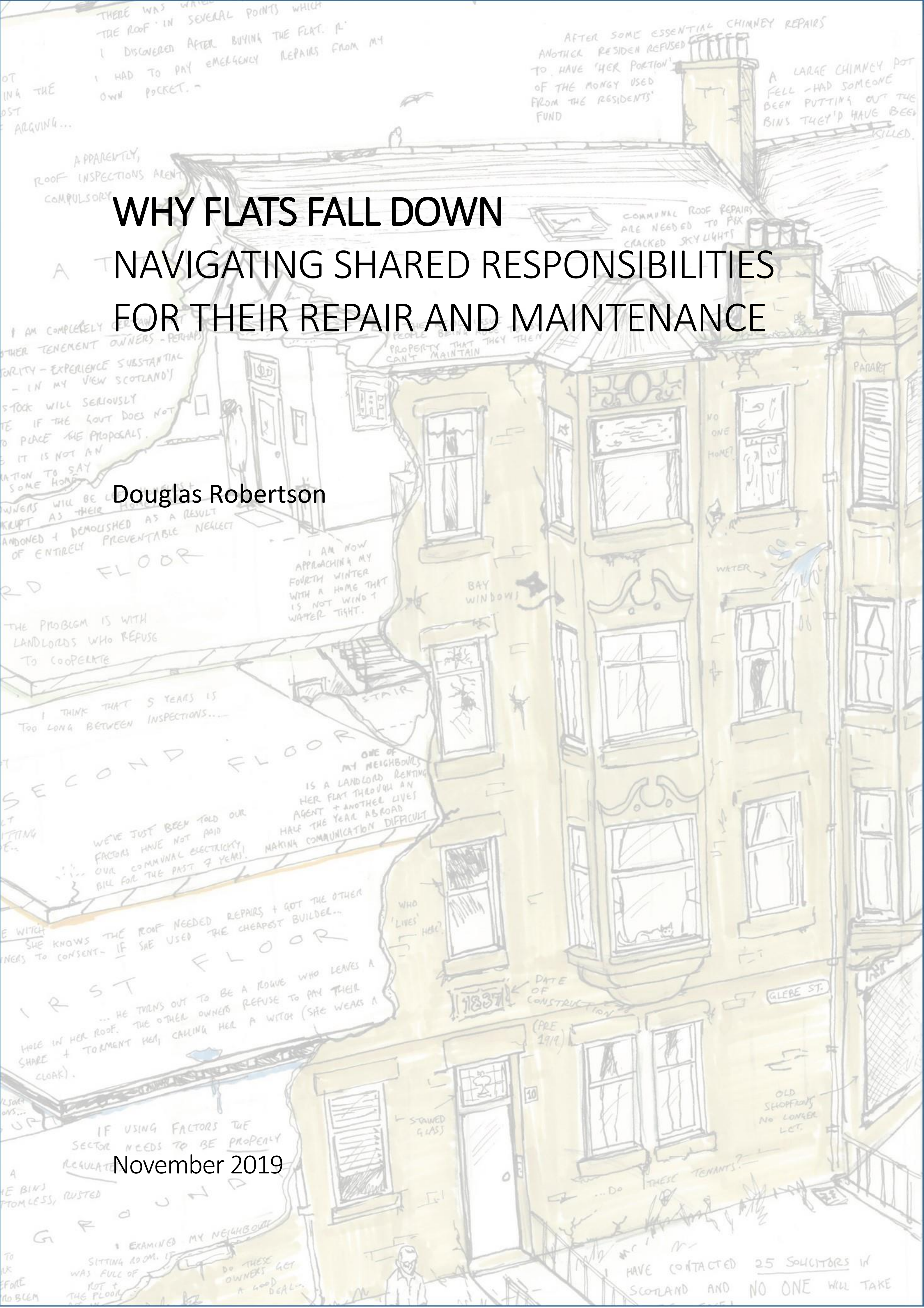

WHY FLATS FALL DOWN

NAVIGATING SHARED RESPONSIBILITIES FOR THEIR REPAIR AND MAINTENANCE

Douglas Robertson

November 2019

Douglas Robertson taught both housing and sociology at the Stirling University for 30 years. During that time, he undertook research on a variety of housing policy matters including regeneration and renewal, private property ownership and its management, social housing in Europe and Scottish housing & planning history. He now works as a housing consultant, commentator, researcher and writer. He also holds an Honorary Professorship at Stirling.

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REPORT SUMMARY

This report seeks to address a serious question: why are flats falling down?

What this study highlights, drawing on data published by the Scottish House Condition Survey, is that half of all Scottish housing is in 'critical disrepair' and almost half of this demands 'urgent attention'. If we look at the age profile of these properties, the worse stock in terms of condition is the oldest. For housing constructed over a 100 years ago two-thirds require critical repair, and a third requires both critical and urgent repair. More modern stock, dating from 1964 to 1982, is not that much better, with half being found to be in critical disrepair, and 20% requiring critical and urgent attention. Post-1982, our most modern housing stock, also reflects an apparently endemic failure of property maintenance, with a quarter being classed as being in critical disrepair, and 8% requiring urgent attention. So we can see disrepair cannot simply be explained by property age. Rather, we need to take some account of deep-seated socio-cultural and legal failings, in relation to how our current model of property ownership is structured. As a society, we do not appear to consider the on-going maintenance of property a requirement of ownership. Previously, we did, but now, for whatever reason, we don't appear to retain that interest.

Where this situation appears most acute is within flatted property, legally defined as 'tenements' within the Scottish context. This is because of their complexity in relation to both physical structure and multi-owner interests, combined with the serious inadequacies of current management, maintenance and repair arrangements. It needs to be borne in mind that the legal term 'tenements' refers to any: '*building, or part of a building, which comprises at least two related flats which are, or are designed to be, in separate ownership and are divided from each other horizontally*'. That definition thus captures all flats, apartments and conversions which in total now account for almost 40% of Scotland's entire housing stock.

In seeking to properly explain the causes of endemic disrepair this report considers, in detail, the serious challenges thrown-up by current property law arrangements. It looks carefully at the impact of recent reforms of private property management, via the regulation of property factoring. Local authority enforcement powers are also considered, as in the past these were critical in ensuring action was undertaken when owners failed to agree. With less access to capital funding local authorities are more hesitant in stepping in. The role played by conservation trusts is also considered, reflecting on lessons from pilot projects to encourage property repair and maintenance. Having systematically set out the problems, a critique of emergent reforms is offered, which draws on primary research with those who manage such initiatives and arrangements. Overall, while some of these proposals have merit it is not clear how they address the deep-seated structural issues which still hold back management and maintenance arrangements.

The report concludes by offering a comprehensive strategy that draws on detailed analysis of the issues, reform ideas and primary research with stakeholders. This strategy calls on the Scottish Government to set a universal housing quality standard, for all housing, not differentiated by tenure. Having established that goal, measures need to be put in place to ensure that goal is achieved within a specific timeframe. That will involve having a means to

measure and report on progress, which will require to be centrally held and easily accessible. It also requires mechanisms to assist in ensuring standards are met by flat owners, which involves establishing owners' associations, having reserve funds and appropriate insurance cover for these buildings. Where action on the part of owners is not forthcoming, there also needs to be both encouragement and compulsion, with local authorities charged with overseeing such support and interventions. Owners need to be supported by clarifying aspects of common law and being able to access better debt recovery mechanisms where owners resist paying for agreed works. Empowering factors to support owners' associations in their ambitions is also considered. But fundamentally, what is required, is to stop treating flats as if they are detached or semi-detached homes, acknowledging they are a different property type. Flats have a combined, not an individual, owner interest. So to ensure everyone's rights are respected a different approach to management needs to emerge.

This strategy draws directly from the policy principles and approaches outlined in both the Cullingworth Report of 1968, and the recommendations made by the Housing Improvement Task Force (HITF) in 2003. While Cullingworth set down the notion of having nationally agreed housing quality standards, and a series of follow-up measures to ensure these were achieved, the HITF then took that forward by proposing a comprehensive suite of housing reforms which, at their core, sought to change the overall culture of property ownership, and in particular the need for owners to properly maintain flats.

While HITF resulted in a substantial body of housing reform over the last 15 years, the underlying cultural change in relation to managing and maintaining property failed to fully materialise. The impacts of these reforms differed depending on tenure. In social housing, where government could exert direct influence, conditions and responsibilities altered dramatically, through the introduction of the Scottish Housing Quality Standard. In private renting and owner occupation the impact was less marked. What it did do, however, was clearly identify the core routes to securing the desired cultural change. Consequently, this report reiterates these goals but suggests a unified strategy and a series of policy sharpening and re-calibration actions, to move away from piecemeal and tenure specific reforms.

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ACKNOWLEDGEMENTS

This project, in part, arose out of my concerns about the growing levels of physical disrepair and deterioration evident across a wide range of tenements when walking around Scotland's towns and cities. The blooming and greening gutters, missing slates and tiles, decayed leadworks and flashings, wavering and toppling chimneys, intrusive buddleia well bedded into masonry, the stained and salted stonework or render, typically lying immediately below broken gutters or downpipes, spawling and flaking stonework more often than not abutting ugly concrete patching, rotting twisted window frames, rusting and failing ironworks and railings, each and all in their own way contributing to the eventual and far more dramatic ugly structural cracks, sharp movements, slips and the final building collapses. Such deterioration is not just evident on the old traditional Victorian tenements, but spreads out right across all types and ages of flatted or apartment dwellings.

My interest here is not just practical or aesthetic, but ties back to a life-time researching tenements and their improvement. When visiting Glasgow for the first time back in 1978 I was both shocked and amazed by the desolation prevalent across almost all the tenement districts at that time. These were far more marginal and dilapidated tenements than their equivalents across in Edinburgh, Aberdeen and Dundee. In researching Housing Action Areas, then supported by housing association investment and the mass use of improvement, repair and environmental grants, policy-makers readily assured me that a soon to be reformed 'Law of the Tenement' would resolve most of the future management and maintenance issues. This would mean what was a quite massive public investment would be secured for decades to come. Refurbishment money dried-up by the mid-1990s, before eventually being abandoned a decade later. From the evidence I now see such faith in the 'Law of the Tenement' was misplaced. Owners still do not appear to be taking responsibility for the maintenance and repair of their own property. So something deep in our national housing psyche appears seriously amiss, in that while we can improve our housing we appear incapable of maintaining it.

In considering how to best address this, this report falls back on two previous inquiries into Scotland's housing conditions, the Cullingworth Report (1967) and the later Housing Improvement Task Force (2003). Cullingworth provided quality standards and the means to achieve these, while the Task Force laid out how to encourage owners' responsibilities. Both, as will be shown, helped greatly in resetting the housing quality agenda. Cullingworth also provides a salutary lesson here, in that it drew heavily from an earlier report, that of the now all but forgotten MacTaggert Committee (SHAC, 1948). MacTaggert warned that inaction on their recommendation would condemn thousands of people to reside in quite unacceptable housing condition for far longer than necessary. Sadly, that proved to be the case. It took Cullingworth twenty-years to again pick-up that agenda and convince politicians and public administrators to act. Glasgow's 'state of emergency' declared following in January 1968 following a hurricane which literally flattened large swathes of the city undoubtedly helped focus their interest. Twenty-years on from the Task Force recommendations, this work conjures up a similar feeling of *déjà vu*. Hopefully, in this instance a national tragedy will not be required to convince people to act. The evidence, argument and strategy presented here should be all that's required.

In writing this report I would like to acknowledge the help received from a number of people who generously gave of their time and specialist knowledge to ensure that the particular technical, legal and practical matters covered are both accurate and properly framed. I am thus indebted to Euan Leitch, Sonya Linskaill, Frankie McCarthy, Andrew Steven, Jackie Timmons and Neil Watt. I would also like to thank Graeme Purves and Anna Goldthorp for proof reading the draft and final version of this report respectively. Thanks are also extended to John Gilbert for offering up no end of helpful thoughts and advice over the years as well as the images used in this report. Finally, can I thank each of the research sponsors and the Scottish Government for supporting this work.

Prof Douglas Robertson,
25th November 2019

REPORT STRUCTURE

Flats are indeed falling down. Although not that many, at present, the scale of on-going deterioration within the overall fabric of many flatted properties will result in more collapses and abandonments. This report sets down the challenges for ensuring common repairs to privately-owned flatted property are undertaken, before going on to question the performance of these current arrangements. In order to set this in context, it is first helpful to explain how the current common repair arrangements came into being.

Today's policy context for common repairs derives from a series of recommendations made by the Scottish Executive's Housing Improvement Task Force's (HITF) report *Stewardship and Responsibility: A policy framework for private housing in Scotland* (HITF, 2003). Established two years earlier, the HITF was charged with coming forward with a set of recommendations to: "*address the significant problems of housing quality in the private sector"* (HITF, 2003, Forward). The resulting report proffered a comprehensive suite of: "*recommendations on how conditions, standards and the overall quality of housing across the sector - owner occupation and private renting - can be improved"* (HITF, 2003, Forward).

These reform suggestions followed a protracted period, of some 35 years, whereby a previous set of recommendations, set out in the 1967 Cullingworth Committee Report, *Scotland's Older Houses*, had held sway. The Cullingworth Report established a strategic policy framework which first defined, and then set in place a series of measures designed to tackle what were to be termed Below Tolerable Standard (BTS) housing, in essence slums. The approach made use of compulsory area improvement powers, enacted by the local authority, which demanded that owners' improved their BTS property, within a proscribed five-year time period while, at the same time, supporting them to do this through subsidising the actual costs via providing generous improvement and repair grants. This was the classic 'sticks and carrots' approach to policy implementation, and it proved very successful in largely eradicating slum housing, long a scourge on the quality of Scottish housing.

