TMS r 1.5. We respectfully disagree, under reference to 7.18, with any suggestion that improvements be re-categorised as maintenance. For many, a tenement property will be their first home. Maintenance costs will be in their reasonable contemplation as comprehensive upgrading will not be.

(b) No.

32. Should the non-exhaustive list of powers exercisable by the OA include:

(a) The power to instruct demolition of all or part of the tenement building?

(b) The power to seek approval from the court for sale of the demolition site and distribution of the proceeds as regulated by the 2004 Act s 22?

(c) The power to seek approval from the court for sale of an abandoned tenement building and distribution of the proceeds as regulated by the 2004 Act s 23?

(Paragraph 7.24)

Comments on Question 32

(a) No. We think such a power goes too far. Demolition powers should remain as they are present. As noted at 7.21 the decision to demolish a tenement is an unusual one.

(b) No. The functions of the OA should be restricted to maintenance.

(c) No. The functions of the OA should be restricted to maintenance.

33. Should the non-exhaustive list of powers exercisable by the OA include the power to execute a deed modifying the application of the OA legislation to the tenement, including execution of a DMS deed of application?

(Paragraph 7.26)

Comments on Question 33

We agree that such powers should be included.

34. Should an OA be prohibited from carrying on a trade, whether for profit or not?

(Paragraph 7.29)

Comments on Question 34

We agree that an OA should be so prohibited for the reasons stated in paragraphs 7.27 and 7.28.

35. (a) Should the OA be capable of owning parts of the tenement (including garden ground forming part of the tenement plot)? Why or why not?

(b) If an OA is capable of owning parts of the tenement, should there be any limitations on which parts of a tenement can be owned? If so, which limitations should be in place, and why?

(Paragraph 7.36)

Comments on Question 35

(a) An OA should not be capable of owning parts of a tenement. With reference to 7.31 it would involve radical reform of the law and is outwith the scope of the current project. It strays far from maintenance issues and regulating maintenance.

(b) With reference to 35(a) we suggest this strays far beyond the current scope of the initial project and would be unduly problematic.

36. Should an OA be capable of owning heritable property which is not part of the tenement? Why or why not?

(Paragraph 7.38)

Comments on Question 36

An OA should not be capable of owning heritable property which is not part of the tenement. It not consistent with the core function being maintenance.

37. Should there be a strict link between allocation of voting rights and allocation of liability for costs within the OAS? Why or why not?

(Paragraph 8.15)

Comments on Question 37

In the view of the Faculty this is ultimately a question of policy rather than law. The Faculty agrees that any case in which there is a significant mis-match between those in a position to carry a vote in favour of proceeding with a scheme of works and those who will, by virtue of that vote, be under obligation to pay for the works there is obvious potential for dispute. The difficulties caused by e.g. a tenement roof being in the ownership of the top flat were addressed to some extent in the 2004 Act by the designation of scheme property and the consequent severance of ownership rights from decision making in respect of maintenance and liability for the cost of the works.

There are cogent practical considerations favouring a simple scheme. As the discussion paper points out it may not be straightforward to ascertain conclusively which share attaches to which flat, particularly where there have been sequential alterations in the configuration of the tenement. It is a policy decision for parliament whether practical considerations of this nature should carry greater weight than ensuring a strictly accurate relationship between voting rights and liability for cost. In the view of the Faculty it may be said with considerable certainty that there will be much less scope for dispute if the voting rights are allocated equally per flat. One possible solution would be to provide a default setting of equal voting rights per flat, but subject to an exception if the disparity between the relative sizes of the flats exceeds a specified threshold. There would be obvious scope for dispute as to the application of any such scheme to any particular tenement and it is ultimately a policy trade off whether relative simplicity and certainty should be seen as of greater importance than precise alignment with liability for the cost of repair.

38. In the OAS:

(a) Should each flat be allocated one vote?

(b) Is any special rule needed for situations where the number of flats in the building changes, and if so, what?

(Paragraph 8.19)

Comments on Question 38

Q38(a)

The research conducted by the Commission indicates that most title schemes which allocate voting rights do so on the basis of one vote per flat. Other mechanisms, such as deeds referring to rateable value as the basis for voting rights often come to the same thing in practice where all flats are in the same council tax band. The Faculty agrees that the default setting should be one vote per flat.

Q38(b)

For the reasons set out in the discussion paper there is at least the potential for unfairness where existing flats are either amalgamated or subdivided. There may be practical difficulties in devising a set of default rules that will cater adequately for every set of circumstances in which the problem may arise. The Faculty would suggest that a better practical solution would be to provide a statutory mechanism for a proprietor to submit an application to the court, or First-tier Tribunal as the case may be, for an order effecting a variation in the default scheme by reason of a supervening change in the number or size of the individual flats within the tenement.

