

## RESPONSE FORM

### DISCUSSION PAPER ON TENEMENT LAW: COMPULSORY OWNERS' ASSOCIATIONS

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

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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

Potential to bring additional work for energy efficiency upgrades, repairs and maintenance, consultancy work, surveys to benefit local businesses and economy.

Potential to provide better financial management which could reduce interest payment to tenement owners as a result of increased organisation, reducing reliance on loans and remortgaging, etc.

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

Increased collaboration and engagement within tenements, forming relationships and community.

Benefits included increased public safety, from better maintenance and reduced reports of dangerous buildings and defects. Potential, to reduce demand on Council to step in for repairs.

Lifecycle of buildings could increase and buildings receive regular maintenance and repair work, reducing the need for new buildings and materials which are carbon intensive.

Improvements to health of residents, less water ingress, warmer flats, less damp and mould. Reducing respiratory illness and illness from being too cold.

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

Yes, agree with above proposals. Suggest yearly meetings following the initial meeting.

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, otherwise no change is likely.

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**

Suggest widened to include and agent of an owner (eg. Family member), likewise, building managers or property letting agencies with relevant experience/qualifications should be considered.

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

(Paragraph 4.34)

**Comments on Question 6**

Support in theory, as long as the process is simple and does not cause delays.

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 – Agree in principle, however, would this be a discretionary power or statutory duty where the Council must act?

C – Yes

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**

Agreed.

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**

Agree, however, seek clarification for how the Local authority will be able to reappoint a manager such as a factor to the role and remove the statutory duty from the Council

B – Suggest a registered property factor should be allowed to apply for the role.

C – It would need to be clear that the remedial manager is not acting as a factor and only held to account for the role as remedial manager under the OA legislation.

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) Agree

(b) Agree

(c) The demolition of the building seems like another key marker for the end of the remedial manager's term. As explained later in consultation.

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, agree.

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**

Yes, agree. This seems sensible for the clarity of all members of the OA for 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.

Note that the DMS has some sections that cannot be amended.

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**

In favour of changes to disapply existing title conditions to the extent that they modify the application of the OA scheme.

A Yes

B Suggest 10 years

E Standardisation will help provide clarity to tenement owners

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**

A- This seems suitable, no comments.

B- The address of the OA should be the address of the tenement, suggest correspondence address for use of the manager.

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**

Options 2b is most appropriate.

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(i) To encourage maintenance of all buildings, it seems that the OA legislation should apply to small tenements, in this case though the requirements are the same, it would stand to reason that the difficulty in achieving these requirements would be lower.

B – Yes

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**

Agree with (ii).

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, this seems appropriate in large development where there is one factor for a number of blocks.

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

(Paragraph 5.43)

**Comments on Question 19**

Yes, this seems appropriate.



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**

Nothing appears obvious.

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**

Yes, a legal body seems appropriate.

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**

- A- Yes, this seems appropriate.  
B- Yes, this seems appropriate. Perhaps with a slightly, longer period in which to register, hopefully repairs to new builds will be uncommon and an extended period (eg. 6 months from full occupation of a tenement) could prevent the first buyer being forced into a role that may be more suitable or interesting to a person that purchases one of the final flats in a development.

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**

A – No comments

B – Due to complexity, we are supportive that non-owner occupiers should NOT be part of the OA. Assuming agency law applies.

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**

Agree.

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**

A - Yes

B - Yes

C - Yes

D – Yes, Perhaps with consent of the missing OA member or their agent.

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, with agreement of the OA.

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**

A – Yes

B – Yes

C – Yes

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**

Yes.

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 – Yes

B – Yes, subject to application of the TMS rules under the OAs.

C – Some consideration should be made re B, perhaps a simple majority for necessary works, eg, repairs to the roof, and a unanimous decision for upgrades such as solar panels, to prevent a situation where an owner with less funds is compelled to pay for “nice-to-have” upgrades which would be for the “benefit of members”.

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 – Yes, this appears suitable.

B – If the list from 7.10 is used care should be employed around

- Carry out maintenance, improvements or alterations to scheme property – suggest that improvements and alterations require a higher percentage of votes than maintenance requirements.

- Invest any money held by the association – this should be limited to savings accounts with interest, it is not recommended that OA funds be use for investments that carry risk.
- Borrowing should only be done from a registered bank and only up to a certain amount or level so that borrowing is limited and not too high compared to funds held/value of tenement.

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 – Yes

B – Broaden the definition of maintenance to cover all health and safety issues, fire safety measures, energy efficiency measures.

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**

Yes to all.

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**

Yes

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

(Paragraph 7.29)

**Comments on Question 34**

Yes, as per current similar legislation.

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 – Suggest this is too complicated and existing titles for each property can cover common parts.

B – N/A

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**

No, as it is not consistent with its core function of managing and maintaining the tenement.

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**

Shouldn't be strictly linked, suggest 1 vote per flat as per TMS.

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**

A – Yes

B – No, just one vote per flat.