The core focus of both these official reports was the traditional pre-1919 tenement, though it always needs to be borne in mind that the term 'tenement' encompasses a far broader range of flatted property types, embracing conversions, four-in-a-blocks, inter and post-war apartments, as well as modern flats of differing ages, styles and varying forms of construction. Legally a 'tenement' is defined in Section 26 of the Tenements (Scotland) Act 2004 as a building, or part of a building, which comprises at least two related flats which are, or are designed to be, in separate ownership and are divided from each other horizontally. It is also the case that a 'tenement' can include both commercial and residential properties.
The HITF recommendations marked an official end to the Cullingworth policy agenda, that of eradicating sub-standard private housing, in large part, because it had proved to be so successful (Robertson and Bailey, 1996). With BTS housing now deemed a legacy issue, housing policy then shifted its emphasis towards ensuring the on-going repair, maintenance and improvement of all private housing, by encouraging owners' to take on these responsibilities.

There then followed a substantial number of legislative reforms, covering matters such as changes to the legal basis of property ownership, through to the introducing a compulsory Home Report to be provided by those selling a property, to wide-ranging reforms of private rental tenancies, as well as the registration and regulation of landlords, their agents and also property factors. Each of these reforms can trace its antecedence directly back to the recommendations made by the HITF (HITF, 2003). Given the significance of this swath of property and housing reforms, it is now worth taking time to properly consider each reform in greater detail, and consider how well it has contributed to

encouraging owners to take responsibility for the on-going repair, maintenance and improvement of their flatted property.

In undertaking this exercise particular attention should be focused on the impact of the Tenement (Scotland) Act 2004 and its critical role in reforming tenement common law, given the HITF had laid great emphasis on the benefits that would accrue from such a reform. Securing the on-going maintenance and common repairs of tenements via initiating a default management regime for all tenemental property was core to this reform. Consideration should also be given to the more recent property factoring reforms, which introduced a degree of regulation over such services. This reform was again encouraged by the HITF, given the importance factoring was seen to have in organising and executing maintenance and repairs across the various types of flatted property. The reform of local authority intervention measures also needs considered, given that their role changed from that of enforcer to that of encouraging and supporting owners to undertake the necessary works, with now very limited, if any actual financial support. This loss of capital resources, to help facilitate action, on the part of owners, is a critical consideration here, given the cultural legacy of expectation on the part of owners, given the previous Cullingworth inspired approach. Local authorities had long stepped in to resolve matters when, for whatever reason, property owners failed to do so. Thus the changing intervention practices of both Glasgow and Edinburgh in relation to such matters is critical here, given their domination in terms of the actual numbers of privately owned flatted property. Consideration also should be given to the work of other parties, most notably conservation trusts, given the pioneering role they now play in helping to support owners repair and maintain local historic buildings. Although representing a niche within the broad range of flatted private property, their work does indicate the value of developing new supportive approaches. Or are these merely reiterations of old ways of working, now no longer available to local authorities?

As this report details, encouraging property owners to take responsibility for undertaking common repairs on their own property still constitutes a major policy challenge. Attitudinal changes have not apparently taken hold, despite the above panoply of linked legislative reforms. After almost two-decades of sustained policy changes, each in their own way proffered by the HITF as a means to help resolve that particular problem, there is still little tangible evidence of owners actively engaging with the on-going repair and maintenance of their property, let alone improving it. So is it not time to take stock of where we are, and then question what exactly has been achieved since the HITF recommendations? And if the prime objectives of that broad series of reforms still appears to be wanting, is it not time to come forward with a revised focus?

Arguably, Scottish housing policy has for well over a decade now reverted back to an older policy approach, that of judging success solely on the basis of the number of new houses constructed, in a given period, what was at one time called the Macmillan ‘numbers game’, after the Conservative housing minister who is credited with building the most council houses. Given the clear failings outlined in this report, which calls into question the value of the HITF recommendations in respect of securing its core ambitions, that of encouraging owner responsibility in repair, maintenance and improvement of private property, is it not now time to re-consideration and re-focusing housing policy? Surely, the actual physical condition of the houses that already exist is critical to any comprehensive housing policy, given new housing plays such an insignificant role in terms of improving overall conditions and quality. More crucially, should housing policy not also acknowledge its failings and then seek to address them, so that those houses that currently exist do not further deteriorate and become the slums of the future?

BACKGROUND

For whatever reason, Scotland appears reluctant to address the serious disrepair problem re-emerging within its flatted housing stock. Put simply, much of Scotland's private housing is deteriorating and some of it is quite literally falling down because of simply a lack of regular and on-going property maintenance and repair. While house prices may, in certain places, be at an all-time high, that provides no reflection of the actual condition of the property being purchased. As far back as 2010 the Scottish House Condition Survey reported that almost 60% of all dwellings had disrepair to 'critical elements' of their fabric, over half of which were in need of urgent attention (Scottish Government, 2011). These cover building elements critical to ensuring weather tightness, structural stability and preventing further deterioration of the property. This figure rose to over three-quarters (76%) for 'traditional dwellings', the pre-1919 property. Overall, flats or apartments, defined legally as 'tenements' in Scotland, account for 895,000 properties (Scottish Government, 2018d). The latest figures, while recording a slight improvement, still suggest that just under half (48%) of the entire housing stock now has disrepair to 'critical elements', rising to two-thirds (67%) for all pre-1919 dwellings (Scottish Government, 2017). Further, 5% of the pre-1919 stock is described as requiring extensive repair, which is defined as being a serious/urgent repair that covers more than 20% of the building (Scottish Government, 2017).

Part of the explanation for the slight improvement in Scottish housing conditions can be put down to the introduction of the Scottish Housing Quality Standard (SHQS). Although not legislation, the SHQS is best understood as an expectation agreed by various parties and the Scottish Housing Regulator[1] for implementation by all social landlords, both local authorities and housing associations, which now ensures that any property they let out is in a good state of repair, energy efficient, healthy, safe and secure. To meet the requirements of the SHQS there are 12 components to ensure compliance with the Tolerable Standard, 18 components which ensures the property is free from serious disrepair, 6 to ensure it is energy efficient, 10 to ensure it complies with modern facilities and, finally, 15 to to ensure it is healthy safe and secure (Scottish Government, 2016).

Amending SHQS guidance is a reasonably straightforward, and has been carried out on a number of occasions since its introduction, with future guidance developed by a group nominated by the representative organisations, thus ensuring an implicit process of sector consent in both setting and revising these particular housing quality standards.

When the SHQS was introduced back in February 2004, a timeframe was set for the standard to be fully complied with, that of April 2015. Five years on from that 37% of their property still fails to meet that standard, although most of these failures relate primarily to one element of the 55 (and 63 elements) that make-up the standard and, in particular, to energy efficiency issues with certain inter and post-war council housing construction types (Scottish Government, 2018d). So overall, quality standards, within the third of Scotland's housing constituted by social housing, some 641,000 homes have significantly improved, albeit that there is still a legacy issue to be addressed. This was achieved, as with the Cullingworth approach, by setting down an expected housing quality standard and then giving the owners of that property, in this case local authorities and housing associations, a deadline by which to meet that standard.

By contrast, private owners and private landlords are currently under no obligation to bring their properties up to this standard. Rather the private rented sector is expected to adhere to the Repairing Standard, which was set in 2006, whereas for owner-occupation it is the Tolerable Standard, established by the Cullingworth Report, way back in the mid-1960s, which still applies.

[1] For more information on the role and function of the Scottish Housing Regulator see: https://www.scottishhousingregulator.gov.uk/

That said, the Tolerable Standard was recently updated in respect of safe electrical wiring requirements. However, both these quality measures are clearly far less onerous than that set down by the SHQS.

A landlord's rental property is deemed to meet the Repairing Standard if:

- it is considered 'wind and watertight'
- the structure and exterior, both the walls and roof, are in a reasonable condition
- the installations for water, gas, electricity, sanitation and heating are in a reasonable state of repair and in working order
- any fixtures, fittings or appliances provided by the landlord such as carpets, light fittings and household equipment are in a reasonable state of repair
- any furnishings provided by the landlord can be used safely for the purpose they were designed
- it is fitted with suitable fire detection devices, at least one smoke alarm in the living room, one in every hall or landing, and a heat alarm in every kitchen
- it is fitted with a carbon monoxide detector in any room with a carbon fueled appliance such as a heater or boiler, but not a cooker, or there is a flue from such an appliance
- electrical safety inspections are carried out by a qualified electrician at least once every five years
- and, that the property meets the statutory Tolerable Standard

A property is deemed to fail the Tolerable Standard, and thus is not be fit to live in if:

- it has problems with rising or penetrating damp
- it is not structurally stable, so might be subsiding
- it does not have enough ventilation, natural and artificial light or heating
- it is not insulated well enough
- it does not have an acceptable fresh water supply, or a sink with a hot and cold water supply
- it does not have an indoor toilet, a fixed bath or shower, and a wash basin with hot and cold water
- it does not have a good drainage and sewerage system
- the electric supply does not meet safety regulations
- it does not have a proper entrance
- and, there are no cooking facilities – this does not mean the landlord has to provide a cooker, but there must be somewhere suitable for a tenant to install their own

Why exactly there are now different housing quality standards, which are dependent upon the properties tenure is, to say the least, a quite peculiar policy outcome, especially given that the HITF had as one of its core ambitions proposed: "*a new cross-tenure Scottish Housing Quality Standard as the basis for local and national planning to raise the overall quality of the stock*." (HITF, 2003, VIII). As they rightly argued at the time: "*Appropriate and measurable standards form a critical part of the policy framework for improving the quality of private sector housing. Properly defined, they will provide the basis for targeting action and establishing yardsticks for measuring progress*." (HITF, 2003, VIII).

Work is still on-going by the Scottish Government to harmonise these differing housing quality standards, but a decade and a half further down the line progress is slow. The Scottish Government takes the view that there should be higher standards for rented housing given the relative lack of power held by these tenants. However, rather than replace SHQS and the repairing standard with a single standard, mainly because the enforcement routes are so different, the Scottish Government

still has an ambition to make both these standards more consistent. Some changes to the Repairing Standard will come in in 2024 from regulations made in January by Scottish Statutory Instrument 2019/61, which aims to fill in most of the gaps compared to SHQS. The Scottish Government also takes a view that although fewer changes are needed to SHQS, one is in respect of fire and smoke alarms, which is addressed by the change to the Tolerable Standard, while another is in relation to five-yearly electrical safety inspections. On the later, our view is that social landlords should be doing five yearly inspections because the only way to demonstrate electrical safety is to comply with recent guidance, and this is likely to be explicit in the SHQS guidance.

Similarly, in respect of energy efficiency standards for housing, as defined by the Energy Performance Certificate (EPC) rating system, under Section 64 the Scottish Government's legal commitment to the Climate Change (Scotland) Act 2009, which ties back to the EU Climate Change Directives, there is a similar tenure differentiation evident in expected standards. For social housing, all properties will require to meet an EPC 'C' rating, within five years. As part of Energy Efficiency Standard for Social Housing (EESSH), all social housing is required to meet a 'B' rating, or as efficient as possible, by end of December 2032 (Scottish Government, 2019a). However, no social housing should be re-let below after 2025 if it is below band 'D'. Whereas for privately rented housing, the target is EPC band 'E' from April 2020, at change of tenancy, and then Band 'D' from 2025. As there is strong support for all PRS properties meeting band 'C' by 2030, following a recent consultation exercise, the Scottish Government is now currently looking at this. By contrast, the ambitions set for owner occupied property are less clear. While the Scottish Government has an underlying aim of ensuring all housing should be at least EPC 'C' by 2040, as set out in the Energy Efficient Scotland Routemap (Scottish Government, 2018a), as yet there is no information as to what mix of incentives and enforcement that would help ensure this might become a reality for the owner-occupied stock.

Given the slow rate of new housing additions, clearly it is important for policy to focus on improving the overall quality and standards of the country's existing housing stock, and especially private housing given its prominence. Yet, there is, surprisingly, currently no national strategy to address the on-going deteriorating condition of private housing stock. In its recent draft strategy document setting down future housing policy priorities this issue failed to merit even a single mention (Scottish Government, 2018b). Following stakeholder consultation, a brief mention of the issue then appeared in relation to high quality sustainable homes: "*Maintenance – I find it easy to find high quality, reliable and cost effective tradespeople to make repairs and improvements to my home. Although I live in a block of flats, it is really straightforward to make improvements and repairs to communal areas. My property factor delivers a high quality service*" (Scottish Government, 2019c: 6).