39. In the OAS:

(a) Should decisions to exercise the powers of the OA generally be taken by a simple majority of votes allocated? If not, what alternative threshold do you suggest?

(b) Where votes are tied, so that 50% of votes are in favour of a decision, should that be sufficient to allow the decision to be made?

(c) Should decisions which require a special majority be taken by 75% of votes allocated? If not, what alternative threshold do you suggest?

(d) Which decisions should require a special majority?

(e) Where a special majority decision relates to a part of the tenement not in common ownership, should the owner's consent to the decision be required?

(f) Should unanimity be required for a decision to demolish the tenement?

(Paragraph 8.34)

Comments on Question 39

Q39(a**)**
This is primarily a question of policy rather than law. The Faculty agrees that there may be practical problems if a minority of apathetic or deliberately disengaged owners is able to frustrate the wish of an engaged majority. A simple majority may therefore be the appropriate default mechanism.

Q39(b)
As before this is a question of policy. A balance has to be struck somewhere between restricting the ability of apathetic and disengaged minorities to frustrate schemes of repair and protecting proprietors from having schemes of repair imposed upon them against their wishes. The choice between requiring a majority, or a default setting that 50% of the owners may carry the resolution is a difficult one; if 50% is to be regarded as sufficient authority for the works to proceed, there should be a right for a non-consenting owner to apply to court, as mentioned at the end of paragraph 8.28.

Q39(c)
If a special majority is required for any decision the Faculty agrees that 75% is an appropriate threshold. That is, for example, the threshold for passing a special resolution in a limited company governed by the default articles of association, which might be seen as reasonably analogous to an OA. The Faculty is inclined to think that such a provision in cases which currently require unanimity would be A1P1 compatible, essentially for the reasons set out in the discussion paper.

Q39(d)
This is ultimately a policy question. The Faculty sees no obvious objection to the list of decisions set out in paragraph 8.32 of the discussion paper and can see no obvious omissions. This may be something which would be appropriately addressed by the provision in primary legislation of a power to make regulations specifying the categories of decisions requiring a special majority, which would more easily allow those categories to be reviewed in the light of practical experience of the legislation in operation.

Q39(e)
The answer to this question will depend to some extent on the nature of the property in question. There are foreseeable circumstances which will bring competing interests into conflict. For example an upper floor proprietor who has left the upper flat unoccupied in circumstances where the roof is not wind and watertight may care little for the consequential water ingress to the flat below, and deterioration of the roof may ultimately compromise the structural integrity of the whole tenement. Significant problems may arise if the remaining owners are unable to compel a repair. Other examples may present more nuanced questions of balancing rights. On balance the Faculty does not consider that a veto right is appropriate, and it does not consider that provision to that effect would fall foul of A1P1.

Q39(f)
In general the Faculty agrees that unanimity should be required for a decision to demolish. In particular if demolition is with a view to re-development empowering a majority to impose its will on the minority may raise significant A1P1 issues. One possible exception is where the tenement has become unstable or dangerous and demolition may be required urgently. It may be that cases of that type will continue to be dealt with as they are at present by local authorities exercising existing statutory powers.

40. In the OAS:

(a) Should the owner or any person nominated by the owner be able to cast a vote?

(b) Where the owner wishes to nominate a person to act on their behalf, should that nomination require to be in writing?

(c) Where a flat is co-owned, should a majority of co-owners be entitled to cast the vote for that flat?

(Paragraph 8.38)

Comments on Question 40

Q40(a)
Yes. The Faculty sees no basis for principled objection to the nomination of proxies. It may be that in many cases those nominated would be property professionals managing portfolios on behalf of owners.

Q40(b)
Yes. The administrative burden is modest, and would appear to be outweighed by the risk of disputes arising as to whether a purported nominee was properly appointed.

Q40(c)
Yes. Situations where there is more than one co-owner, the co-owners do not agree, and it is possible to identify a majority of co-owners are likely to be rare, but there seems no good reason to deny them the ability to cast the vote. A dissenting co-owner will almost invariably be entitled to insist on division and sale of the flat and so will not be locked in to a decision on repairs that they may fundamentally disagree with.

41. In the OAS:

(a) Should the manager have a duty to call the annual general meeting?

(b) Should the manager have a duty to call any other general meeting when required to do so by owners having not less than 25% of the voting allocation in the tenement?

(c) Should the manager have the power to call a general meeting at any time?

(d) Should any member have the power to call a general meeting where the manager has failed to do so, or where there is no manager?

(e) Should any member have the power to call a meeting in other circumstances, and if so, which circumstances?

(Paragraph 8.46)

Comments on Question 41

Q41(a)
The Faculty agrees that calling the annual general meeting should be the duty of the manager.

