



The Scottish Parliament
Pàrlamaid na h-Alba

Local Government and Regeneration Committee

4th Report, 2014 (Session 4)

Stage 1 Report on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

Published by the Scottish Parliament on 18 March 2014

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -
www.scottish.parliament.uk

Any links to external websites in this report were working correctly at the time of publication.
However, the Scottish Parliament cannot accept responsibility for content on external websites.



The Scottish Parliament
Pàrlamaid na h-Alba

Local Government and Regeneration Committee

4th Report, 2014 (Session 4)

CONTENTS

Report	1
Introduction	1
Purpose of the Bill	2
Background to the Bill	3
Charging Orders	5
General Principles of the Bill	5
Cost Recovery	6
Other issues	9
Financial Memorandum	13
Delegated Powers	14
Conclusions on the General Principles of the Bill	15



The Scottish Parliament
Pàrlamaid na h-Alba

Local Government and Regeneration Committee

Remit and membership

Remit:

To consider and report on a) the financing and delivery of local government and local services, and b) planning, and c) matters relating to regeneration falling within the responsibility of the Cabinet Secretary for Infrastructure and Capital Investment.

Membership:

Cameron Buchanan
Mark McDonald
Stuart McMillan
Anne McTaggart
Alex Rowley (25 February 2014 - present)
Kevin Stewart (Convener)
John Wilson (Deputy Convener)

Richard Baker (4 September 2013 – 25 February 2014)

Committee Clerking Team:

Clerk to the Committee

David Cullum

Senior Assistant Clerk

Fiona Darwin

Assistant Clerk

Seán Wixted

Committee Assistant

Fiona Sinclair
Ben Morton



The Scottish Parliament
Pàrlamaid na h-Alba

Local Government and Regeneration Committee

4th Report, 2014 (Session 4)

Stage 1 Report on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. The Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill, (“the Bill”), was introduced to the Parliament on 30 October 2013 by David Stewart MSP, the member in charge of the Bill (“the member in charge”). The Parliament designated the Local Government and Regeneration Committee as the lead committee for the consideration of the Bill.
2. The Bill is a members Bill, as specified under Standing Order Rule 9.14. The Bill is accompanied by both a Policy Memorandum and Explanatory Notes, containing a Financial Memorandum.
3. We issued a call for written evidence on the Bill on 8 November 2013. The call for evidence closed on 31 January 2014 with 30 submissions¹ being received in response.
4. On 19 February 2014 we took oral evidence² from Gillian McCarney, East Renfrewshire Council; Dave Sutton, Institute of Historic Building Conservation; John Delamar, Midlothian Council; Alistair MacDonald, North Lanarkshire Council; and Susan Torrance, Scottish Federation of Housing Associations.
5. At its second and final oral evidence session we heard from Derek Mackay MSP, Minister for Local Government and Planning (“the Minister”) and the member in charge of the Bill.

¹ The written submissions received are available at:
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69658.aspx>
[Accessed 13 March 2014]

² The Official Reports of each of the evidence sessions together with associated papers are available at:
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29854.aspx>
[Accessed 13 March 2014]

Purpose of the Bill

Policy intention

6. The policy objective of the Bill, as stated in the Policy Memorandum³, is to amend the Building (Scotland) Act 2003 (“the 2003 Act”) in order to allow local authorities to make charging orders for recovery of expenses incurred where they have carried out work to defective or dangerous buildings under sections 28, 29 or 30 of the 2003 Act.

7. Currently when a local authority incurs repair costs having served either a defective building notice (under section 28 of the 2003 Act), a dangerous building notice (under section 30), or taken urgent action to deal with a dangerous building (under section 29), and has not been able to recover these costs from the owners of those buildings, the local authority can pursue the debt through civil debt recovery procedures. However, local authorities can face difficulties in tracing owners, and pursuing owners through the courts can be costly.