As we have seen, within the social rented sector, housing conditions have, by-in-large improved, as a result of setting in place the SHQS in 2004. As this report will show, whilst there have been a good number of legislative initiatives, policy reviews and no end of reports and policy statements offering various remedies to this or that aspect of private property maintenance, there is still no strategic engagement with the challenge of safeguarding current, let alone improving the future physical condition of privately-owned property. Further, it is also quite galling that agreed housing quality standards in the private rented sector can legitimately be compromised where: "*A flat in a tenement does not fail the Repairing Standard if work cannot be done because of other owners refusing consent*" (Scottish Government, 2018). As shall be shown,

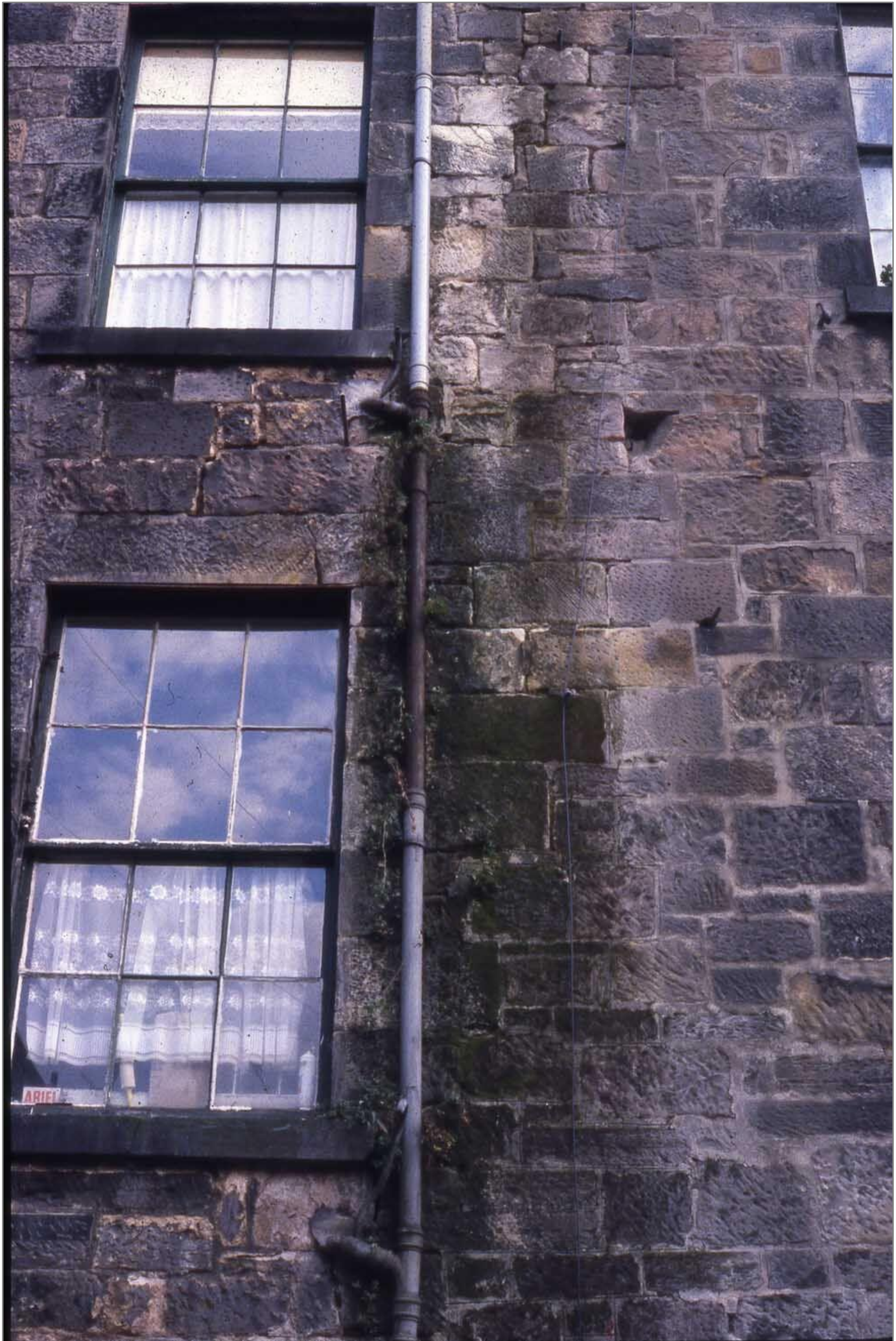
Current arrangements for addressing property disrepair emanate, largely, from the recommendations made by the Scottish Executive's HITF (HITF, 2003). It's core ambition was to improve overall standard of private housing, by first reforming standards and then through ensuring owners themselves, rather than the local government, took responsibility for delivering on these standards. In this new world, where slum property had all but been eradicated, home-owners now

needed to step-up and take responsibility for the proper management and maintenance of their own property.

A reformed 'Law of the Tenement', the common law provisions covering such matters, was at the same time in the process of being legislated for, as part of a wider set of property law reforms. Scotland was one of the very last places in Europe to still have a feudal land ownership system. The reform exercise, involved abolishing feudal title, reforming property titles conditions in light of this and then up-dating the 'Law of Tenement'. The latter exercise was considered by the HITF to be a useful complement to their work. The Scottish Law Commission's offer here was for a reformed legal framework for all private tenemental property which would encourage the establishment of owners' associations, as the means to organise the on-going management and maintenance of the property. Allowing for majority decision-making on such matters by these bodies, and sorting out where exactly shared responsibilities for maintenance within 'tenements' lay, held attractions for HITF policy-makers (SLC, 1998a).

Of course, at that time, immediately prior to the 2007 Global Financial Crisis, private property was still expanding overall, and the 'cheaper end' of the market was considered very important as it provided the important first rungs on the home-ownership ladder. Since then, one of the consequence that fell from the Financial Crisis was a collapse in first-time buyers, given tighter mortgage security requirements, and the linked unprecedented growth in private renting, largely focussed at the very same 'cheaper end' of the property market, funded via a relatively new financial product, the 'Buy-to-Let' mortgage (Robertson and Young, 2018). Private renting, long expected to disappear, underwent a three-fold increase from five to over 20% of the entire Scottish housing stock and, became a majority, in some very specific inner city tenemental neighbourhoods in both Edinburgh and Glasgow. In addition, within popular tourist destinations, most notably Edinburgh and parts of the Scottish Highlands, most notably Skye, a new form of private renting emerged, so-called short-lets (Evans *et al*, 2019, forthcoming; Indigo House, 2017). Rather than let for longer periods, such short-let property are rented out for just two or three days. Growth in short-lets has been at the expense of both private renting and owner-occupation.

Thus, following the Financial Crisis, a far more complex ownership and use pattern has arisen within flatted properties overall. It is also within this very same stock that an acceleration in property disrepair has been occurring. Given this marked changed in tenure profile, and the impact this change has had on the way much flatted property is now used, as well as the changed legislative framework which placed responsibility for the management and maintenance of property squarely on the shoulders of the owners, what has been the impact in terms of ensuring overall housing quality?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POLICY CONTEXT

Scotland currently possesses almost half a million pre-1919 residential properties, some 467,000 homes, which constitutes just short of one-fifth of its entire housing stock. Just over half of these pre-1919 properties are flats, where responsibility for maintaining the common fabric of the building is shared amongst all owners. A flat is legally defined by Section 29(1) of the Tenements (Scotland) Act 2004 as including: "*any premises whether or not (a) used or intended to be used for residential purposes; or (b) on the one floor" of a "tenement".* In terms of Section 26(1), "tenement" means: *"a building or a part of a building which comprises two related flats which, or more than two such flats at least two of which (a) are, or are designed to be, in separate ownership and (b) are divided from each other horizontally*." Thus a wide range of property types are captured by this definition, including not only traditional sandstone tenements, but also four-in-a-block housing, inter and post war council blocks, modern apartments, lofts and so-called conversions, where a large property has been subsequently broken-down into a number of smaller flats[2]. As a result, tenements overall account for 584,000 properties, which equates with 24% of Scotland's entire housing stock. However, if you then include the 'other flats' category, which accounts for 311,000 properties, then 37% of all Scotland's housing is flatted, therefore tenemental as defined by the 2004 Act. So as a housing type, tenements overall, are still the most common house type, exceeding detached, semi-detached and terraces as a type (Scottish Government, 2018d). It is important, therefore, to always bear in mind that 'tenements' refers to far more flats than just traditional Victorian sandstone flats. Tenements, for example, constitute some 63% of all inter-war housing. Disrepair is thus not just a feature that effects older tenemental properties, but affects all flat types, as we will see, albeit that the older the property, generally, the poorer its actual condition (Scottish Government, 2018d).

Further, within this broad policy context, certain terraces and semis, and even some detached properties located within a suburban setting, which are clearly not flats, can also share responsibility for the up-keep of certain common elements such as gardens, landscaped areas, paths, roads and boundary walls. Each owner of these properties will thus have mutual management and maintenance responsibilities, specified in their properties title deeds.

The Scottish Housing Condition Survey (2017) reveals that 50% of Scotland's homes have '*Disrepair to Critical Elements*', what was previously termed as not being '*Wind and Watertight*'. That figure rises to 68% for pre-1919 homes, these 467,000 homes largely, but not exclusively found within traditional tenement structures. Urgent repairs, affect almost a quarter of all Scottish housing, rising to over a third within the pre-1919 stock, which is only slightly more than is found within the inter and immediate post-war stock. '*Extensive Disrepair*', the most serious category is evident, but not as prevalent, at 2% nationally, rising to 5% for the pre-1919 properties and 1% for the inter-war stock, though is surprisingly higher in the two more recent age categories. Overall, while historically, the condition of Scottish housing is better than it has been, given the almost complete eradication of BTS housing, it is still far from being considered acceptable.

The prevalence of disrepair to '*Critical Elements*' has long been associated with age of construction, as the taper in physical failings decreases the newer the property is, as is evident in Table 2.1 below. That said, these patterns do not hold for properties in the worst condition, those defined as having '*Critical, Urgent & Extensive Disrepair'*, though sample size issues may influence these results. However, although dwellings built after 1964 are less likely to fall within this category, the 48% figure sits just below the current national average.

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[2] For a comprehensive review of what property types are constituted by the terms flat, apartment and unit, which cover UK, US and Australian terms see: https://en.m.wikipedia.org/wiki/Apartment

Table 2.1: Nature of Disrepair from Scottish House Condition Survey, 2017

Nature of Disrepair	Scotland - all housing stock	Pre-1919 stock	1919-44 stock	1945-64 stock	1965-82 stock
Critical Disrepair	50	68	63	58	48
Urgent disrepair	24	36	32	31	21
Extensive disrepair	2	5	1	4	3

Source: SHCS 2017, Table 45, Scottish Government, 2018d. Note: Only 1% of total housing stock is now classified as being Below Tolerable Standard, yet 50% is in disrepair

The data also shows a small degree of improvement in the overall condition of older dwellings, across all age groups and disrepair categories, though this is not significant with the exception of the the 1919-1944 house types, within 'Critical and Urgent Disrepair' category. The reasons for these changes are not explained, but may well have something to do with the fore mentioned recent investments in social housing stock in order to meet the quality requirements specified within SHQS.

Table 2.2: Disrepair to Critical Elements, Urgent and Extensive Disrepair in %, by Dwelling Age and Location, 2015, 2016 and 2017

	Age of dwelling					Location		
	Pre 1919	**1919-1944**	**1945-1964**	**1965-1982**	**Post 1982**	**Urban**	**Rural**	**Scotland**
Dwellings with any Critical Disrepair								
2017	**68**	**63**	**58**	**48**	**24**	**50**	**47**	**50**
2016	**67**	**58**	**60**	**48**	**20**	**48**	**49**	**48**
2015	**68**	**67**	**60**	**49**	**26**	**52**	**51**	**52**
Dwellings with Critical and Urgent Disrepair								
2017	**36**	**32**	**31**	**21**	**8**	**24**	**23**	**24**
2016	**37**	**27**	**30**	**22**	**9**	**24**	**25**	**24**
2015	**39**	**40**	**35**	**25**	**10**	**28**	**27**	**28**
Dwellings with Critical, Urgent & Extensive Disrepair								
2017	**5**	**1**	**4**	**3**	**0**	**2**	**3**	**2**
2016	**5**	**3**	**5**	**2**	**1**	**3**	**2**	**3**
2015	**8**	**7**	**6**	**3**	**1**	**5**	**4**	**5**

Source: Scottish Government (2018c) SHCS, Table 45; Scottish Government (2016) SHCS, Table 45.

The robustness of the house condition data is, however, now being called into question. There is a concern that the SHCS is no longer based on a sufficiently large sample size to produce reasonably robust estimates for issues that, crucially, affect small sub-groups within the population and, in particular, BTS rates at a local authority level. That said, broader sampling also appears to be an issue. Looking at Table 2 above, the data variations in relation to the 1919-1944 sample for the 2016 survey, when compared to the preceding and subsequent years does stand out.

In both contexts, it is worth noting that the sample size employed by the SHCS has fallen markedly. The three-year sample, for all 32 Scottish local authorities is now under 8,300, down from 15,000 sampled in the previous survey. The 2017 survey involved just 3,002 households across Scotland, who undertook both the physical dwelling inspection and household survey interview (Scottish Government, 2018d). So aside from City of Edinburgh Council and Glasgow City Council, total achieved samples are now so low one should be wary of putting too much store on any apparent changes. Consequently, BTS and over-crowding figures, say since 2012-14, especially when broken down by tenures, other than owner-occupation, even for these two main cities, now needs to be treated with caution.

This issue is compounded by the fact that BTS properties (and potentially overcrowding) has historically been highly clustered, being found within neighbourhoods, if not particular streets especially within Glasgow where its long and continues to be a problem. The current sampling strategy could, therefore, not credibly be expected to adequately address this issue within its adjusted sampling frame. Further, it needs to be borne in mind that certain elements of the BTS measure cannot be fully quantified within the focus of this technical survey, for example, water quality. It is also the case that the core focus of the recent 2017 SHCS has been on energy efficiency and fuel poverty considerations, rather than actual physical condition, given this represents a critical focus of current policy (SHCS, 2018c; Scottish Government, 2018a).

As already noted, in the past, properties that failed to meet the ‘tolerable standard’, or lacked ‘standard amenities’ were subject to statutory action on the part of local authorities, requiring them to be improved, demolished, or dealt with by a combination of these approaches within a five-year timescale. Local authorities could thus declare a Housing Action Area (HAA) for either improvement, demolition or a mix of the two. In the case of undertaking improvements such a declaration then allowed the local authority to enhance the improvement grants offered to owners to cover up to 90% of ‘approved costs’. This gave owners an incentive to remedy the serious physical failings of their property. Similarly, in the past, repair grant aid was also made available at enhanced rates to help remedy ‘serious disrepair’ matters. Such HAA declarations declined markedly after 1996, when housing capital funding underwent a significant cut-back (Robertson and Bailey, 1996; Bailey and Robertson, 1997a). A decade later HAAs were abolished entirely, to be replaced by a new ‘Housing Renewal Area’, a measure which, in contrast to HAAs, did not automatically attract grant funding, let alone enhanced funding, given that local authorities were now free to offer whatever advice and/or support they consider appropriate.