Q41(b)
Yes. Owners must have a procedural mechanism to raise issues of concern. The Faculty considers 25% to be a reasonable and realistic threshold to be able to require a meeting to be called.

Q41(c)
Yes. The manager should be enabled to ascertain the will of the owners where necessary.

Q41(d)
There is a balance to be struck. If there is no manager in place there is a cogent argument to give any owner the power to call a meeting. Where there is a manager in place and assuming that the manager has power to call a meeting and also that 25% of the members have the same power, there may be little justification for also conferring the power on a single member. Where that member cannot obtain either the agreement of the manager that a meeting should be called or the support of sufficient other members to reach the 25% threshold it may be questionable whether a power to require a meeting is reasonable.

Q41(e)

On balance the Faculty does not consider that a power to call a meeting is necessary where the member cannot obtain the support of either the manager or at least 25% of members.

42. In the OAS, to call a general meeting:

(a) Should the person calling it be required to send a notice to each member and the manager specifying the date, time, location and intended business of the meeting?

(b) Should the notice require to be sent at least 14 days prior to the intended date of the meeting?

(Paragraph 8.46)

Comments on Question 42

Q42(a)
For essentially the reasons given in the discussion paper the Faculty agrees that some degree of formality is appropriate, and that written notice should be required.

Q42(b)
The Faculty agrees that some notice is appropriate, for essentially the reasons given in the discussion paper. Whether the period should be fourteen days or any different period is a policy decision.

43. In the OAS:

(a) Should a quorum be required for a meeting of members?

(b) If so, why, and what quorum would be appropriate?

(Paragraph 8.49)

Comments on Question 43

Q43(a)
If decision making at a meeting is to be on the basis of a majority of votes allocated as distinct from a majority of those present and voting there is no requirement for a quorum, since there is no scope for a vote to be carried by an unrepresentative minority.

Q43(b)
In light of the answer to the preceding question, this question does not arise.

44. In the OAS, where a meeting of members is called:

(a) Should the manager have a responsibility to support virtual attendance?

(b) Should members be required to elect a convenor from amongst their number to run the meeting?

(c) Should the manager have a responsibility to keep a record of decisions taken at the meeting, and to send that record to all members following the meeting?

(Paragraph 8.54)

Comments on Question 44

Q44(a)
Yes. There will frequently be non-resident owners, and the Faculty considers that the use of tried and tested technology to facilitate remote attendance is likely to promote engagement. Consideration should be given as to whether detailed provision is required specifying the mechanisms that should be used to facilitate remote attendance.

Q44(b)
Yes. For essentially the reasons given in the discussion paper.

Q44(c)
Yes. For essentially the reasons given in the discussion paper.

45. In the OAS:

(a) Should there be a rule as to how votes can be cast at meetings?

(b) If so, what should that rule be?

(Paragraph 8.57)

Comments on Question 45

Q45(a)
There are good reasons to avoid imposing unnecessary and perhaps unwanted formality on the conduct of meetings. In principle the detail should be left to those involved. A show of hands or similar will be sufficient in almost all cases. It should be left to the manager and/or the convenor of the meeting to determine whether any other mechanism is appropriate for any particular vote. A more effective mechanism to secure compliance with basic norms of procedural fairness would be a requirement to keep a record of who voted for or against any resolution.

Q45(b)
In light of the answer to the preceding question, this question does not arise.

46. In the OAS:

(a) Should it be possible for decisions to be taken by consultation?

(b) If decision making by consultation is possible, should it be possible for consultation to be undertaken by (i) any owner and (ii) the manager?

(c) If decision making by consultation is possible, should the scheme set out rules on how that consultation must occur? If so, what rules would be appropriate?

(d) If decision making by consultation is possible, should consultation with one co-owner be sufficient to count a vote for a co-owned flat?

(e) If decision making by consultation is possible, should the person who undertook the consultation be responsible for counting the votes and notifying all owners of the outcome as soon as practicable, or instructing the manager to do so?

(Paragraph 8.62)

Comments on Question 46

Q46(a)
Yes. Where possible co-owners should be encouraged to agree on management decisions without obstacles unnecessarily being placed in their way.

Q46(b)
In principle, yes. The principal practical issue is likely to be the adequacy of the record keeping in the event of subsequent dispute.

Q46(c)
Yes, primarily in specifying what sort of record is required to evidence agreement. There seems no impediment in principle to a requirement that the party conducting the consultation should require to collect sufficient evidence of consent, but regulations might usefully specify what is required.

Q46(d)
In principle yes, although consideration should be given to requiring the consenting co-owner to confirm that they have discussed the matter with the other co-owners and have their authority to proceed.