8. The intention is the charging order should operate by means of local authorities attaching a formal charge over the building concerned. Section 55 of the 2003 Act gives a wide meaning to “building”, which covers any structure or erection, whether temporary or permanent. It embraces commercial and residential property, and includes where appropriate part of a building. The charge would be registered in the Land Register of Scotland or, as appropriate, the Register of Sasines.

9. The charge relates to the amount the local authority has incurred in undertaking the repair costs. This would be repayable over a fixed 30-year term, through 30 annual instalments, or earlier by negotiation where the owner is in a position to redeem by paying the local authority an agreed sum.

10. The Bill in summary—

- provides for costs and expenses incurred by local authorities in the repair, securing or demolition of defective or dangerous buildings to be recovered by way of charging order;
- specifies recoverable expenses to include local authorities’ works costs, registration and discharge fees for a charging order and administrative expenses incurred in connection with arranging the registration and discharge of a charging order, and interest;
- sets out the required contents of a charging order;
- provides for the registration, repayment (including early redemption), and discharge of charging orders; and
- provides for a charging order to be appealed in certain circumstances.

³ Dangerous and Defective Buildings (Recovery of Expenses) (Scotland) Bill, Policy Memorandum, paragraph 2.

Background to the Bill

11. Prior to the current system of building standards provided for by the 2003 Act, the Building (Scotland) Act 1959 (“the 1959 Act”) dealt with the setting of building standards, compliance with and enforcement of those standards, and powers in relation to dangerous buildings.

12. Schedule 6 to the 1959 Act provided a framework for charging orders. Local authorities were empowered to make charging orders for the recovery of their expenses where they executed works under section 10 (to remedy contraventions of a building warrant or construction in the absence of a building warrant), 11 (to remedy non-conformity with building standards for certain purposes) or 13 (to deal with dangerous buildings). This entitled the local authority to burden the property with an annuity over a 30-year term, which had priority over existing and future burdens and encumbrances (with some minor exceptions).

13. The 2003 Act (Schedule 6, paragraph 1) repealed the 1959 Act in its entirety and replaced it. The Explanatory Notes for the 2003 Act describe the Act as retaining the general framework of the Building (Scotland) Act 1959 while making changes to procedures for the building standards process to make it simpler, and to reflect existing practice.

14. Local authorities have a statutory obligation to deal with dangerous buildings under sections 29 and 30 of the 2003 Act. Under section 29, where the local authority considers that urgent action is required to reduce or remove any danger to people in or around the building, the general public or to adjacent buildings or places, it can carry out any necessary work. It may then recover expenses incurred in doing so from the owner. Section 30 enables local authorities to serve a notice on owners to undertake work the local authority considers necessary to remove the danger. Where owners fail to carry out the works they may be guilty of an offence and on summary conviction would be liable to a fine not exceeding level 5 on the standard scale (currently £5,000).

15. According to the Scottish Housing Condition Survey (SHCS) for 2011, it is estimated that 83% of dwellings in Scotland have some disrepair. The Survey also indicated that levels of “any disrepair” in urban and rural areas are about the same.⁴ In just under half the dwellings (48%) with some form of disrepair, that disrepair was urgent.⁵ The definition of an urgent repair in the SHCS is one which, if not carried out, would cause the fabric of the building to deteriorate further and/or place the health and safety of the occupier at risk.

16. According to the member in charge a rough Scotland-wide figure is calculated to be 700 charging orders that might be registered annually should the Bill be enacted. This figure might be substantially lower if local authorities decide not to make use of charging orders in all cases where debt is to be recovered or find the notification of an intention to apply a charging order leads to more owners

⁴ Scottish Housing Conditions Survey – Key findings 2011, paragraph 143, page 44. Available at: <http://www.scotland.gov.uk/Resource/0041/00410389.pdf> [Accessed 13 March 2014]

⁵ Scottish Housing Conditions Survey – Key findings 2011 paragraph 149, page 44, Available at: <http://www.scotland.gov.uk/Resource/0041/00410389.pdf> [Accessed 13 March 2014]

paying. Equally it might increase if local authorities take a more proactive approach to defective buildings.