As has already been mentioned two official reports helped to frame what were two quite distinct policy approaches to addressing the physical problems associated with instigating improvements and repairs on multi-owned flatted property.

> **Cullingworth Report** (1967) had as its prime focus addressing slum housing conditions, by first determining a basic housing quality standard, the ‘tolerable standard’, and then setting in place a ‘sticks and carrots’ policy approach to ensure all properties were brought up to that standard. That eventually led to the declaration of HAAs, which compelled owners to bring their property up to the ‘tolerable standard’, within a fixed time period. To help them in this task owners were automatically offered enhanced improvement grants, a capital subsidy, which could be as much as 90% of eligible costs. The emphasis here was on compelling owners to undertake the needed improvement works, with some financial support, to help bring the property up to the ‘tolerable standard’. However, if owners failed to take action within the prescribed period, then compulsory action was instigated by the local authority, with the owners either being charged for that work being undertaken, or alternatively losing the ownership of their property through the use of compulsory purchase powers.

Housing Improvement Task Force (2003) in reflecting the marked reduction in BTS housing, in large part, as a consequence of the success of the above legislation, set itself the task of putting in place a range of measures that would encourage owners to take responsibility for on-going regular property maintenance, without automatic recourse to publically funded capital grants. Interestingly, as will be detailed later, the majority of the proposals outlined by the HITF have now come into being, as a result of prolonged and concerted legislative action over the past 15 years. Most of these reforms, with one or two exceptions, have garnered cross-party political support. The emphasis here has been to introduce measures that help and encourage property owners to take responsibility for the proper management, maintenance and improvement of their properties.

Cullingworth Report

Fifty-years ago, a system to address the critical problem of legacy slum housing was put in place. The term legacy was used, as this focused on housing that had not been subject to the mass slum clearance programmes which operated for a short period from the late 1950s through to the early 1970s (Robertson, 2019 forthcoming). It was property that had been retained, as to deal with it then would have been be to add to the already serious overcrowding issue, that was the pre-eminent focus of post-war housing policy. Cullingworth largely focused on small flats, one and two roomed flats, lacking in basic amenities, and also in serious disrepair. These had always been very limited properties, in terms of internal space and amenities, and had also not been properly maintained over a protracted period and were, by then, quite literally falling down (Robertson, 1992). The revival of slum clearance then introduced 'planning blight' and any minimal investment in that stock was then entirely snuffed out.

The BTS housing quality measure, drawn up by the Cullingworth Report, was a basic measure to define a 'slum'. Local authorities were then legally obliged to survey all housing within their boundaries against this measure, and then come forward with proposed to address those that were BTS. Resolving the problem consisted of two elements, the 'stick', strong local authority compulsory powers to address BTS housing, via declaring HAAs, and the 'carrot', financially attractive improvement (and then shortly afterwards both repair and environmental) grants.

This administrative arrangement took time to be put in place, as it involved first addressing the short-comings that arose from the initial legislative measure, the Housing Treatment Area (HTA) set out in the Housing (Scotland) Act 1969, by quickly coming up with new procedures, the HAA under the Housing (Scotland) Act 1974. This entire reform exercise, from 1966 through to 1975 was collaborative, in that the then Scottish Office, local authorities, other public agencies and a few universities worked together to produce viable technical and administrative arrangements to pursue tenement improvement. The exercise was evidence-based, working through practical experiments in places like Oatlands, Govan and Springburn in Glasgow, as well as Fountainbridge and Gorgie in Edinburgh (Young, 2013).

In time, the emergent legislative framework ensured that, right across Scotland, different local authorities were able to tackle BTS housing, in ways that best suited themselves, and thus it proved extremely successful (Robertson and Bailey, 1996; Bailey and Robertson, 1997a). In Glasgow community-based housing associations became the Council's renovation agents, whilst in Edinburgh it was the Council's co-ordinated use of improvement grants to private owners that was their preferred approach. On the back of this focus, in order to eradicate BTS housing, a massive renovation grants programme was spawned, targeted at improving the common parts of Scotland's pre-1919 tenement stock, primarily in both Glasgow and Edinburgh, and to a lesser degree Clydebank and Paisley, given their then substantial stocks of slum housing. Other cities such as

Aberdeen, Dundee, Stirling and Inverness, as well as many larger town, were slower off the mark, so addressing disrepair became a bigger issue proportionately, as a result.
This combined programme constituted a massive and sustained public subsidy to property owners, which the then Conservative Government was more than happy to support, given its housing policy focus was on growing owner-occupation. Tenement housing, long 'red lined' by mortgage lenders, thus became a critical entry level element of what was by then the expanding Scottish housing market (MacLennan *et al*, 1987). Given the marked physical improvements, lenders were now more than happy to fund mortgages in such places, replacing the previous local authority funded mortgage regime, with many of these first-time buyers being enthusiastic home-improvers (Bailey and Robertson, 1997a).

Over time, with slum numbers dropping to manageable numbers the Scottish Office tired of the project, and sought to cut back on both housing association and renovation grant capital expenditure. This funding cutback really started to bite in 1996, though had been planned over the previous decade. Addressing severe disrepair within council housing had become the new focus of housing policy. For a while, this could be achieved via a stock transfer, the switching of council housing to existing or newly created housing association landlords. Typically, to encourage this switch the government offered to write-off the local authorities capital debt, as well as provide some grant monies to ease access to future private borrowing from which the required improvement works could be financed, given the impact this had on the transferred entities cash flow situation (Robertson, 2019 forthcoming). Later, with the introduction of the SHQS, then a basic housing quality target was introduced for all social landlords, as both local authority departments and housing association now found themselves termed. Private housing was, as noted earlier, only subject to a slum clearance measure as its quality benchmark.

Housing Improvement Task Force

The HITF (2003: 81) set itself three objectives in respect of home owners: "to provide advice on how to find out what exactly your repair and maintenance responsibilities are; to inform you about the role that property managers can play in organising the necessary repair and maintenance work to your building; and, finally, to provide basic advice on how to resolve particular repair and maintenance problems when they arise".

Its core objective was to undertake a comprehensive review of housing policy, as it related to the condition of private sector housing across Scotland, the first since Cullingworth. Crucially, it noted that: "In the years since then, the private sector has changed substantially. Owner-occupation is now the largest tenure in Scotland, while the private rented sector has declined in size and become more diverse. Significant inroads have been made into tackling the problems of "unfit" housing in the private sector but new problems have emerged" (HITF, VII). It went on: "Our starting point has been the belief that the responsibility for the upkeep of houses in the private sector lies first and foremost with their owners and that there is a need for greater awareness and acceptance by owners of this responsibility. Our recommendations are intended to achieve this by influencing the operation of the housing market; improving cooperation between owners; reshaping assistance to owners and modernising the housing role of local authorities generally; and by encouraging and, if necessary, requiring owner-occupiers and private landlords to increase their expenditure on repair and maintenance". Its proposals, based on two years of discussions and debates, with a broad range of stakeholders and various interested parties, were as follows.

Housing quality standards: proposed a new cross-tenure Scottish Housing Quality Standard, as the basis for both local and national planning as a means to raise the overall quality of the stock. This would require a revision the Tolerable Standard, by adding in thermal insulation and electrical wiring standards. Finally, a Repairing Standard would be brought in for PRS housing.

Improving operations of the housing market: Argued for the implementation of a single survey and Home Report, which had by then been piloted in England and Wales, containing information on a property's condition as well as its energy rating.

Facilitating common repairs: With some 25% of home owners having some degree of shared responsibility for maintenance and repair the report stated: **"**this requires effective mechanisms for getting agreement between owners on what work needs to be done, deciding the respective contributions from each owner and ensuring that they all meet their share of the cost. We also believe that it is necessary to ensure that there are effective arrangements for managing the property, so that communal repair and maintenance requirements are identified and work carried out, and for ensuring that there are adequate arrangements for insurance of communal parts of the building" (HITF, 2003, IX).

Here, as already noted, the HITF opted to rely on the Scottish Law Commission recommendations for the 'Law of the Tenement' reforms, which were subsequently implemented by the 2004 Act. Further, they also wanted to improve: "the ability of owners to recover costs from uncooperative owners and recommend that local authorities should have powers to act as a 'backstop' when genuine difficulties occur, but in a way that avoids them simply becoming the automatic recourse of individual owners faced with repair problems" (HITF, 2003, IX).

Under this heading the HITF also recommended powers to require owners to establish property management arrangements, linked to a proposal for a statutory power to require owners to put in place maintenance plans. They also envisaged a role for local authorities to encourage this development.

Finally, the HITF also recommended new arrangements for the accreditation of property managers, in partnership with the industry, local authorities and consumer interests and that the scope of community mediation schemes should be extended to include disputes between owners.

Public Sector Intervention: Here there were three recommendations: direct intervention by using powers to compel owners to undertake works; assistance to owners in undertaking such works; and strategic planning of interventions to achieve policy objectives. This also involved, however, removing the link between statutory notices, or orders, and mandatory grants; ensuring that services like 'care and repair' and other assistance schemes for those owners with particular needs were made available nationally, for all who need them; and, finally, providing powers to local authorities to offer a wider range of practical assistance, other than providing subsidy, including advice, assistance with organising work and accessing the finance via equity-based loans. They also made recommendations to create a more flexible and effective charging order mechanism for recovering local authority expenses incurred when enforcing its powers.

Improving standards within the PRS: The proposal here was to create a new Private Rented Housing Tribunal from the then existing Rent Assessment Committee arrangements. This was deemed necessary to support tenants in enforcing their landlord's repair and maintenance obligations and, where appropriate, apply sanctions on landlords who failed to properly maintain their property. The HITF took the view that where the condition of a property was such that it affected the health, welfare or well-being of a tenant, the local authority should have the power to serve a notice and require the necessary works be carried out. The report also argued for a review of the operation of the assured tenancy regime. It did however step back from attempting to impose a single, national, regulatory framework for all private landlords, preferring instead to let local authorities develop their own tailored schemes.

Legislative actions arising from HITF recommendations

These recommendations then became the basis of almost all Scottish housing legislation over the subsequent 15 years. This is surprising, not least because the remit of the HITF was in respect of encouraging flat owner responsibility for undertaking repairs and maintenance, whereas the emergent legislation often adopted a broader housing policy remit. Here is a listing of the main policy reforms that followed on from the work of the HITF.

- Private landlord registration, was introduced as part of the **Anti-Social Behaviour etc (Scotland) Act 2004**. A revised Houses in Multiple Ownership licensing scheme, was then introduced by the **Housing (Scotland) Act 2006**, Part V Licensing of Houses in Multiple Occupation. This related largely to bedsit accommodation, or flats where a more than three unrelated people share the use of accommodation, and was partly a response to the tragic deaths of two students in a rented basement flat in Glasgow's Woodlands district.

- In relation to housing quality standards, the fore mentioned SHQS was introduced in 2004, but only for social housing. The Repairing Standard for the PRS came in under the **Housing (Scotland) Act 2006**. Complaints about landlords not adhering to this standard are now considered by the newly created First Tier Tribunal (Housing and Property Chamber). The precursor body, the Private Rented Housing Panel (PRHP) had been established under the 2006 Act, again in line with the recommendations made by the HITF, to deal with both repairs and tenancy matters.

  As was noted earlier, although owner-occupation has not as yet been subject to a revised housing quality standard, the Tolerable Standard was recently revised in respect of electrical wiring matters and will be subject shortly to fire safety requirements that emerged out to the Grenfell fire tragedy. That said, although the Scottish Government is not now seeking to deliver one universal Scottish quality standard, as recommended by the HITF, it is pursuing a degree of compatibility between the SHQS, for social housing, and the Repairing Standard, for private rented properties.

  Further revisions in relation to Repairing Standard obligations were added in the **Private Rented Sector (Scotland) Act 2011** which, at the same time, also refined the landlord registration criteria and introduced the need for landlords to provide a tenants' pack, detailing all their statutory rights under the tenancy. This included information on the Repairing Standard and how to appeal to the PRHP (now Tribunal) should the tenant consider their landlord was failing to meet their statutory requirement in respect to repairs. The subsequent **Housing (Scotland) Act 2014** then allowed the Scottish Ministers to extend elements of the Repairing Standard, with landlords obliged to meet that revised standard. This Act also allowed for third party applications to the PRHP (now Tribunal) so that local authorities can pursue disrepair issues where tenants might have felt their tenancy might be compromised in taking up such matters with their landlord.

- The later legislation also placed on a statutory footing what were titled 'Enhanced Enforcement Areas', designed explicitly to deal with a concentration of poor environmental standards, overcrowding and anti-social behaviour within particular pockets of private rented housing. These measures have, thus far, only been applied within the Govanhill district of Glasgow, where there have been serious housing quality issues arising from 'gang masters' using certain landlords to house a vulnerable migrant labour force.
- The **Housing (Scotland) Act 2006** also introduced the requirement for a prescribed Home Report to be provided when selling a residential property. This document, which came into being in 2008 comprises of a physical survey, an energy audit and a property valuation. The

objective here was: "*to improve information about property conditions, therefore providing an incentive for repair or maintenance works to be carried out in advance of sale, or identifying areas where improvements could be made after purchase*". Related to this development was the legal requirement for an Energy Performance Certificate (EPC), under the **Climate Change (Scotland) Act 2009**, which ensured Scotland complied with EU regulations about having in place and energy assessment tool (EC, 2010).