Q46(e)
There should be a requirement for a record to be kept of the votes cast and for owners to be notified. The Faculty has no strong view on whether the responsibility for this should rest with the person who called the meeting or the manager.

47. In the OAS:

(a) Should it be provided that any procedural irregularity in the making of a scheme decision does not affect the validity of the decision?

(b) Where an owner directly affected by procedural irregularity in the making of a decision is not aware that costs have been incurred (or objects immediately to the costs), should it be provided that that owner is not liable for the costs, with their share redistributed amongst the other owners?

(Paragraph 8.64)

Comments on Question 47

Q47(a) and (b)
The Faculty considers that the suggested mechanisms strike an appropriate balance subject to the proviso that it ought to be possible to correct most procedural irregularities by means of

a subsequent regular procedure. For example co-owners who purport to pass a resolution on technically defective intimation should have the option of proposing the resolution again with the defects corrected rather than being forced to proceed on the basis of the defective resolution.

48. In the OAS, should an owner (or group of owners) with liability for 75% or more of the costs resulting from a decision have the power to annul that decision by sending notification to the other owners and the manager?

(Paragraph 8.66)

Comments on Question 48

Yes, for the reasons given in the discussion paper.

49. In the mandatory provisions of the OA legislation:

(a) Should the court have the power to annul a majority decision taken by members to exercise the powers of the OA?

(b) Should the court have the power to order the exercise of the powers of the OA where the required majority has not been achieved?

(b) Should the court have power to make an order only where the decision being challenged is not in the best interests of all members or where it would be unfairly prejudicial to one or more members?

(c) What factors, if any, should the court be required to take into account in deciding whether to grant a relevant order?

(Paragraph 8.76)

Comments on Question 49

Q49(a)
Yes, for the reasons given in the discussion paper.

Q49(b)
No. The introduction of OAs can never be a comprehensive solution to all problems. For the reasons given in the discussion paper the court is ill-equipped to perform this function, and application to the court is unlikely to provide an effective remedy in many cases. Difficult or intractable cases may have to be dealt with by local authorities exercising their existing powers.

Q49(c)
In principle, the Faculty considers that the court's power should extend to decisions which are unfairly prejudicial. Some care will be required in defining what is meant by that in this context. A significant factor in many cases in which the unfair prejudice remedy in company law now found in s994 and 996 of the Companies Act 2006 is invoked is an allegation of breach of the fiduciary duties incumbent on company directors. Individual proprietors of flats in a tenement are not generally in a fiduciary relationship with the other proprietors. There may be cases in

which unrestrained exercise of majority voting rights will be so prejudicial to the dissenting minority that the court should be empowered to prevent it, but those cases will not necessarily be precisely analogous to cases in which the company law jurisdiction is invoked. If the term "unfairly prejudicial" is used without qualification it will inevitably be argued that the substantial company law jurisprudence should be imported to the quite different and distinct situation of tenement management. The Faculty considers that it would be preferable if the power of the court to intervene was more clearly defined.

Q49(d)
The two most obvious factors are bad faith on the part of those purporting to exercise the power, and the power being exercised for an improper collateral purpose. There may be other examples. Situations where the minority simply cannot afford their share of the cost of the repair present more difficulty. In the Faculty's view there is a difficulty in importing into this context policy considerations derived from statutory control over the rights of secured lenders. Such lenders may be taken to know the risks and to have priced them in in the antecedent commercial decisions as to whether to lend. The same cannot be said of co-proprietors in tenements. If a repair is objectively required and the requisite majority of co-proprietors are in favour of having it done there seems little justification for giving an impecunious or illiquid co-proprietor an effective veto. In reality the practical solution in most cases will be for the majority to fund the repair and then to seek to recoup the appropriate share of the cost from the impecunious minority. If the remedy is ultimately constitution of the debt followed by sequestration the power of a trustee to force the sale of a family home is already subject to significant restriction on wider policy grounds.

50. In the OAS, should a decision taken by members be binding on owners and their successors as owners?

(Paragraph 8.78)

Comments on Question 50

Yes, although perhaps there is a requirement for some sort of "sunset" mechanism whereby a decision which is not implemented eventually lapses. It cannot sensibly be a feature of the scheme that an otherwise valid decision may be rendered ineffective by the decision of a single proprietor to sell, thus requiring the whole process to be started again, perhaps on more than one occasion. The Faculty considers that the standard missives of sale used in most transactions would quickly evolve to require disclosure of any existing decision to do repairs, thus placing purchasers on notice.

51. In the OAS:

(a) Should provision be made for members to carry out emergency work to scheme property?

(b) If so, should emergency work be defined as under the TMS?

(Paragraph 8.80)

Comments on Question 51

The Faculty answers yes to both these questions.

52. In the OAS:

(a) Should the manager require to be a registered property factor?