17. The Scottish Government commissioned research to identify ways of improving recovery of costs that local authorities incurred on work to deal with dangerous and defective buildings under the 2003 Act.

18. The research project collected information from eight⁶ local authorities on their cost recovery experience when carrying out their duties concerning defective and dangerous buildings. The project estimated the total unpaid debt for the eight authorities amounted to £1.5 million. This figure, when roughly extrapolated, produced an estimated all-Scotland figure of £3.9 million.⁷ Also of interest was the varying level of unpaid debts. The case study authorities demonstrated these could range from a few thousand pounds in the case of Highland to several hundreds of thousands in the cases of Fife, Glasgow, Renfrewshire and Borders.⁸

19. In Session 3 David Stewart MSP consulted on a proposal that was principally concerned with changes to cost recovery in respect of building repairs. The consultation⁹ received 43 responses with the majority agreeing that legislation for defective and dangerous buildings required reviewing and supported the proposed introduction of charging orders, or similar cost recovery mechanism.

20. The key change proposed was the reintroduction of charging orders as a means of cost recovery for both dangerous and defective buildings. The draft proposal fell at the end of Session 3.

21. The member in charge of the Bill lodged the current proposal which focused solely on the introduction of charging orders. This was lodged on 17 January 2012 accompanied by a statement of reasons.

22. The Local Government and Regeneration Committee considered the draft proposal and statement of reasons at its meetings on 8 February 2012 and 22 February 2012. The Committee agreed it was satisfied with the member's statement of reasons as to why further consultation was not required. As a result the member in charge became entitled to introduce a members' bill.

⁶ Dundee City Council, The City of Edinburgh Council, Fife Council, Glasgow City Council, Highlands Council, Perth and Kinross Council and Renfrewshire Council

⁷ The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012, Extent of cost recovery, para 4.4.10, Available at: <http://www.scotland.gov.uk/Resource/0041/00412487.pdf> [Accessed 13 March 2014]

⁸ The Scottish Government – Research Project to identify a cost recovery mechanism for local authorities dealing with dangerous and defective buildings, November 2012, Extent of cost recovery, para 4.4.8, Available at: <http://www.scotland.gov.uk/Resource/0041/00412487.pdf> [Accessed 13 March 2014]

⁹ Member in charge consultation <http://www.davidstewartmsp.org.uk/consultation/> [Accessed 13 March 2014]

Charging Orders

23. A charging order is a form of statutory charge which attaches to land and property, for example, in relation to the repayment of a loan, recovery of expenses incurred or grants made.

24. The member's consultation summary set out the main benefits of charging orders identified by those responding—

- Greater certainty to local authorities that they would ultimately recover their costs;
- Charging orders attach to the property rather than to the owner, therefore providing some security in cases where the owner does not have sufficient funds;
- Avoids the legal costs involved in pursuing the debt through a civil action;
- Would bring the position in line with the Housing (Scotland) Act 2006 which makes provision for the use of Repayment Charges.¹⁰

25. Charging orders are used in a number of enactments including the Building (Scotland) Act 1959; the Health and Social Services and Social Security Adjudications Act 1983; and the Legal Aid (Scotland) Act 1986.

26. The Registers of Scotland told us that as of November 2013, 4,426 orders had been registered in the Land Register and 7163 in the register of Sasines. The fee charged for charging orders and discharges in both the Land Register and the Register of Sasines is £60.¹¹

GENERAL PRINCIPLES OF THE BILL

27. The Bill provides an additional means by which local authorities can recover costs and expenses they incur in carrying out their statutory duties in relation to dangerous and defective buildings.

28. Provisions are also made for defining what constitutes recoverable expenses; content of a charging order; registration, repayment and discharging of a charging order; and appeal against a charging order.