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**

A – Yes

B – Yes

C – Yes

D – Listed under 8.32

- Making a payment from any reserve fund which has been formed;
- Carrying out improvements or alterations to scheme property where not reasonably incidental to maintenance;
- Demolishing scheme property where not reasonably incidental to maintenance.
- Disapplying the OAS from the tenement.

E – Yes.

F – Agree with suggestion that unanimity remain required for the demolition of a tenement.

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**

A – Yes

B – Yes

C – Yes

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**

A-D – Agree

E – Yes, maintenance issues that require short to medium term action where the manager has not called a meeting.

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**

A- Yes

B- Yes

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**

A – Support the continuation of the current DMS quorum requirement only for meetings, as long as they are not voting on maintenance or repairs.

B – Suggest continuation of DMS definition where “*a quorum is made up of members representing at least 50% of the total number of votes allocated in a development composed of thirty units or less. In a larger development, members representing at least 35% of the votes allocated is sufficient.*”

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**

A – Yes

B – Yes, support keeping the requirement the same as in the DMS

C – Yes, support keeping the requirement the same as in the DMS

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**

Would suggest that show of hands is appropriate for most situations, however any OA member should be able to request the manager for the option of a secret ballot.

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**

- A- Yes
- B- Yes, both.
- C- If setting rules, perhaps a minimum number of days for an owner to provide a response. Suggest 1 week, unless for emergency work.
- D- Yes
- E- The manager should count the votes

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**

A – It should affect the validity and the decision should be retaken.

B – Vote would be null and void

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**

Agree.

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**

A – Yes, as per the The Act.

B – Yes.

C – Yes, as per current practice.

D – Suggest continuing with the following factors: the age of the property, the condition of the property, the reasonableness of that cost (but not the actual level of cost, these works can sometimes be justifiably expensive).

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, maintain provision set out in TMS.

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**

A – Yes

B – Yes, suggest keeping same provision as in the TMS.

“work which, before a scheme decision can be obtained, requires to be carried out to scheme property: (a) to prevent damage to any part of the tenement, or (b) in the interests of health or safety.”

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**

A – No

B – Person should be an interested party, building managers or property letting agencies with relevant experience/qualifications should be considered.

- 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**

A – No

B – Suggest a small flat fee or hourly rate that reflects the resource that is being put in to arrange work and meetings. DO NOT SUPPORT a discount on works as this could easily be in the order of thousands of pounds.

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)

**Comments on Question 54**

A – Yes, as per the DMS

B – Yes, as per the DMS

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**

A – I Yes, as per the DMS

II – Yes, as per the DMS

III - Yes, as per the DMS

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**

A – Yes

B – Supportive of items set out in 9.36 (as per DMS) and 9.37

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**

Yes, as per the DMS.

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**

OA should have the ability to terminate the appointment of the manager if they act beyond their powers and duties.

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 – Agree with replicating the rules as set in the 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 – Yes

B – Yes, agree, vote not to be counted.

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 – Agree to adopt the provision set out in the TMS

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**

Agree, no changes required.

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- Yes, agree the budgeting system should be adopted from 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- Yes,
- B- In the interest of achieving maintenance of tenements, agree with aligning to the DMS which sees any surplus retained for the following year's costs.
- C- If not included in answer to B. The surplus should be able to count towards a discount on the following year's budget, where OA members choose to use the surplus as part of the budget rather than to add to an additional reserve.

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- Yes
- B- Suggest, funds invested should be in no-risk accounts where capital is not at risk and suggest the inclusion online banking apps such as Monzo and Revolut.

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- Agree with proposed changes.

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**

- A- Agree with the inclusion of a non-exhaustive list for the purpose of guidance and clarity.
- B- Suggest that works that maintain or protect elements of the scheme that are shared should be included. As per the example given in 11.13, all members of the OA would be liable as the work to protect the walls from moisture from the ground would affect an element shared by all (the walls).

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- No
- C- Yes

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

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**

Suggest by application to the Housing and Property Chamber as there appears to be more overlap with their current duties and the possible disputes arising from the operation of an OA.

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,
- B- Yes
- C- No further comments.

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, excluded.

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**

- b- Yes, as per the DMS
- c- Yes
- d- No

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

(Paragraph 12.16)

**Comments on Question 75**

Agree, Sequestration is the best process as per the DMS.

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

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**

- A- Yes
- B- Yes
- C- No further responsibilities appear necessary.

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**

Distribution of service fees should be equal.

Distribution of maintenance funds should either be equally or as apportioned during collection, eg. Where a flat is much larger and contributes 1.5x more than the smallest flat, the larger flat should be given back their 1.5 share.

Redistribution of funds should be given to OA members who are not in arrears to the OA.

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**

A- Yes, as per the DMS

B- Yes, as per the DMS

**General Comments**

Has been any consideration of if there will be any opportunities to look at improving accessibility standards as part of this? I.e. could OAs be required to make upgrades to improve accessibility too (rather than just maintenance, and health & safety)?

There are conversations around Housing for Varying Needs and Scottish Accessible Home Standards (for new builds) but is there a way of tying this in? This could end up being a missed opportunity if we end up with OAs being brought in which have no responsibility towards accessibility and we would want to see that this has at least been considered.

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.