(b) Should eligibility to act as manager be subject to any other qualifications?

(Paragraph 9.19)

Comments on Question 52

Q52(a)
No, we do not consider that the manager should require to be a registered property factor; we agree that it would seem sensible to apply the same criteria as that used in DMS. It would appear to be unreasonable to expect an owner who was appointed as manager to register as a property factor.

Q52(b)
No, we do not consider that eligibility to act as manager should be subject to any other qualifications, however we consider that there should be an ability to review the work carried out by the manager and to apply to have the manager removed from the post where they were found not to be not discharging their duties appropriately.

53 (a) Where a member of an OA acts as the manager of that OA, should they be considered to be "acting in the course of their business" within the meaning of section 2(1) of the Property Factors (Scotland) Act 2011 *solely* because they are in receipt of a moderate benefit for that work?

(b) Do you have any comments on how "moderate benefit" might be defined in this context?

(Paragraph 9.24)

Comments on Question 53

Q53(a)
No, we do not consider that where a member of an OA acts as the manager of that OA, they should be considered to be "acting in the course of their business" within the meaning of section 2(1) of the Property Factors (Scotland) Act 2011 *solely* because they are in receipt of a moderate benefit for that work.

Q53(b)
(b) Moderate benefit may be tied to the compensation for the member's reasonable expenses.

54. In the OAS:

(a) Should the manager and a member acting on behalf of the OA be required to sign a certificate confirming the manager's appointment?

(b) Should the certificate require to be signed within one month of the manager's appointment?

(Paragraph 9.28)

Q54(a)
Yes, we consider that the manager and a member acting on behalf of the OA should be required to sign a certificate confirming the manager's appointment, we consider that it would seem sensible to align such a requirement to the DMS rules as there is some similarity between the two schemes.

Q54(b)
Yes, we think that the certificate require to be signed within one month of the manager's appointment, for the same reasons as set out in the previous answer, it seems sensible to align these rules with the DMS rules.

55. (a) In the OAS, should the manager:

(i) Be designated an agent of the OA?

(ii) Have capacity to exercise any of the powers available to the OA?

(iii) Have a duty to manage the tenement for the benefit of members?

(b) If you answered no to any part of the question above, what are the reasons for your answer?

(Paragraph 9.34)

Comments on Question 55

Q55(a)

(i) Yes the manager should be designated an agent of the OA?

(ii) Yes, the manager should have capacity to exercise any of the powers available to the OA

(iii) Yes, the manager should have a duty to manage the tenement for the benefit of members. As we mentioned in answer to question 29, however, there is a general point about the articulation of this core duty. Further material to guide the understanding of 'benefit' may need to be included.

Q55(b) N/A

56. In the OAS:

(a) Should the general duty of the manager be supplemented by a non-exhaustive list of specific duties?

(b) If a non-exhaustive list is provided, which duties should it include?

(Paragraph 9.39)

Comments on Question 56

Q56(a)

Yes, we consider that the general duty of the manager should be supplemented by a non-exhaustive list of specific duties?

Q56(b)
If a non-exhaustive list is provided, we consider that the purpose of the OA needs to be clearly defined. We note that the suggested specific duties are:-

- 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;
- 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).

Rule 8 of the DMS rules has as its first specific duty – to carry out inspections from time to time of the scheme property. If the purpose of the new Act is to ensure that the tenement is maintained through the establishment of the OA then we would suggest that there should be a duty to carry out inspections of the property. We presume that such inspections would provide a basis to consider what budget needed to be set for the following year. Where it was considered that such a duty should not be specific then we would suggest that consideration be given to setting out non-mandatory duties.

If the purpose of the AGM is to consider works to be done to the tenement for maintenance purposes it would seem to us to be sensible for there to be some type of report to be prepared setting out what works have been done in the last year; what an inspection has flagged up; and what works should be considered for the coming year.

We note the reference to the building insurance and that it is quite common for block insurance policies to be required in tenements. Where the title deeds do not oblige owners to have block building insurance it would seem to us reasonable to have a power to order owners to provide evidence of the buildings insurance they have in place to the owners' association. We wonder what requirement is placed on the manager in this regard: are they to assess the adequacy of each property's building insurance cover or just its existence? If the manager were another owner in the tenement would that be a particularly onerous duty? Where would liability fall if an owner's building insurance was not sufficient? We think that the extent of any such duty would have to be clearly defined.

57. In the OAS, should duties on the manager of the OA be owed to the OA itself and to members?

(Paragraph 9.41)

Comments on Question 57

We consider that duties on the manager should be owed to the OA and also to members. We agree that there may be situations where an owner may wish to enforce his interest against the manager.

58. (a) Does the OA legislation require any provision to deal with circumstances in which the manager purports to act beyond their authority?