29. The Scottish Government agree that cost recovery powers in the Building (Scotland) Act 2003 need to be improved.¹² The Scottish Government indicated in evidence they would be prepared to support the Bill subject to key attributes for improved cost recovery powers being addressed to allow the improved powers to be activated by local authorities sooner.

¹⁰ Building Repairs Consultation Summary December 2011, paragraph 43. Available at <http://www.davidstewartmsp.org.uk/consultation/> [Accessed 13 March 2014]

¹¹ Correspondence from Registers of Scotland, Keepers Office
http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/General%20Documents/20131211-Keeper_of_the_Registers_letter_of_reply.pdf [Accessed 13 March 2014]

¹² Scottish Government. Written submission.

30. The following part of our report considers the evidence received on the Bill and sets out our conclusions and recommendations thereon.

Cost Recovery

31. Section 46D(1)(a) provides for the repayable amount under a charging order to be paid by means of 30 annual instalments, these being due on the same date each year. Section 46D(1)(b) confirms that where an annual instalment is not paid, then normal civil debt recovery procedures can be taken by local authorities to pursue recovery of that instalment, together with charging order fees and connected administrative or other expenses.

Timescale

32. Most written and oral evidence commented on the timescale of recovery of expenses incurred by the local authority. As drafted the Bill is extremely prescriptive and the charging order must provide for the repayable amount to be paid in 30 annual instalments.

33. Evidence gave the general consensus that 30 years was too long a period of time for the recovery of expenses, particularly where smaller amounts were concerned.

34. It was suggested in oral evidence to us that the average cost spent by a local authority to make a dangerous and defective building safe was between £2k and £3k.

35. John Delamar from Midlothian Council told us—

“We do the minimum works under section 29 of the Building (Scotland) Act 2003 to make the building safe. A debt that was recovered would generally be for the cost of Heras fencing, scaffolding and contracts for cherry pickers, for example. The figures that we deal with are probably around about £100 to £3,000.”¹³

36. Mr Delamar went on to say—

“We suggest that the time [for repayment] should be relative to the person’s means to pay and the costs involved, rather than just a standard 30-year period.”¹⁴

37. Dave Sutton from the Institute of Historic Building Conservation (IHBC) recognised that although £3k is the average amount quoted for a one-off repair to make a building safe, the same building could have further interventions over a period of years thereby accruing further costs.

¹³ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 19 February 2014, Cols 3108-3109.

¹⁴ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 19 February 2014, Col 3109.

“...£3,000 might be the cost for a one-off incident, but such buildings tend to have a number of incidents over a period of years rather than having the problems solved in a one-off.”¹⁵

38. In written evidence Argyll and Bute Council stated—

“Where works for the repair or securing of a building are undertaken by this Council costs claimed from an individual owner of a building, or part thereof, are rarely in excess of £10,000.00. Where a building is demolished the costs claimed by this Council are rarely in excess of £40,000.00. As the majority of works undertaken are for the repair or securing of a building it is considered that a 30 year annuity period for a debt of less than £10,000.00 is excessive and that it may therefore be beneficial to provide differing annuity periods for different levels of debt.”¹⁶

39. Perth and Kinross Council were of similar view noting—

“Whilst it is understood why the 30 year payback is being introduced, this seems too long to work as an incentive to the local authority to do work in default. Perhaps the wording should stipulate a maximum payback period of 30 years with flexibility for shorter periods where sums outstanding are not excessive.”¹⁷

Views of the Scottish Government

40. The Scottish Government agreed that cost recovery powers need to be improved and recognised the proposals suggested in the Bill are an improvement to the current situation.¹⁸

41. With regards to the timescale for the recovery of costs, the Minister stated—

“I think that, if the 30-year period was the standard, it would be too rigid for every circumstance. Having greater flexibility and different options would be very welcome. Some of the repairs might not warrant a 30-year payback period, of course, so greater flexibility should be considered at this stage.”¹⁹

Views of the member in charge

42. The member in charge of the Bill concurred that the timescale posed for cost recovery was perhaps too restrictive and went on to state—

“I take on board the point that the period should vary according to the level of the debt. If the debt is only £5,000 or £6,000, five years would be a better period.”²⁰

¹⁵ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 19 February 2014, Col 3110.