This is an issue that will be returned to later, for in a recent review of the Home Report system it was noted that: "*in order to limit surveyor liability, the writing in the Home Report was often 'neutral' or 'bland' and contained too much caveating*" (Black *et al*, 2015: 5). Further, the: "*main concern that buyers had with the Home Report was that repairs/problems with the property were not identified – a number of the buyers in the qualitative research were able to give specific examples of this happening*" (Black *et al*, 2015: para 4.15). Given the ambitions set by the HITF for the Home Report, in respect of encouraging repair and maintenance works, these are serious failings.

- The **Housing (Scotland) Act 2006** also introduced the 'Scheme of Assistance', which replaced private sector home improvement and repair grants. Further, it also abolished HAAs, so repealed these powers, which had been in place since 1974. The core aim set for the 'Scheme of Audit', as noted previously, was to encourage home-owners to take responsibility for the condition of their homes, and to ensure that, overall, private housing in Scotland was kept in a decent state of repair.

  While home-owners are primarily responsible for their own property, under the provisions set out within their title deed, local authorities still retain statutory powers to maintain and improve the general condition of private sector housing within their administrative area. If an owner needs help to look after their home, the 'Scheme of Assistance' powers allows local authorities broad discretion in providing assistance through offering advice and guidance, practical help, or through direct financial assistance by way of either grants or loans. But crucially it is for the local authority to determine what assistance is made available, on the basis of their local priorities and budgets.

  As the Scottish Government makes clear: "*Local authorities must provide assistance to owners who have been served a statutory work notice requiring them to bring a house into a reasonable state of repair. Local authorities must provide assistance by way of grant for most work to adapt homes to meet the needs of disabled people, other than for home extensions. All other assistance is discretionary. Under the Scheme of Assistance local authorities must prepare a statement providing information about the assistance that is available locally"* (Scottish Government, 2019b). The priority accorded to adaption work is reflected in the overall spend.

  In 2017-18, total spend nationally on 'Scheme of Assistance' provisions totalled £38.6m. The vast majority of this spent went on disabled adaptations, £21.9m covering 5,559 awards (Scottish Government, 2019b). Out of the 214,286 recorded '*instances of help*', the vast majority, 205,237 (96%) were in the form of non-financial assistance such as website hits, leaflets or advice. Thus, in total, some £16.7 million, or just under half, was spent on actual property grant assistance.

  In the previous year, 2016-17, local authorities provided householders with 173,050 '*instances of help'* of which 156,175 cases (90%) were in the form of non-financial assistance. Total spending across Scotland for that year was £31.8 million. As part of that

5,967 grants were paid out to fund property adaptions for disabled households, which totalled £22.8 million, leaving just £9 million for grants to private owners.

Overall, while annual spend on adaptions stands at roughly around £20m annually, the amount expended on grants assistance has fallen back, reflecting the tightening of local authority budgets. Back in 2010-11 total spend was £48.9 million, of which £22.4 million was for adaptions, leaving £26.5 million for owners' grants (Scottish Government, 2018c).

- Revised local authority powers in relation to disrepair, under the **Housing (Scotland) Act 2006**, also gave local authorities the power to take action where: "*housing is sub-standard, in order to bring it into and keep it in a reasonable state of repair (which must at least meet the tolerable standard); or the appearance or state of repair of houses is adversely affecting the amenity of the area, to enhance it*". Given the pressure on local authority budgets, and the withdrawal of all budget 'ring fencing' following the Scottish Government / COSLA Concordat of 2007, thus ensuring such intervention becomes dependent on the overall spend priorities set by each individual local authority.

- A reformed PRS tenancy came in under the **Private Housing (Tenancies) (Scotland) Act 2016**. This provides for an open-ended tenancy that can only be extinguished by the landlord under a set of statutorily prescribed grounds, thus replacing the previous Short Assured Tenancy which typically offered but a six-month tenancy. It is hoped that with enhanced security of tenure provisions tenants will be better placed to insist on their rights being respected in relation to the Repairing Standard and the general condition of the property. The new tenancy also requires landlords to detail all the statutory rights which had been a requirement under the previous tenants' pack provisions.

- In response to the recommendation to establish a single, national voluntary accreditation scheme for property managers in Scotland in partnership with the industry, local authorities and consumer interests, the Scottish Government supported a private members Bill, the **Property Factors (Scotland) Act 2011**. This set in place an accreditation scheme for factors composed of three main elements: a compulsory register of all property factors operating in Scotland; a code of conduct which sets out minimum standards of practice to which all registered property factors must comply; and a route for redress through a newly created Homeowner Housing Panel (now incorporated into the First Tier Tribunal, Housing and Property Chamber). Home-owners are now able to apply to the Tribunal if they believe that their factor has failed to comply with the statutory code of conduct, or otherwise failed to carry out their factoring duties. The Code of Conduct was subject to review in 2017 and we still await the the outcome of that exercise. The later 2014 Act also introduced a requirement for all letting agents to be formally registered.

- Local authorities were given 'missing shares' powers, that is to fund a home owners share of the repair costs where, for whatever reason, they are either unable or unwilling to participate in the project, under two separate pieces of legislation. The first of these is under section 4A of the **Tenements (Scotland) Act 2004**, to which was later inserted by Section 85(1)(a) of the **Housing (Scotland) Act, 2014,** and the second was under Section 50 of the **Housing (Scotland) Act 2006**. A subsequent 'missing shares' provision was made in the **Housing (Scotland) Act 2014** to allow housing associations to undertake and pay for repair works in a common repair scheme. This power was only brought into force in October 2018, following a required consultation exercise (Anna Evans Consultancy, 2016). In all such cases, the work is carried out on the property, under the instructions of the majority of owners, with the 'missing owner' then being billed. The cost here also carries an administrative fee

to cover either the local authorities or housing association's costs. If the bill is then not paid, then the local authority or association can place a repayment order on the property for the outstanding debt. The provisions of the 2014 Act do not allow for the charging of interest on this debt, though the 'missing shares' provisions of the 2006 Act do.

Although there is some legislative overlap between these two provisions, broadly speaking, the Section 4A powers can be used where there has been an owner decision under the Tenement Management Scheme or title deed, but does not require a maintenance account to have been set up by the owners, whereas Section 50 requires a maintenance account to have been established. This example also provides a very useful illustration of how administrative complexities can be introduced when incremental legislatives changes are laid one on top of each other.

- There was also a recommendation that there should be a requirement to have a compulsory common building insurance for all new flatted blocks, although in the event that was fudged within the 'Law of the Tenement' reforms, in that insurance is required for all flats irrespective of age, but that does not need to be via a block insurance policy. Individuals can, under the **Tenements (Scotland) Act 2004** ask to see their neighbours' individual insurance policies to check whether there is an appropriate level of cover. Whether that ever happens is open to conjecture.

It has perhaps not been fully appreciated just how influential the HITF has been in framing Scottish housing legislation over the past 15 years. Further, it would also appear that there has, in large part, been something of a political consensus in relation to these reforms, in that although the HITF was established under the Labour/Liberal administration, much of its subsequent legislative outputs have been taken forward since 2007 by the three subsequent SNP administrations.

The other conclusion to be drawn from this extensive legislative listing is that while improving common repair and maintenance on private property may have been the key driver in the recent development of Scottish housing policy, many of these reforms appear to have a somewhat tangential connection with that specific issue. The ending of feudal tenure, a core achievement of the first Scottish Parliament, while clearly having some implications for undertaking common repairs on multi-owned property, embraced far more than simply that. Similarly, the introduction of the Home Report, the regulation of factoring, or the recent tenancy reforms in the private rented sector, while again having common repair and maintenance implications or consequences, again seek to address a far broader policy agenda.

That said, over time, our awareness of the antecedence of these housing and property reforms has become lost. While the need to address common repair and maintenance matters initially drove this wide ranging and highly productive reform agenda, the specific issue that initially drove it became just one element within a broader reform package. The need to ensure a strategic focus in addressing common repairs matters thus got lost somewhere along the way. Further, the somewhat fragmented, if not ad hoc nature of policy-making, an inevitable consequence of the civil service mode of working, given people after a few years are expected to move onto a different policy area, ensures institutional memory is easily lost. Clearly, a broad range of reforms were delivered, and while they were originally framed to address common repair matters, because this occurred over a protracted time-frame, the underlying coherent and planned focus became lost. So, despite this plethora of useful reforms, all of which were initially conceived off as a means of offering in one way or another a means to address a particular dimension of common repair practice, the actual impact on the ground has proved fairly negligible. If anything, matters now appear to have got worse. For example, initiating statutory action for serious disrepair, without the backing of enhanced grant

subsidy has resulted in a marked demise in the undertaking of such major works. With local authorities reluctant to commit their own resources, they pull back from pursuing such action. Further, the hope that home-owners would step-up and fill that space, armed only with basic information and advice, has not surprisingly failed to produce a changed culture in respect of repair and maintenance practice, as the house condition survey evidence clearly reveals. So why might this be the case?

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TENEMENTS (SCOTLAND) ACT 2004

Historic context

This Act constituted the final part of a major legislative programme of property law reform which abolished feudal tenure. The Tenements (Scotland) Act 2004 came into force in November 2004. As noted above, the HITF saw this particular element of reform as setting in place a much needed Tenement Management Scheme, which would support their ambitions for ensuring owners were able to repair and maintain their property. The then First Minister, Donald Dewar had made repealing feudal property law a priority for the very first administration of the Scottish Parliament. This was accomplished through passing three separate, but linked pieces of legislation: Abolition of Feudal Tenure etc. (Scotland) Act 2000, Titles Conditions (Scotland) Act 2003 and, finally, the Tenements (Scotland) Act 2004. The, then, Scottish Executive provided a comprehensive user guide to these provisions (Scottish Executive, 2005).

The 'Law of the Tenement' reforms closely followed the recommendations set down in the long-awaited 'Report on the Law of the Tenement' (SLC, 1998a). The Scottish Law Commission had embarked on examining this issue way back in the mid-1980s (SLC, 1990). The explanation given for the long reform timeframe was that because the common law relating to tenements was inextricably tied into feudal title, given the core role played by titles and conditions, that broader body of Scottish property law needed to be reformed first.

Common law rules governing the maintenance and management of tenements had developed since the 17th Century, but these were neither comprehensive, nor without anomaly (Adam, 1978; Gretton and Steven, 2017). The development of the Law on Real Burdens, however, had imposed obligations on successive owners to adhere to a detailed regime for the management and repair of a tenement. Such burdens were drawn up by conveyancing solicitors to suit the particular circumstances of a specific tenement development, or when an individual flat was subsequently sold-off by the landlord to a new owner, via a so-called 'break-off title'. Real burdens always took precedence over the common law rules, as is still the case today. It is only when the real burdens are silent, or defective in some way, which makes them inoperable, that owners can default to the common law. Reforming both Real Burdens and the 'Law of the Tenement' was thus an attempt to ensure that the default provisions were better placed to address common management and maintenance matters (See SLC 1998a; 1998b).

It is also worth noting that within Glasgow, and the West of Scotland more generally, title deeds were often complemented by a deed of condition, in effect, a secondary deed that set down specific management rules for that block. The reason for this localised practice, common from the 1880s to outbreak of World War One, was that as tenement construction was often funded primarily by a series of small investors, it was generally the factors who took responsibility for bringing these investors and builders together, and then managing the resulting properties on behalf of the investors (Adam, 1978; Fraser 1901; Sim, 1995; 1996). The deed of condition thus allowed factors to operate a more comprehensive and uniform management operation. In other places in Scotland, where large landlord holdings existed, as opposed those composed of a series of small investors, the day-to-day management was in the hands of these larger commercial entities and, hence, the need to set down a more standardised management code was deemed unnecessary. This was especially true for Edinburgh, where a small number of landlords controlled sizable amounts of property (Elliot *et al*, 1978; Elliot and McCrone, 1975). In smaller towns, where there were neither large landlord holding, nor factors, it was generally the local solicitors who organised the routine management and maintenance of rented property.

However, with the break-up of flats into home-ownership, a process that took place throughout the later part of the 20th Century, problems started to arise. While the deed of condition and factors stayed in place in the West of Scotland, ensuring that the tenement management system could still function, the lack of standardised title deeds arising from the various Edinburgh break-off titles, plus the absence of property factors, resulted in greater complexity for these flat owners and as such a stronger reliance upon common law remedies. It was also the case that earlier tenement blocks, most notably in Edinburgh's New Town development, did not have specified management arrangements detailed in the title, so were always more reliant on the common law arrangements. Further, in Edinburgh it is not uncommon for flats, within the same block, to have quite different title conditions depending on when the break-off deed was drafted and by whom, given custom and practice in drafting such documents differed and has also changed over time. Similar problems have arisen more recently in relation to council house sales, under the 'Right-to-Buy', in that conveyancing practices differed between local authorities, and then, with local government re-organisation in 1996, where a number of authorities were brought together, practice was then standardised (Russell and Welsh, 1998; Welsh, 1999). Again, local authority solicitor practices also differed between authorities and similarly have altered over time.

There is a popular and long-held misunderstanding that tenements are a collective property entity, given owners share a building. However, that is not the case in law. The original 'Law of the Tenement' provisions were based on the Law of Common Interest, but crucially not on any notion of common ownership (Rennie, 2004). In essence, the common law developed certain rules about protecting support, shelter and natural light within a tenement structure, for the benefit of all, under the umbrella term of 'common interest'. What the Tenements (Scotland) Act 2004 did was to replace these 'common interest' provisions by similar statutory obligations, so that the owner of any part of the tenement building that provides support or shelter for other owners is obliged to maintain that part.