(b) If so, what provision is required?

(Paragraph 9.49)

Comments on Question 58

(a) No, we consider that the OA legislation does not require any provision to deal with circumstances in which the manager purports to act beyond their authority

(b) n/a

59. In the OAS:

(a) Should the rules on liability for costs replicate the rules on liability for costs in the TMS?

(b) If not, how should liability for costs be allocated?

(Paragraph 10.15)

Comments on Question 59

(a) We agree, under reference to 10.13, that liability for costs should be replicated per TMS.

(b) N/A.

60. In the OAS:

(a) Should members have the power to exempt an owner, in whole or in part, from liability for a share of costs which would otherwise be due?

(b) If so, should the vote of any owner who stands to benefit not be counted in making the decision?

(Paragraph 10.17)

Comments on Question 60

(a) We agree, under reference to 10.16 and 10.17, that members should have the power to exempt an owner, in whole or in part, from a liability for the share of costs which would otherwise be due.

(b) N/A

61. In the OAS:

(a) Should liability for exempt or missing shares of costs be redistributed equally amongst other owners liable for the same costs, subject to a right of relief where the share is missing (but not where the share is exempt)?

(b) If not, what alternative rule should apply?

(Paragraph 10.21)

Comments on Question 61

(a) We agree, under reference to 10.16 and 10.17, that the provision in the OAS should essentially replicate those under the TMS. Liability for exempt or missing shares of costs should be redistributed equally amongst other owners liable for the same costs, subject to a right of relief where the share is missing (but not where the share is exempt).

(b) N/A.

62. Are any changes to sections 11-15 of the Tenements (Scotland) Act 2004 required by the introduction of the OA regime?

(Paragraph 10.24)

Comments on Question 62

Adopting the reasoning set out in 10.22-10.23, we identify no changes to sections 11-15 of the Tenements (Scotland) Act that will be required by the introduction of the OA scheme.

63. In the OAS:

(a) Should the budgeting system be based on the system used in the DMS?

(b) If not, what alternative system would you propose?

(Paragraph 10.39)

Comments on Question 63

(a) The budgeting system should be based on the system used in the DMS.

(b) N/A

64. If the DMS budgeting system is adopted for the OAS:

(a) Should the draft budget be required to include details of the works intended to be carried out, the estimated cost of each work and how the estimate was arrived at, and the timeline for completion of works?

(b) Should any surplus service charge payments be returned to owners or remain available to the OA for work the following year?

(c) Are any other changes required to adapt the DMS system for the OAS?

(Paragraph 10.39)

Comments on Question 64

(a) We suggest that a draft budget be prepared to include the details of all works, the estimated costs, how the estimate was arrived at and time-frame for completion. This will make the workings of the OA transparent and hopefully minimise disharmony.

(b) We suggest that any surplus remain available to the OA for work the following year; for the reasons set out in paragraph 10.38.

(c) We suggest some modification is required as set out at 10.36 and 10.37.

65. In the OAS:

(a) Should there be provisions on treatment of funds equivalent to those in the DMS?

(b) If not, what changes or additions to the DMS provisions would you suggest?

(Paragraph 10.43)

Comments on Question 65

(a) We suggest that, adopting the reasoning in 10.40-10.42, there should be provisions for treatment of funds equivalent to those in the DMS.

(b) N/A.

66. (a) Should section 8 of the 2004 Act be amended to include a duty on owners to maintain any part of the tenement which they own so as to prevent damage to any part of the tenement, or in the interests of health and safety?

(b) If not, why not?

(Paragraph 11.12)

Comments on Question 66

(a) Yes, for the reasons set out in the Discussion Paper.

67. (a) Should legislation include a non-exhaustive list of works covered by the duty on owners under section 8 of the 2004 Act? Why or why not?

(b) If legislation were to include such a non-exhaustive list, what works should be included in the list?

(Paragraph 11.15)

Comments on Question 67

Q67(a)
We think not. The purpose of the reform set out in paragraphs 11.8 to 11.11 is to try to compel owners to maintain their property so as to prevent damage to any part of the tenement or in the interests of health and safety. Any list of works covered, no matter how carefully composed, risks implying that the purpose is to compel performance of the listed works, which is slightly different. The eiusdem generis rule is likely to affect interpretation, and could thus omit the performance of necessary works, or compel the performance of works which do not meet the threshold regarding prospective harm. As the paper acknowledges, tenements are a heterogeneous set of buildings and flexibility in determining what works are needed in a specific context will be important.

Q67(b)
If, however, a list is to be prepared, we share the view, which is implicit in the example in paragraph 11.13, that the provision of detail regarding the outer walls of the tenement would be needed. This is particularly so regarding the outside walls of properties such as 'four in a block' buildings, or the gable-end wall of a traditional 19th century tenement.