¹⁶ Argyll and Bute Council. Written submission, page 3.

¹⁷ Perth and Kinross Council. Written submission, page 1.

¹⁸ Scottish Government. Written submission.

¹⁹ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 26 February 2014, Col 3133.

²⁰ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 19 February 2014, Cols 3120-3121.

Flexibility of payment

43. Repayment of costs is required under the Bill to be by annual payments until all costs have been recovered. This method of cost recovery was deemed in some evidence as being too rigid and may hinder people paying back costs in an annual lump sum.

44. Dave Sutton from IHBC told us—

“If someone receives a monthly salary, it may be more helpful for them to have a monthly charge than to have a lump sum requested once a year. I think that most councils will apply a degree of flexibility provided that they get the money back within a reasonable period.”

45. East Lothian Council agreed, stating—

“A LA [local authority] might prefer to choose payment by bi-annual instalments or even instalments as agreed with a landowner that suits parties better. Thereby ensuring the debt is repaid at a suitable pace and amount for the LA and/or landowner.”²¹

46. We consider the current drafting to be overly inflexible and would welcome amendments at Stage 2 allowing local authorities to recover expenses over a suitable timescale related to the amount incurred, and the debtors ability to pay.

Retrospective Costs

47. Given there is approximately £4million worth of debt due to local authorities, as a consequence of their undertaking of this work, representations were received to authorise retrospective notices relating to the outstanding debt.

48. COSLA suggested in written evidence that it would be of great financial assistance to local authorities if the provisions to recover outstanding debt could be applied retrospectively.²²

49. A number of local authorities suggested such a move, although in oral evidence others were more cautious.

50. Alistair MacDonald from North Lanarkshire Council stated—

“I do not think that having the ability to backdate charging orders would be a great benefit. Finding out when a building had changed hands would involve administration and legal costs.”²³

51. Derek Mackay, Minister for Local Government and Planning, noted legal and technical issues with introducing legislation that was retrospective and indicated he was continuing to explore the competency of a retrospective provision.²⁴

²¹ East Lothian Council. Written submission, page 3.

²² COSLA. Written submission, paragraph 6.

²³ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 19 February 2014, Cols 3122-3123.

52. We do not support the addition of retrospective powers to the Bill.

Funding

53. Local Authorities indicated they have limited capital and revenue immediately available to undertake this work pending repayments.

54. Many local authorities who responded to our call for evidence suggested the Scottish Government set up a national fund from which they could access funds to undertake their statutory duties in relation to urgent repairs to dangerous and defective buildings.

55. Fife Council stated—

“Unless monies can be provided via a funding mechanism such as a central capital fund allocation or accessed from a national loan fund for these purposes, capital can only come from other budgets to the detriment of other Council priorities.”²⁵

56. Glasgow City Council stated that if necessary they would intend approaching the Scottish Government to seek capital resources.²⁶

57. In response, Derek Mackay, the Minister, told us—

“...we as a Government are not attracted by creating a new ring-fenced pot of money that local authorities can draw on. [...] If we were to create a specific fund for this bill, it would be a form of re-ring fencing local authority resources, which is not a road that we would choose to go down.”²⁷

58. We consider the issue of a national fund to be a matter for the Scottish Government and local authorities, and not one for the Bill to legislate upon.

Other issues

Listed buildings

59. In written and oral evidence provided by the IHBC, issues were raised about potential legislative conflicts between the defective and dangerous buildings regime in the 2003 Act and other legislation concerned with conservation of buildings. The IHBC sought a more joined-up method across the relevant pieces of legislation to create a more effective approach.

60. The Committee acknowledge these concerns but note the member in charge’s position that the provisions of his Bill are focused and narrow, and could not address such an issue.