Given this, and a long-standing concern in Scots Law that co-ownership demands unanimity in decision-making, which is difficult to achieve, common property has always been very limited, with only the common stairs (or close), the roof above the stairs and the solum (ground) immediately below the stairs, being common. That said, as Rennie (2004) noted: "*Most title deeds change the rules of ownership to make things like the roof, solum, garden and outside walls, passages, stairs and services common and this is by far the best method of dealing with matters. But the variation of the common law rules may be inadequate, the maintenance obligation may be unclear or inconsistent and there may be no management scheme to deal with matters of common repair".*
Titles can, and do make for separate provisions, but they do so in a variety of different ways. Titles also suffer from becoming dated, and thus inoperable in practical ways over time. At its simplest, this means certain terms or approaches fail to keep up to date. For example, it was common practice to calculate the respective share of costs, between the owners, through the use of their individual rateable value when drafting titles. However, with the introduction of the Community Charge, and the abolition of rates, and then, in turn, its subsequent replacement by the Council Tax, such an approach became redundant. However, many title deeds still contain such apportionment provisions which are now inoperable.
In most other jurisdictions, there is a statutory code that applies to all flatted property (Bailey and Robertson, 1997b; Robertson, 2006). In effect, what the 2004 Act provides for is a limited, or tightly prescribed form of statutory code, hence its description as a less radical reform. This is because it opted not to apply rules right across the board, for all tenemental property, no matter what existing titles might say, but rather only where the existing titles were silent, or inoperable. However, there was one quite notable exception, the property's roof which now, in effect, has become common. The 2004 Act thus provides a statutory structure for the maintenance and management of all 'tenements', if this is not provided for within the existing title. Core to this is the provision of a

Tenement Management Scheme (TMS) as a means to help owners make decisions about the day-to-day management and maintenance of their building. But again, crucially this only applied where the titles are silent, or inoperable in respect of that matter.

Defining tenements

As already noted, the 2004 Act starts by defining a tenement as being: "*a building, or part of a building which comprises two related flats at least two of which (a) are, or are designed to be, in separate ownership; and (b) are divided from each other horizontally*" (s26 (1)). A property divided vertically is considered a terrace, not a tenement. This broad definition, is designed to capture the broad range of flatted properties, whether a purpose-built modern apartment, traditional Victorian tenements, ex-council or SSHA flats or larger older properties now converted into a number of individual flats. Further, when determining whether flats are related, regard must be given to the existing title and any burdens which treat the building, or any part of it, as if it were a tenement (Gretton and Steven, 2017). The use of the legal term also has a downside, in that a tenement in the publics mind is the traditional Victorian sandstone building and not the broader range of more modern flatted properties that are captured by the definition.

Sectors, boundaries and pertinents

The 2004 Act then sets out its two core ambitions: firstly, to codify the common law rules in respect of tenement law, as noted above, and, then secondly, to set down the Tenement Management Scheme (TMS). Mirroring the common law, it was again an up-dating exercise, given the legislation relies on common ownership very sparingly. As previously mentioned, there is good reason for this, given common or co-ownership would require unanimity in decision-making, and that has a tendency to give rise to disputes between owners (Gretton and Steven, 2017). There is an observation, noted in Roman Law, '*communio est mater rixarum',* which simply means 'co-ownership is the mother of disputes'. This neatly reflects not only the age of the problem that we seek to address, but also the critical importance of a long-standing tension within the Scots property law in respect of co-ownership, between the rights of the individual and any entity formed by these owners collectively. Co-ownership demands unanimity, so under Scots property law that has been actively avoided. Hence, as is detailed below, within any flatted property most elements of the building are directly assigned to an individual owner. Under a co-ownership arrangement, no matter the actual size of the share held by an individual share, each owner effectively owns the property in its entirety. This therefore means, normally, each co-owner must be consulted as regards all dealings in respect of their property. In accordance with the unanimity rule, each co-owner consequently has a right to veto, and this can, and often does, lead to deadlocks. For these reasons, co-ownership is regarded in Scots property law as a restriction of ordinary ownership. However, as we shall see while historically Scots property law has consciously and explicitly sought to avoid creating co-ownership for these very reasons, it is still effectively caught within the very same bind it seeks to avoid. This is not in terms of the actual decision-making process, as both the Tenements Act, and the Title and Conditions Act make provisions for majority decision-making by owners, and not unanimity, but in terms of the actual payment for works, for if the one owner refuses to participate and contribute to these costs then, in effect, unanimity is still there. But we are stepping ahead of ourselves here, so let's pause and step back.

It is important to clearly understand that these reforms retain the long held premise that individual owners have exclusive ownership of their flats and then there are rules provided to deal with what are now termed 'sectors', 'boundaries' and 'pertinents'. Previously, these elements were understood as 'common interest', those parts of the building that provided both shelter and support to the owners of the building, so owners shared an interest in their upkeep. As Rennie (2004) neatly put it, tenement law: "*favours exclusive ownership of each part of the tenement, slice-by-slice and*

floor-by-floor, with a common interest in those parts of the tenement which are part of a particular slice but which provide either support or shelter for the whole building".

Consequently, under Section 2 of the Act the tenement is now divided up into 'sectors', which means by each flat, any common stair, close or a lift and, finally, any other three-dimensional space such as a cellar. The boundary between each of these different 'sectors' is normally 'the median of the structure that separates them', namely, the centre line, or mid-point. The 'boundary' between two flats is the mid-point between them, whether at the ceiling, or floor. The division between the flat and the close or common stair, which is defined as a 'pertinent' given all flats take access from it, is also taken as the mid-point between the walls. All external walls are, therefore, owned exclusively by the 'sector' in question, so in the case of the front wall, it is owned in sections by all front facing flats. In terms of Section 3, ownership of a top floor flat includes ownership of the roof above it, and similarly ownership of a ground flat includes the solum, the ground on which the building is erected, which lies immediately below the ground floor flats. In the case of the close, or stair, only the roof above and the solum below it, is defined as being common.

'Pertinents', as noted above, primarily refers to the close, the connecting passage, stairs and landings within the building which constitutes a common access to two or more of the flats. If a main door flat does not access via the common stair, then it is excluded from ownership of this 'pertinent'. The ground around the flat, such as the back green or back court, belongs to the flat adjacent to it, but there are exceptions, such as paths, any outside stair, or the means to access other sectors of the building. Other examples of 'pertinents' are fire escapes, rhones, pipes, flues, conduits, cables, tanks and chimney stacks. Where such parts serve more than one flat they are common property to those flats. Shares in common property are normally of equal size, but in the case of chimney stacks the actual share depends on the ratio of the number of flues serving the chimney to the total number of flues in the stack (2004 Act, s3; Gretton and Steven, 2017). What this categorisation exercise does is to define key parts of the tenement building as 'scheme property', as these elements then become the subject to the Tenement Management Scheme provisions.

Tenement Management Scheme

The 2004 Act seeks to ensure all tenements have an arrangement for the management and maintenance of the property. As of June 2009, the Tenement Management Scheme (TMS) applied to all 895,000 tenement flats in Scotland (Xu, 2010). That was prior to the advent of the Development Management Scheme (DMS) becoming available, the provisions of which are detailed later. It is also worth noting at this point that the DMS was explicitly designed for the future management of large new developments, rather than for existing tenements, where the TMS is considered to be the default. That said, for the reasons already well outlined, not all tenements will have the exact same scheme. The relevant scheme, for a particular tenement property, will thus do one of following:

1. operate to the rules set out in its Title Deed;
2. operate to the rules set out in the Tenement Management Scheme;
3. operate to the rules set out in Development Management Scheme;
4. operate under a combination of 1). and 2). above.

Again, the TMS arrangements can only apply if the property's title deed provisions do not set down other arrangements, or are defective in some way, or if all owners agreed it as an alternative.

Then the TMS only applies to the building elements that fall within the definition of 'scheme property'. This, firstly, means the strategic parts of the building, which under common law had been the subject of 'common interest' obligations, namely:

1. The ground on which the tenement is built upon, the solum
2. The foundations
3. The external walls
4. The roof (including supporting structures such as rafters)
5. Any mutual gable wall shared with an adjoining building, to the centre line
6. Any other wall, beam or column that is load bearing

These parts do not have to be co-owned, in terms of the title, to be 'scheme property'. A top floor flat, which under the common law had sole ownership of the roof above, now finds the whole roof is nonetheless taken to be 'scheme property'. The idea here is that the whole roof should be treated as a single entity, but again only if the titles have nothing to say on the matter. What this default rule does, is that if the title deeds are silent, then liability for the roof is not based on the long-standing 'common interest' understanding, which held that it was only the section above the close that was common, but rather there is now equal liability for maintenance for the whole roof (unless the flats are disproportionately different in size where liability is by floor area). In effect, this is the only nod to a statutory code approach which is common throughout other legal jurisdictions.

The second definition of 'scheme property' includes parts of the building that are owned in common, such as the close. Thirdly, it also includes any part of the building which are maintained under a real burden by two or more flats.

The main decisions that require to be taken by the TMS in respect of 'scheme property' relate to its on-going maintenance. Scheme decisions can be made by a simple majority of the flat owners, though again, if the title deed set a higher threshold, such as two-thirds, then this applies. The first such decision might be to undertake an property inspection to determine what maintenance works are required. The word 'maintenance' is critical here, as the Act makes specific mention of: '*repairs and replacement, the installation of insulation, cleaning, painting and other routine works, gardening, the day to day running of a tenement and the reinstatement of a part (but not most) of the tenement building; but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance*' (TMS rule 1.5). There has always been a distinction in the law between what is considered to be regular maintenance and repair, and what is deemed to be an improvement (Gilbert and Flint, 1988). That said, the dividing line can be contentious, as a repair may not properly address a technical problem which an improvement might actually resolve.

Once a decision is made to undertake maintenance, then the majority need to instruct the work, and then decide on either an owner or manager to instruct and manage that work. A scheme decision can then require all owners to deposit their respective share of the estimated costs in advance, in an interest-bearing bank or building society account. Who holds and manages that account is left unspecified, but in factored properties, it is the manager that offers such a service. Self-factoring blocks tend not to have a bank account, with payments often sorted out on an ad hoc basis (Gilbert and Flint, 1988).

There is no requirement for a formal meeting to be held to progress such works. If an owner feels that a repair requires to be carried out they can go around all the tenement owners and see if the majority agree. Of course, that presumes all owners are easily contactable. This also exposes an underlying presumption that the owners are all resident within the block which, at the time when this legislation was formulated, was likely to be have been the case given the then high levels of owner-occupation. However, post the Financial Crisis, and the markedly changed ownership patterns this has brought in its wake, through the unprecedented growth in private renting, then absentees owners now represent a real and significant problem. This is because as the law stands all owners need to be consulted, as each has one vote. Though the vote does not need to be in writing,

it is considered advisable to have all the owners' positions stated in writing before instructing any repair works. If a formal meeting is held then 48 hours' notice must be given, and again any decision needs to be on the basis of a majority of owners, not just a majority of those who attended the meeting. If the block has a majority of absent owners such requirement could be very hard to secure.

After a decision is made then all owners need to be formally informed of that decision, again in writing, and then that decision cannot be implemented for 28 days, in order to allow any owner who opposes to lodge a challenge at the Sheriff Court. The Sheriff has to be satisfied that the decision is not in the best interests of all owners, or prejudicial to one, or more of the owners. Where the decision is not successfully challenged, then it then becomes binding on all owners and their successor.

Scheme costs are those that arise from scheme decisions to carry out maintenance, or costs incurred in undertaking the management of the tenement. Again, as with this entire piece of legislation, it is again subject to the titles. Where the real burdens detail scheme costs, then these must take precedence, but where the real burdens are silent on such matters, or are either defective or partial, then the TMS rules can then be applied.

Normal apportionment is by equal shares, but again, there are other possibilities. If part of the property is deemed common, then liability is by share of ownership. Further, if it is not owned in common, but the floor area of the largest flat in the building is more than one and a half times greater than the smallest, then liability is then in proportion to floor area.

In the case of an emergency repair, any owner is entitled to instruct, or have remedial work carried out. Emergency work is defined as being: "*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 interests of health and safety*".

Similarly, where an owner has an obligation, set down in the title, to maintain a specific element of the building, for the benefit of all other owners, then these costs are shared, and that responsibility is also enforceable by the other owners. Further, given its importance, no scheme decision is required provided the part in question is 'scheme property', or property that must be maintained by virtue of the real burdens. Costs on the share basis can be recovered from all the other owners, as if a scheme decision had been made.

This duty to maintain, does however, have to be reasonable, so due regard to the age and condition of the building and cost is taken. Consequently, in the case of a dilapidated building, it does not apply. Finally, if action to ensure support, shelter or light is not undertaken by the responsible owner, then a claim of negligence or nuisance can be made.

The Tenements (Scotland) Act 2004 makes it a requirement of flat owners to insure both their flat and their share of the common property to meet their obligations to rebuild the tenement/block of flats. Section 18 of the Act states that insurance needs to cover the: "*prescribed risks of fire, smoke, lightening, explosion, earthquake storm, flood, theft, rioting, vandalism, subsidence, and damage from water or oil leakage"*. Again, if the real burdens state that a common policy must be used, or a scheme decision is made to have one, then that would apply. It is also a common requirement for block insurance to be part of a property factoring agreement, with the insurance arranged through the factors. That said, there is no legal requirement for a 'common' block insurance to be in place, only for there to be appropriate insurance cover. It is thus possible for a set of separate individual policies to address this requirement.

An owner is, however, only adequately insured if every other owner is also adequately insured. In light of this the 2004 Act gives owners the right to ask their fellow owners to provide evidence that they are insured to the full reinstatement value, with premiums fully paid. If one owner is not properly insured, any of the other owners can go to Court to enforce the obligation that they become properly insured. How this works in practice is more precarious and causes many serious problems, some of which are detailed in Appendix One.