68. (a) In the OA legislation, should each owner continue to have an individual right of enforcement in relation to obligations owed to them by other owners under the 2004 Act or under the management scheme applicable to the tenement?

(b) In the OAS, should the manager have the right to enforce any obligation owed to one owner by another under the 2004 Act or under the management scheme applicable to the tenement?

(c) In the OAS, should the manager have a duty to enforce any obligation owed to one owner by another under the 2004 Act or under the management scheme applicable to the tenement where reasonable to do so?

(Paragraph 11.27)

Comments on Question 68

a) Yes.
b) Yes.
c) No. This appears to us to go too far. Some difficult situations will arise where there is a genuine dispute as to the need for works at all, or the scope of those works. Imposing a duty on the manager to, in effect, side with one owner over another, with only a yardstick of reasonableness to guide the manager, appears to us too onerous.

69. In the OA scheme, should each owner have an individual right of enforcement in relation to the obligations owed by the manager to the OA?

(Paragraph 11.31)

Comments on Question 69

Yes – with an obligation to intimate the action to other owners who, if they perceive an interest to do so, may wish to enter the process.

70. Should enforcement action in relation to obligations arising under the 2004 Act or the management scheme applicable to the tenement be dealt with by summary application to the sheriff court or by application to the Housing and Property Chamber of the First-tier Tribunal? Please give reasons for your answer.

(Paragraph 11.40)

Comments on Question 70

While we can see merit in having enforcement actions arising under the 2004 Act or the management scheme dealt with in one jurisdiction, and further that it should be a specialist tribunal, namely the Housing and Property Chamber of the First Tier Tribunal, "enforcement action" is not a defined term. We think it unlikely that all enforcement action should, or will in fact, be sent to the tribunal.

There is currently an overlap with similar related housing matters being dealt with by the Housing and Property Tribunal and also the Sheriff Court. For example, complaints about property factors come to the tribunal; but an action for breach of contract/negligence against a property factor or a failure to pay the factor's service charge will go to the sheriff court. The jurisdiction of the sheriff court to determine such cases is unlikely to change. Any proposed legislation should therefore clearly define what cases the tribunal would have jurisdiction to hear and what is excluded. There requires to be a proper definition of what *enforcement action* is.

We would also note that proposed cases involving, for example, the enforcement of maintenance of a tenement; or the failure of a manager appointed to discharge his duties may raise questions which would be technical and complicated. While the Housing and Property Chamber is inquisitorial, basic rules of evidence and application of the law still apply. These cases can be appealed and the Upper Tribunal will determine the appeal looking at what the tribunal did.

The vast majority of parties coming to the tribunal do not have legal representation, and the rules of procedure are more flexible leading often to a more "wide-ranging" number of papers being lodged by party litigants. There can be a lack of understanding as to what is relevant evidence; and a lack of understanding as to the powers open to the tribunal in terms of remedies. By way of example, remedies sought against property factors can often be for compensation for damages for alleged negligence/breach of contract, with parties not understanding that jurisdiction to determine such matters sits with the sheriff court.

We consider that in complicated, technical or high value cases, there is benefit in parties having legal or other professional representation and a more formal scheme of rules to follow, such as those for the sheriff court. We consider it can assist a tribunal or court, and the parties themselves, in having legal or other professional representation to assist parties in properly

identifying the issues in dispute and in pulling together relevant evidence to support a party's case. We consider having legal or other professional representation can lead to better, more effective and expeditious decision making. We consider that parties coming to the sheriff court are more often legally represented.

While it assists parties in accessing justice and dispute resolution to have a system where there is no cost to making an application and very limited risk of expenses, we consider that this is more appropriate for disputes which are not unduly complicated, technical and are not of high value.

We would suggest therefore that any legislation should clearly define what cases can come to the Tribunal and what cases should sit with the Sheriff Court. We consider that there should be careful consideration as to what "enforcement action" is to mean. We consider that cases where the allegations are complicated, technical and/or of high value should be considered by the sheriff court.

We consider that careful consideration of the remedies open to the tribunal should be defined in any proposed legislation, and it should also be clear which powers do not sit with the tribunal.

71. (a) Should a court or tribunal dealing with an application to enforce an obligation arising under the 2004 Act or the management scheme in place in the tenement have power to refer the matter for mediation if appropriate in all the circumstances of the case?

(b) Should a court or tribunal dealing with an application to enforce an obligation arising under the 2004 Act or the management scheme in place in the tenement have discretion to take into account any attempts by any party to the case to engage with an alternative dispute resolution process when determining any award of expenses?

(c) Do you have any other comments about the use of alternative dispute resolution processes in the context of tenement maintenance disputes?