²⁴ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 26 February 2014, Col 3133.

²⁵ Fife Council. Written submission, page 2.

²⁶ Glasgow City Council. Written submission, page 1.

²⁷ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 26 February 2014, Col 3139.

Housing Associations

61. The Scottish Federation of Housing Associations (SFHA) told the Committee that currently housing associations must rely on the provisions of the title deeds of each tenement, or rely on provisions of the Tenements (Scotland) Act 2004 and a tenement management scheme in order to legally undertake common repairs with or without the consent of all owners.

62. Giving oral evidence from the SFHA, Susan Torrance stated—

“A parallel power to the charging order, or co-operation or collaboration with local authorities so that they use their charging order powers to recover costs, would be extremely useful.”²⁸

63. Questions were raised around increasing the flexibility of charging orders allowing housing associations to pay building repair costs upfront and having these costs recovered through local authorities on their behalf thereby avoiding taking cases through the court system.

64. Gillian McCarney from East Renfrewshire Council commented—

“...that would mean taxpayers’ money being used to recover the costs for a housing association as opposed to the housing association recovering the costs for itself. My concern would be about the administration and additional costs for the council.”²⁹

65. John Delamar from Midlothian Council was of the same opinion stating—

“...legal implications for local authorities taking on the burden of private sector debt through a charging order would have to be looked at.”³⁰

66. Acknowledging the concerns raised by the Scottish Federation of Housing Associations, the member in charge explained the limitations of the proposed Bill in this area stating—

“...if there could be internal arrangements between local authorities and housing associations to resolve the problems that Susan Torrance raised last week, I would be more than happy to extend the scope of the bill. However, I feel that that is beyond the competence of the bill.”³¹

67. We note the concerns raised around this issue. We would encourage local authorities to work closely with housing associations and take as flexible as possible an approach to assist them when circumstances permit.

²⁸ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 19 February 2014, Col 3106.

²⁹ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 19 February 2014, Col 3117.

³⁰ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 19 February 2014, Col 3117.

³¹ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 26 February 2014, Col 3144.

Prescription and limitation

68. The Law Society of Scotland, and others, suggested that by providing in the charging order for payment by instalments each instalment could be interpreted as becoming, in effect, an annuity. These then become subject to section 6 of the Prescription and Limitation (Scotland) Act 1973 which provides that the instalment prescribes after a period of five years. This prevents the local authority from taking any further action to recover the instalment 5 years after it falls due. The member in charge of the Bill accepts that position although contends that this does not affect the totality of the sum covered by the charging order. We note the members suggestions that at the end of the 30 year period the entire unpaid sum becomes due for payment as a consequence of the provision of the inserted section 46D(1)(c).^{32 33}

Appeals mechanism

69. The Policy Memorandum states the Bill amends section 47 of the 2003 Act in relation to appeals. Appeals are limited to matters which could not have otherwise been raised on an appeal against the original notice or the decision requiring the works to be carried out. It is therefore unlikely, the Policy Memorandum contends, that an appeal against a charging order on the basis of the cost of the work or the apportionment of costs would be considered admissible.

70. An example of the circumstances which could conceivably lead to an appeal would be where a change of ownership has taken place in the period between when costs were incurred by the former owner and the decision was taken by a local authority to seek a charging order. The new owner might appeal on the basis they were not aware of any work having been carried out by the local authority or the existence of outstanding debts to the local authority when they purchased the property.

71. Concerns were voiced by local authorities around the appeals process with Fife Council raising the issue of resource implications for local authorities, and potential abuse of the process by persons wishing to avoid or delay payments³⁴.

72. Moray Council stated in written evidence—

“The charging order is subject to appeal this could delay the process or have implications to the recovery of costs.”³⁵

73. The Scottish Government advised that charging orders can be appealed by summary application to the sheriff which could be used as a stalling tactic. The Scottish Government also suggested that any appeals mechanism must be defined to prevent it being used to stall or prevent registration in the appropriate property register.³⁶

³² Correspondence from David Stewart MSP, Member in charge of the Bill
http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/Inquiries/LGR-S4-14-6-5_Member_in_Charge_of_the_DD_Buildings_Bill_Letter.pdf [Accessed 13 March 2014]

³³ Explanatory Notes, paragraph 19.