Finally, the Act also sets in place arrangements that allow for the appointment and/or dismissal of a property factor by a majority vote within the block. It is not compulsory to have a property factor and owners can opt to manage their building themselves. Evidence gathered by the by the Office of Fair Trading (OFT) (2009) investigation into the factoring market estimated that some 35% of all tenemental property, at that time, was in fact 'self-managed' or 'self-factored'. What the Property Factors (Scotland) Act 2011 did was make it imperative upon a property factor to be able to demonstrate the basis of the authority they have to act on behalf of the owners within a block or development.

The basis for appointing a factor will generally be found within the title deeds, or an accompanying deeds of condition. If there is provision for the appointment of a property factor contained within the titles, then that procedure must be followed. Titles may specify who may appoint the initial factor, who the initial factor is, the period of first appointment and whether the appointed property factor is also to be appointed for any future phases of a development. Such 'real burdens' or 'manager burdens' can be set down in the titles when the properties are first constructed. However, the Act notes, a 'manager burden' ceases to have effect once the person entitled under the burden, typically the original developer, ceases to own any of the properties within the development.

Where the titles are silent on the appointment of a factor, then the rules set out within the Tenements Act apply. This states the majority of owners can appoint a factor and the owners in the minority, irrespective of whether or not they agree with the factors appointment will be required by law to meet their share of the factoring charges. A majority decision can also dismiss the factor.

The consensus on the value of these reforms is that there is now a better set of arrangements in place than previously. There are clear benefits in having a definition of both a 'tenement' and 'scheme property' which overrides ownership issues. Where title is silent, flawed or inoperable then this offers owners a course of action to resolve a maintenance or repair issue. As Rennie (2004) acknowledged at the time, it: "*provides for sensible, but not radical reform*". However, his contention that the management scheme should help persuade neighbours to avoid the sort of difficulties that have arisen in the past, where owners simply dig their heels in, or ignore the requirement for maintenance was somewhat optimistic. Partly because the actual ownership patterns in many tenement blocks has changed, and also because of the inherent complexity of these arrangements, such difficulties and disputes are still commonplace, and if anything are perhaps even more exaggerated and contentious.

Crucially, the Act presumes owners are resident and thus readily contactable. However, given the recent dramatic shift in ownership patterns within tenements, from owner-occupation to private rental, that is less likely to be the case. As already noted, this shift has been most marked within the 'cheaper end' properties, traditionally dominated by small tenemental properties, generally in a poorer physical condition because of their age. As a result, contacting owners through tenants and/or agents can prove to be a real challenge, as is then securing agreement to proceed with any repair works, before then insisting their share of costs are deposited in advance. Initial examination of Landlord Registration data provides some insight here, in that 60% of landlords are resident in

Scotland, while another 20% are resident in England and Wales with the remaining 20% located world-wide, though largely concentrated in Australia, New Zealand, South Africa and Canada. Landlords were once local, now they are increasingly global.

The critical issue here is not getting a majority decision made, though securing a majority can still be quite a challenge, but then getting all owners to contribute their share of the costs. So, although a binding majority decision has emerged out from this legislation, the practicalities of actually getting all owners to fund the necessary works that fall from that decision, in advance, still proves to be the major stumbling block. As argued earlier, in effect, this constitutes a *de facto* unanimous decision. As many of the case study examples set out in Appendix One ably illustrate, this is the real impediment to actually getting the necessary maintenance and repair works carried out.

A further criticism of the Scottish Law Commission's approach was that it consciously resisted having the owners' association within the TMC arrangements organised within a formal company/body corporate structure. As they observed: "*the degree of formality and regulation involved are out of scale with the relatively humble functions performed by the association*" (SLC, 2003, n1 para 6.8). This view now needs reconsidered, given that the relatively humble function, in many instances, presents major challenges for many owners.

Development Management Scheme

The Title Conditions (Scotland) Act 2003 also provided for a more sophisticated management scheme, primarily for use in larger modern property developments. So although it could be used for a single tenement, it was envisaged that it would more likely to be utilised for a group of adjacent apartment blocks, or houses, to some extent mirroring the Planned Unit Development, or Strata Titles models that operate in US or Australia State legal jurisdictions (Bailey and Robertson, 1997b). As such it primarily designed to be put in place when a new development was being planned, prior to its construction, rather than being applied retrospectively to a property with an existing title. Adoption of such a governance arrangement, in that context, would demand unanimous approval by all parties, both owners and their lenders and, therefore, involve additional individual conveyancing changes for all affected parties.

The DMS, in contrast to the TMS, is constituted as a body corporate which is a business association (albeit not for profit), so is thus a UK reserved matter and, therefore, needed to be set out within a separate Statutory Instrument, the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 (SI 2009/729). As the date suggests, this was passed some six years after the Title Conditions (Scotland) Act 2003. That said, the scheme itself was based on the draft provided in Schedule 3 of the draft Bill, as set out in the Scottish Law Commission Report on Real Burdens (SLC, 2000).

Under this scheme, the development is run by a manager directly employed by the constituted owners' association. The association, being a body corporate, thus has juristic personality. The scheme details the rules that have to be followed by the owners' association, in respect of budgeting, service charges, meetings, maintenance, reporting and other matters. It can be applied with, or without variation, to a development by a deed of application, and dis-applied by a deed of disapplication.

Where the DMS applies, a TMS cannot. The major difference between the two schemes is that the DMS has a formal legal standing, and as such demands adherence to the procedures and reporting conventions, as set down within the statutory instrument. The association is termed a '*sui generis body corporate',* for the sole purpose of managing the development for the benefit of its members. More importantly, it ensures that there is a person who is directly charged with the duty of

management, who acts as the agent of the association, and who carries out such day-to-day tasks as routine maintenance in consultation with the owners' association. In contrast with the TMS, where these responsibilities are assigned to all the owners, the DMS concentrates the management function on a single person, who in practice will usually be a professional manager or factor.

The TMS is thus legally a far looser arrangement, designed to allow owners the opportunity to adapt and use it as they see fit. While this was considered a strength, in that a more formal approach might have been more difficult to implement and use, as owners might just opt not to use it, the potential for informality and variation is perhaps just as much a problem. The DMS sets in place a governance regime prior to the owners taking up their ownership, so they should know and accept what they are moving into. However, English experience of leasehold and its management arrangements would suggest that has not always been the case (Bailey and Robertson, 1997b). Having a manager appointed by the developer in advance of owners moving in, is also fraught with problems, especially in the initial 'snagging stages' given the potential for the manager to have divided loyalties, between the developer that appointed them to that position and from whom they hope to secure further business, and the owners who they are now paid by, as has proved to be the case in Australia, New Zealand and the USA (Blandy *et al*, 2011).

Given its late enactment, and the conservatism shown by both developers and their solicitors in using something new, there are still as yet very few examples currently of DMS in operation, although latest figures from Registers of Scotland do show an upwards trend. This mirrors a similar pattern with the introduction of Commonhold in England and Wales (Xu, 2010).

Inherent within the HITF recommendations was the hope that the 'Law of the Tenement' reforms would put in place a 'backstop' management system, based on a standardised owners' association model, and that would make undertaking common maintenance and repair a more straightforward exercise. That ambition now appears misplaced. Perhaps that outcome also reveals an inadequate understanding on the part of the HITF of the individualistic principles that underpin Scots property law. Further, while the Tenements Act offers a framework for undertaking common repairs, this can only happen if the titles are either silent, or inoperable. Again did the HITF appreciate the core importance of titles in all of this? The Tenements Act reforms were never going to provide a comprehensive statutory code covering all flatted accommodation which all title deeds were required to conform to, though some had expected just that.

The weakest link here, however, is the ability to get other owners to contribute their share to the cost of undertaking the required works. While the Tenements Act reforms now allows for majority decision-making, if an individual owner chooses not to make their financial contribution then, in effect, the principle of unanimity in decision-making *de facto* operates. While technically it is possible to resolve such a situation, the solution, that of all other owners making up the share of the non-participating owner, and then taking them to a Simple Procedure Court (previously Small Claims Court) hearing to recover these costs was never a workable option, even when the physical structure of your home is threated by the intransigence of one owner.

FACTORING AND PROPERTY MANAGEMENT ISSUES

Given how central a home is to peoples' lives and for their personal wellbeing, ensuring any property is well managed and maintained is of critical importance. While maintaining an individual property always presents its challenges, within a multi-owned structure, given the building's scale and technical complexity, such challenges can become substantial. Add in the dramatic changes in property ownership occurring within these structures, initially through the growth of home-ownership and then, the recent unprecedented expansion in private renting, then ensuring decisions about managing and maintaining the buildings fabric can first be agreed, and then be acted upon, becomes that much harder.

The term factor is distinctly Scottish. In England the word would be property manager, in the USA unit or condominium manager applies, while in both Australia and New Zealand it's a strata title manager. The specifics of the job differ depending on the legal jurisdictions, given that different laws, regulations and thus practices apply. However, while there is no such thing as a standard property manager, the basic tasks are universal (Van der Merwe, 1994).

In Scotland the factor was historically the person charged with superintending or managing the physical property and landholdings of a landowner. The term factor actually ties back to an older term, that of 'tacksman', who was the landlord's agent and took responsibility for allocating and managing the lands that made up the landowner's estate. Over time, as the feudal structures died out in response to the repercussions of industrialisation, the factor became a distinct and urban form of employment.
In the 19th Century, with rapid industrialisation and the associated population move to urban localities in search of employment, factoring continued, albeit in a quite different guise. Factors still worked for landlords, but instead of the focus being on landholding *per se*, it was now primarily on residential property. As a result of urban concentration and the development of the tenement as the most common housing form, factors became core to managing that particular type of property. They had responsibility for assessing rent, allocating flats on the landlord's behalf, collecting rents, and also organising any repairs and maintenance to individual flats and the building. To ensure these tasks were properly organised factors promoted a secondary deed, the Deed of Condition, which allowed for standardisation of the factoring task across properties which had a plethora of different small investor owners. Given factors often brought together several different owners in order to finance the actual tenement development, the Deed of Condition became a development requirement.
In the industrial heartland of west central Scotland, it was common within tenement blocks for the individual flats to be owned by a collection of different individuals, rather than by a single landlord. Such properties were an investment product, very similar to today's 'buy-to-let' properties which are also bought as an investment vehicle. All owners were expected to contribute to the management and maintenance of the building and its communal areas, and it was the factor who was able to organise such activities on behalf of all the owners. In places such as Edinburgh, where the landlord holding was larger, such an arrangement was unnecessary as landlords could organise the management and maintenance for themselves.
Ownership within the traditional tenement stock has changed over time, and some of the original title provisions have become outdated, and thus inoperable. At the same time, new modern apartment developments, often incorporating cutting edge technologies, have added to the actual factoring task. While having a well drafted modern title deed, as set out in the Development Management Scheme, can set in place robust decision-making bodies and well considered management and maintenance arrangements, such outcomes are certainly not universal given the inadequacies evident in the drafting of some deeds. And of course, as with all management tasks, it is people who in the end make them work or not.

All professional factors need, as a core competence, a solid knowledge and understanding of property law, titles and burdens, tenement law, building technology, embracing the various elements that constitute these, at times, complex structures, while paying particular attention to the common parts and their on-going management, maintenance and repair requirements. Health and safety, is also always a critical concern here, involving as it does residents, contractors and property professionals alike. This issue recently gained added prominence, given the range of consequences that are likely to emerge from the Grenfell Tower tragedy (Booth, 2019).

Factoring is, of course, a commercial undertaking, so there are financial and legal aspects to such work, including how to act on instruction and instruct contractors, but also how to account for all such activities in writing, as well as in terms of expenditure, income, profit, debt and loss. Central throughout is ensuring a clear consumer focus, embracing best practice in communications, transparency, confidence building, liability and trust. As part of that, ethical behaviour is also critical, as this allows for a better understanding of issues involved in factoring work and just how different and varied perspectives can emerge around such matters. In this context, it is also critical to understand and be able to act in relation to any conflicts of interest as well as actual conflict situations that can and do arise. Property factoring can thus be a very challenging business.

The property factor's mode of operation is still primarily determined by the provisions set out in the individual property's deed which, in large part, specifics the factoring service being purchased by owners. As such, and this is not always fully appreciated, while the parameters set down within the title define a legal position, the factors Written Statement of Services can often operate beyond that. What is core here is that factors operate within the Law of Agency, in that they provide a service defined by the contract, the Written Statement of Services, which they have agreed with the owners within a block. In relation to pursuing repairs they, therefore, cannot act without the owners deciding and agreeing on a course of action, and then they, the owners, need to ensure the required resources are in place to undertake the agreed works.

This often causes misunderstandings, in that property owners expect factors to act in relation to a specific matter, whereas they often need a clear instruction backed up with a financial commitment by all the affected owners before they can act. Complaints about factors within Scotland have, to some degree, become something of a cultural phenomenon and, in some instances, they may well be justified. However, given what has been said to date, it is clear that organising repairs and maintenance in multi-owned blocks has always been a challenge, and if anything, that has become ever more challenging in recent years.

Perhaps as consequence of such complexity, challenging and contentious environment, factoring has found itself subject to much greater public scrutiny. Initially, this was primarily focused on competition between factors, in large part, in response to concerns raised by 'Right-to-Buy' owners who found themselves tied, through their title conditions, into local authority or housing association factoring contracts in perpetuity (OFT, 2009). In exploring this issue, the notion of service standards emerged, and there were legislative changes under the Property Factors (Scotland) Act 2011 that not only brought about the registration of all property factors, but also the introduction of a statutory Code of Conduct that applies to all factoring businesses, whether working in the private, public or voluntary sectors. Consumer redress was also built into these reforms, to allow those purchasing such services to be able to seek redress if they considered that the service provided failed in some way to meet these legally specified standards.