(Paragraph 11.45)

Comments on Question 71

a) Yes. We share the views expressed in the paper about the desirability of alternative dispute resolution in this context, as we set out more fully in paragraph c).
b) Yes, because such a discretion is consistent with the general approach of encouraging alternative dispute resolution if at all possible.
c) In agreeing with the comments regarding the desirability of alternative dispute resolution, we rely on the near-inevitability of ongoing contact between the parties, making a protracted litigation particularly damaging. We note that the most recent Civil Justice Statistics for Scotland (published on 30 April 2024) reveal that the commonest single civil law problem experienced was with neighbours (see Figure 4). A proportion of these problems is likely to relate to shared parts of a building, which will often be a tenement.
https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/04/civil-justice-statistics-scotland-2022-23/documents/civil-justice-statistics-scotland-2022-23

72. Should the manager be entitled to seek authority from the court for a budget for works required for compliance by owners with their duties under section 8 of the 2004 Act?

(Paragraph 11.48)

Comments on Question 72

Yes.

73. (a) Should the provisions on the diligence of land attachment be brought into force, subject to the restriction that it can be used only by an OA in relation to heritable property forming part of a tenement in connection with debts owed in relation to maintenance of that tenement?

(b) Should the power to sell attached property be excluded where the property in question is used as a family home as defined in section 98 of the Bankruptcy and Diligence etc. (Scotland) Act 2007?

(Paragraph 11.55)

Comments on Question 73

a) Yes.
b) Yes.

74. (a) Where proceedings against an OA by a third party have proved ineffective:

(b) Should the third party have a direct right of recourse against the members?

(c) Should the right of the third party be limited to each member's individual share of money owed?

(d) Should a third party enforcing directly against members be entitled to levy a service charge as if the third party was the manager of the OA?

(Paragraph 11.63)

Comments on Question 74

a) Yes.
b) Yes.
c) We are not sure that this offers an advantage over the more conventional approach: given that the debt has to be evidenced by court decree, the third party should convene the owners as additional parties in the court action concerned, and thereby acquire the right to enforce against them as individuals. The legislation could specify that, in such a situation, only several liability is competent.

75. Which insolvency process (or processes) should be available to an OA?

(Paragraph 12.16)

Comments on Question 75

Of the insolvency procedures available under Scots law, sequestration would appear to be the only viable one for OAs.

76. Should the OA legislation provide that the process of terminating an OA begins automatically when the regime is disapplied from a tenement or plot of land through registration of a relevant deed or notice in the Land Register?

(Paragraph 13.4)

Comments on Question 76

Yes. Against the possibility that there are unpaid debts, however, we wonder whether the granters of the deed should be required to include a declaration of solvency of the OA within the deed itself? This would be in line with what we suggest in Answer 79 regarding the possibility of restoring the OA after dissolution in certain circumstances.

77. In the OAS, following registration of a deed or notice disapplying the OA regime to a tenement or plot of land, should the manager have a duty to:

(a) Use any association funds to pay any debts of the association, then distribute any remaining funds to flat owners?

(b) Prepare the final accounts of the association and send a copy to each flat owner no later than six months after the commencement of the winding up?

(c) Take on any further responsibilities, and if so, what?

(Paragraph 13.9)

Comments on Question 77

Q77(a)
Yes

Q77(b)
Yes

Q77(c)
Yes:

(1) The manager should be under a duty to liquidate any assets held by the OA;

(2) The manager should be under a duty to prepare a final list of members of the OA together with their respective entitlements to a distribution of OA funds. The manager should be under a duty to send a copy of this to each member along with the final accounts.

78. In the OAS, what provision should be made for the distribution of funds to members during the winding up process?

(Paragraph 13.13)

Comments on Question 78

Funds should be distributed to members in accordance with each member's liability for the debts of the OA: if one member is liable for 50% of the OA's debts, then that member should be entitled to 50% of the OA's funds. This default position could be varied only by unanimous agreement.

79. (a) In the OA legislation, should an OA be deemed dissolved six months after registration of the deed commencing the termination process?

(b) Should members be permitted to postpone dissolution for a specified period beyond that date should they so wish?

(Paragraph 13.16)

Comments on Question 79

Q79(a)
Yes, provided no notice of postponement of the date (see below) is registered during the six month period

Q79(b)
Yes, although a notice of postponement of dissolution should require to be registered in which the new dissolution date is identified. There should also be a provision allowing former members, creditors or other parties having an interest to restore the OA after dissolution in a similar manner to the legislative provisions relating to companies. That in turn may require provision to be made as to the circumstances in which a distribution of what appeared to be surplus funds that had been made to members prior to dissolution could be recovered to meet a claim which only emerged after dissolution and which led to the OA being restored.

General Comments

We have no additional comments to make.

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.