³⁴ Fife Council. Written submission, page 1.

³⁵ Moray Council. Written submission, page 1.

³⁶ Scottish Government. Written submission.

74. In oral evidence the Minister added—

“...I am not attracted to an appeals mechanism in which the Government or reporters make determinations or decisions around costs...”³⁷

75. The member in charge further explained the appeals mechanism contained within the Bill.

“In the appeal process that I am providing, I am not giving owners an opportunity to say that the work should not be done or that the cost should not be apportioned in that way. The process in the bill will cover purely technical issues, such as whether ownership was transferred in good faith at market value, which might give the owner an opportunity to appeal.”³⁸

76. We are content with the proposed appeal provision as currently provided.

Calling-up

77. Calling-up of a charging order, as detailed in the Policy Memorandum,³⁹ represents a process in terms of which, in the event of payments not being maintained, the relevant formal agreement can be brought to an end, and an owner can be required to repay immediately the whole amount outstanding.

78. COSLA, while appreciating that allowing charging orders to be called-up had been rejected as part of this Bill owing to the human rights issues, felt there was potential for a balance to be struck where a property is unoccupied.

“In those circumstances there is a significant disincentive upon a LA to utilise its powers under s28, notwithstanding that the property may form part of a tenement with other properties being adversely impacted. Therefore perhaps something like a two tier system could be introduced whereby a charging order placed on an occupied building could not be called up, but one placed on a building which is unoccupied (or at least one placed on an abandoned building) was able to be called up.”⁴⁰

79. The Law Society of Scotland were of similar view stating—

“...the Society believes that local authorities will be discouraged to invoke the terms of Section 28 of the Building (Scotland) Act 2003 notwithstanding that the property may form part of a tenement with other properties being adversely impacted. The Society therefore believes that some consideration be given to a two tier system where a charging order placed on an occupied building could not be called up, but one placed on a building that is

³⁷ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 26 February 2014, Col 3140.

³⁸ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 26 February 2014, Col 3150.

³⁹ Policy Memorandum, paragraph 89.

⁴⁰ COSLA. Written submission, paragraph 12.

unoccupied (or at least one placed on an abandoned building) was able to be called-up.”⁴¹

80. The member in charge indicated that a power, such as calling-up of charging orders, was contained in the residential care context under the Health and Social Services and Social Security Adjudications Act 1983 and those powers are understood to be exercisable under that Act in limited circumstances only.

81. The member in charge went on to state—

“I believe my approach, not to attach a similar power is proportionate for the particular circumstances of my Bill, which is concerned with a quite different subject matter. I believe providing a calling-up power would be likely to raise a number of issues, including some of a potentially significant nature with respect to European Convention on Human Rights considerations relating to property rights.”⁴²

82. We note the arguments put to us and accept the member in charges’ position in relation to proportionality.

Interim orders/Registering liability for costs

83. We heard about “people chopping and changing ownership to try to evade repayment”⁴³ and that power to make an interim order or a liability order would help address such a situation. It was suggested by Fife Council—

“An intermediate mechanism to register a “notice of potential liability for costs” should be considered, which does not require an amount to be specified at the point of registration (similar to that available under the Tenements (S) Act 2004).”⁴⁴

84. We have sympathy with this suggestion and are keen to minimise avoidance opportunities. We recommend consideration be given to providing appropriate powers in this regard, which we understand are under consideration by the Scottish Government.

Financial Memorandum

Finance Committee Report

85. The Finance Committee considered responses to their call for evidence and wrote to us on 5 February 2014.⁴⁵ Much of what they covered is addressed earlier in this report.

⁴¹ Law Society of Scotland. Written submission, page 5.

⁴² Correspondence from David Stewart MSP, Member in charge of the Bill http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/Inquiries/LGR-S4-14-6-5_Member_in_Charge_of_the_DD_Buildings_Bill_Letter.pdf [Accessed 13 March 2014]

⁴³ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 19 February 2014, Col 3112.

⁴⁴ Fife Council. Written submission, page 2.

⁴⁵ Correspondence from Finance Committee Convener http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/General%20Documents/Letter_from_Finance_Committee.pdf [Accessed 13 March 2014]

86. On the general question of the costs in the memorandum respondents to the Finance Committee's call for evidence on the Financial Memorandum of the Bill were broadly content that administrative costs which would apply were captured with Angus Council predicting them as being "minimal".⁴⁶ The City of Edinburgh Council stated that "the expense of invoking the charging order is more than offset by the gain of debt recovery."⁴⁷

87. It was noted some reservations lay around the savings claimed as set out in the Financial Memorandum.

88. Fife Council stated—

"The reference to "savings" in para 60 [of the FM] is potentially misleading. An improved cost recovery rate would reduce losses but would not achieve savings. In fact, if the view in para. 31 is correct and local authorities do become more proactive in issuing defective buildings notices and taking action into their own hands, it is more likely that local authorities will incur additional expenditure than make savings."⁴⁸

89. Whilst it was noted local authorities were already required by statute to take appropriate action with regard to dangerous buildings, it was suggested the fact that the Bill would also apply to defective buildings might result in increased expenditure. COSLA, for example, stated—

"Care needs to be taken with the assumption of 'savings' as a result of the DBB Bill. Firstly, an improved cost recovery rate would reduce losses but would not achieve savings, and secondly, such an assumption about savings needs to be tempered by the likelihood that the level of work (and therefore bad debt) will increase if a cost recovery mechanism is put in place."⁴⁹

Delegated Powers

Delegated Powers and Law Reform Committee Report

90. There are provisions in the Bill which will confer delegated powers to make regulations. As with all bills containing such powers, the Delegated Powers and Law Reform Committee ("DPLR Committee") considered the provisions and reported to this Committee.

⁴⁶ Angus Council. Written submission to the Finance Committee.

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69902.aspx>

[Accessed 13 March 2014]

⁴⁷ City of Edinburgh Council. Written submission to the Finance Committee.

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69902.aspx>

[Accessed 13 March 2014]

⁴⁸ Fife Council. Written submission to the Finance Committee.

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69902.aspx>

[Accessed 13 March 2014]

⁴⁹ COSLA. Written submission to the Finance Committee.

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69902.aspx>

[Accessed 13 March 2014]

91. The DPLR Committee report on the provisions was published on 22 January 2014.⁵⁰

92. The Committee drew the proposed power to section 46A(3) of the Building (Scotland) Act 2003 inserted by section 1 of the Bill to the attention of the Parliament on the basis that the Committee considered the power should be amended to provide a power to amend new schedule 5A to the 2003 Act, as inserted by section 1 of the Bill.

93. The member in charge of the bill confirmed to the Local Government and Regeneration Committee in oral evidence that—

“I will amend the bill at stage 2 to take account of the Delegated Powers and Law Reform Committee’s suggestion that the Scottish ministers should be able to amend directly schedule 5A to alter the form and content of a charging order, rather than there being the prospect of its being amended by subordinate legislation.”⁵¹

CONCLUSIONS ON THE GENERAL PRINCIPLES OF THE BILL

94. In conclusion, the Committee reports to the Parliament it is content with the general principles of the Bill and recommends that the Bill be agreed at Stage 1.

⁵⁰ Scottish Parliament Delegated Powers and Law Reform Committee. 6th Report, 2014 (Session 4). *Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill*. (SP Paper 457)

⁵¹ Scottish Parliament Local Government and Regeneration Committee. *Official Report*, 26 February 2014, Col 3143.

Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

ISBN 978-1-78457-047-7