Title Conditions (Scotland) Act 2003

The actual regulation of property factoring initially started as part of the suite of property law reforms. The Title Conditions (Scotland) Act 2003 contains various provisions relating to property management services, each designed to strengthen the position of owners in appointing and dismissing factors. In particular, Section 28 provides that, where the title deed does not make alternative provision, a simple majority of property owners in a development can dismiss a factor, and then appoint a new one on terms they choose to specify. Again, however, any title deed provision must take precedence.

So within a block with ten flats, where there are no rules set down within the title, the agreement of six owners is enough to secure the removal of a factor. If the title deed imposes a higher voting threshold than a simple majority, Section 64 provides that owners of two-thirds of the properties can dismiss a manager and then appoint a new person to be a manager, regardless of any title required threshold.

Previously, in new built developments, the developer could reserve the right, by virtue of a 'manager burden', to appoint the factor, sometimes for an indefinite period. The rationale here was that the developer had a legitimate interest in the management of the development where they continued to own properties and were still in the process of selling them on. However, Section 63 legislated to limit the time during which a developer could retain this right, even where the title deed states that the developer can appoint a factor in perpetuity. The duration of the 'manager burden' therefore now differs according to the type of housing. This reform, in part, followed a Court ruling on the Hanover Housing Association case, in relation to such a burden being employed in a new private sheltered housing development in Glasgow's Langside (Scottish Courts, 2002). In this case the flat owners, who had bought into the private sheltered housing complex, subsequently objected to both the cost and provision of that very service, which was covered within their overall annual management fee. The fact that they were unable to collectively dismiss the manager, the developer Hanover Housing Association, because the association argued, it held a 'golden share' that ensured they could provide these management services in perpetuity.

Section 33 also makes provision for the variation and discharge of a 'community burden', described simply as a mutually enforceable burden, imposed under a common scheme on four or more units. Such 'community burdens' may make provision for the appointment and dismissal of a property factor, define the powers and duties of such a factor as well as the arrangements necessary to nominate the first manager. These procedures require a solicitor to draw up an entirely new deed, which must then be signed by the majority of owners. As a check on the procedure, under Section 28, the deed must then be intimated to those owners who did not agree with the proposed change. These owners are then permitted eight weeks to raise any objections with the Lands Tribunal for Scotland.

Competition concerns about property factors

These legal changes, and the persistence of complaints about post 'Right-to-Buy' factoring arrangements (Walsh, 1999) resulted in the OFT (2009) undertaking a statutory investigation into the perceived lack of effective competition within this market. This then touched on the difficulties inherent in switching a property factor, and whether the complexity of the then legal situation meant that there was a need for an effective independent complaints procedure and redress mechanism which could be easily accessed by the owners of shared property. Although the investigation was undertaken on the basis of market competition within property factoring, it concluded that in order for that market to work effectively, there needed to be a statutory framework which laid down the minimum requirements expected for ensuring best factoring

practice. Any consumer complaints could then be assessed against these standards. The OFT thus recommended that all property managers should:

- set out in writing the details of the services they will provide and the relevant delivery standards
- as a matter of course, provide a detailed financial breakdown and description of the services provided and such supporting documentation as is appropriate, such as invoices where appropriate
- provide pro-active explanations of how and why particular contractors have been appointed, demonstrating that the services being procured are charged at a competitive market rate
- automatically return floats to owners, at the point of settlement of final bill, without consumers needing to request the return of the float
- have and operate a complaints procedure and pro-actively make details of it available to consumers
- at a minimum, follow [the then] Financial Services Authority guidelines on disclosure of commission on insurance, whether FSA authorised or not
- in addition, there should be a mechanism to allow the audit of payments to contractors, either on a random basis or reactively in response to complaints, to reassure consumers that no improper payments are involved
- encourage property owners to form an organised body (either a formal residents' association or limited company)

Of these eight recommendations, seven related solely to factors, while only the last one was directed at owners. Interestingly, each of the factoring recommendations were, at that time, approved and expected working practices of all property factors who were members of the Property Managers Association Scotland (PMAS), by virtue of its Code of Practice, though perhaps not by non-members, generally smaller companies, nor local authorities and housing associations who also factored property. Subsequently all the above recommendation found themselves being incorporated into Patricia Ferguson MSP's Private Members Bill, which with Scottish Government support became the Property Factors (Scotland) Act 2011.

Property Factors (Scotland) Act 2011

Under the Property Factors (Scotland) Act 2011 all those who, in the course of their business, operate a property factoring service require to be registered. If they fail to do so they are liable for a fine. They are also expected meet the now statutory Code of Conduct, which sets out the minimum practice standards expected of all registered property factors when dealing with clients and their property. Under the Code, property factors must provide all their clients with a Written Statement of Services and details of expectations in a further six prescribed areas (Scottish Government, 2012). The 2011 Act also established a judicial complaints procedure to deal with cases that are not resolved by the factors own internal complaints procedures. If a client feels their complaint has not been properly considered, then they can take their case to the Housing and Property Chamber, First-tier Tribunal for Scotland for a determination. The outcome of such judgements, as with all Scottish Courts cases, are available as a public record. For an individual to apply to the Tribunal for such a determination they are required to show how their property factor has failed to carrying out their 'Property Factor Duties', in respect of the Code of Conduct.

The Code consists of seven distinct sections: 1). Written Statement of Services; 2). Communication and consultation; 3). Financial obligations; 4). Debt recovery; 5). Common insurance; 6). Repairs and maintenance; and, finally, 7). Complaints (Scottish Government, 2012). These requirements, in large part, determine the nature of the property factoring task and then how that service is delivered to clients. When reading through the Code it is clear the Written Statement of Services is the central document all property factors are required to produce for their clients, given all other provisions

within the Code requires to be detailed within the actual contractual arrangements (Scottish Government, 2012). In effect, the requirements set out in the Written Statement of Services now determine the day-to-day operations of each individual property factoring business[3].

Glasgow Factoring Commission

The recent findings of the Glasgow Factoring Commission (2014) again highlight the complexity of organising common repairs within multi-owned stock, and the challenges property factors face daily in working within this environment. As a direct result of evidence considered by the Commission their report focused on three elements:

1. The legal framework within which factoring, property maintenance repair and individual and collective property rights sit
2. Issues about enforcement of statute
3. The human and financial resources available to tackle both building repair and behavioural problems

Thus, the focus was on improving the quality of information, and making the case for better enforcement powers, other legislative reforms and enhanced owners' rights. While issues about the quality of service delivered by property factors was touched on, it was not the core consideration of this work. While it was argued that there needed to be more effort expended on re-building confidence in property management providers, through delivering a more customer focused service, encouraging greater openness, transparency and ensuring regular feedback from consumers, the Commission also felt there had been significant under-investment on the part of owners, over many years, which caused further unnecessary deterioration of their own properties. Overall, they took the view that there was a significant and widespread lack of understanding on the part of owners as to the importance of undertaking regular programmed property maintenance and management work.

The Commission expressed concern that there was currently no obligation, on the part of owners, to carry out regular common property condition checks and, as a result, no requirement to effect comprehensive maintenance plans. While commissioning, implementing and applying comprehensive property surveys was already established practice for a number of housing association and private sector factoring operations, the Commission felt similar mechanisms were also needed to encourage a more comprehensive implementation of routine common property checks by property owners.

The Commission also took the view that there was a fundamental problem of balancing individual rights with the need to protect common building fabric. This was because, in their view, preventative action would result in significant savings both for current and future owners, and would reduce the number of property factors 'walking away' from blocks where the actual scale of repair problems and owner non-payment creates an intractable problem.

It also took the view that the current legal framework associated with property factoring and common property maintenance was still inherently complex and thus difficult for the lay person to comprehend let alone navigate. They voiced the long held concern that there is still no single comprehensive guide, written in plain English, which explains the relationship between the different Acts relating to private property maintenance and management.

[3] For further details of the Property Factors (Scotland) Act 2011 and the accompanying Guidance which covers the Code of Conduct select these hyperlinks.

The Commission also raised a concern that there has been no comprehensive review, in recent times, on the nature of title deeds and the apportionment of common maintenance shares to reflect the contemporary situation. Critically, they took the view that individuals who refuse to pay their fair share of reasonable common repairs, factoring charges and insurance premiums constituted a significant problem, representing perhaps the biggest single threat to property factoring and the wider property maintenance system.

Further, they were also concerned that, despite recent legislative changes, there was still no listing of factored properties, as the Scottish Government's Property Factoring website had not been designed to provide such information, at a specified geographical level. This, they felt, makes it difficult to identify properties which have no property factor, while factor-less owners also have little information as to who potential factors might be.

Other concerns focused on a number of owners living in recently built multi-unit developments, who subsequently encountered additional unexpected property management charges. These tended to relate back to the lack of an in-built tailored sinking fund for the development, as well as a lack of any nationally regulated system which assures transparency and thus contractual buy-in to such long-term maintenance plans and delivery arrangements. The Commission also took the view that the current dispute resolution arrangements through the Tribunal, the Simple Procedure Court (previously the Small Claims) and Sheriff Courts were all to complex for owners to navigate and can also be a traumatic experience for complainers.

In conclusion, the Commission stated that there are a number of emerging issues which appeared to be very difficult to resolve, simply through mutual co-operation between stakeholder organisations, so intervention at a national level would be required. These issues they felt arose largely from the inadequacies of the legal framework that underpins property ownership obligations in Scotland.

Missing the focus

The Justice Committee of the Scottish Parliament (2013) undertook an inquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003. The focus here was on the provisions to dismiss and appointment a factor, their ability to switch factors, as well as the burdens falling on owners of land owning maintenance companies. Both issues had a direct legacy back to the 'Right-to-Buy' and linked green space land maintenance issues. Owner concerns about such matters had undoubtedly increased given that, as a result of the series of stock transfers, many were now being actively pursued for factoring charges for their property and for the on-going maintenance of such green spaces. In the past, such charges covering regular property maintenance and landscaping works were often wrapped up within the overall operating costs of their previous public landlord, whether the SSHA, a New Town Corporation or the local authority, so it was the remaining tenants who previously picked up the tab in their rents. Again this helps to illustrate that individual property ownership rights and collective repair and maintenance obligations are often in contention. The committee noted its concern that people were finding it hard to switch factors, given that were thought to be complex provisions within the 2003 Act. They were also troubled by the issue of land maintenance, but opted to pass it back to government to further consider the issue as no consensus on how to progress the matter had arisen through their deliberations.

The Scottish Housing Regulator (2016) has also dipped into the factoring issue through issuing advice on good practice in the delivery of factoring services, for both local authorities and housing associations. Why this was deemed necessary is hard to fathom given such organisations, in providing factoring services, are legally subject to the requirements of the Property Factors (Scotland) Act 2011 and its Code of Conduct. Having a clear and transparent approach to setting and then, subsequently, increasing management fees to accurately identify apportion and recover costs,

is already a requirement. The same goes for the suggestion factors need to have in place a robust process to assess and demonstrate that owners are receiving a 'value-for-money' for the services purchased, encouraging the provision of good quality information to owners on their factoring services, and ensuring owners receive detailed information on any charges. They are also obliged to undertake meaningful and regular consultation so they better understand owners needs and priorities. Given the requirements such organisations also have to meet under the Scottish Social Housing , it is perhaps surprising the managerial challenges presented by owner non-payment and non-participation in their planned maintenance and common repair programmes, and the knock-on implications this has for them as landlords meeting the SHQS, for their tenants was not, for some reason, considered. Again, in relation to property maintenance it does appear that 'officially' the interests of property owners' trumps that of others who also happen to reside within the same buildings. Such an emphasis does appear misplaced.

Table 3.1: First-Tier Tribunal Hearings for 'Private Sector' Property Factors with a portfolio holding in excess of 1,000 units, 2017-18

REGISTERED FACTOR	NO. OF PROPERTY FACTOR REGISTERED UNITS	2017/18 FTT CASES	COMPLIED DECISION	DECISION AGAINST	% against PORTFOLIO
Hacking & Paterson MS	69,588	6	3	3	0.0001
Ross & Liddell	28,416	8	6	2	0.03
Speirs Gumley	23,559	6	4	2	0.03
Greenbelt	22,883	2	1	1	0.004
James Gibb	22,327	13	3	10	0.06
Newton Property Management	16,102	7	3	4	0.04
LPM	14,283	6	4	2	0.04
Redpath Bruce	11,752	4	1	3	0.03
Firstport	10,669	6	2	4	0.1
Charles White	10,652	9	0	9	0.1
Trinity Factoring Services	7,372	1	0	1	0.01
The Property Management Co	6,883	4	0	4	0.06
Macfie & Co	4,191	4	1	3	0.1
SG Property Management	3,648	0	0	0	0
Morison Walker	3,490	3	1	2	0.09
D&I Scott	2,940	0	0	0	0
JB&G Forsyth	2,385	0	0	0	0
Cumming Turner & Watt	2,367	4	0	4	0.2
Walker Sandford	2,304	4	1	3	0.2
Miller Property Management	1,706	1	0	1	0
Donald Ross Residential Factoring	1,084	0	0	0	0

Finally, it is worth noting that there has not, as yet, been any independent research undertaken to assess the impact these various legislative changes have had on actual property factoring practices, nor their impact on property maintenance. However, data from the First Tier Tribunal, detailing the

number and outcomes of complaints against registered private factors, pursued under the Property Factoring Act, offers an interesting insight into long held negative attitudes towards property factors (see Table 3.1 above). In short, there are very few, and when considered on a proportional basis to the numbers of properties these companies are actually managing, the real scale is negligible. Such complaints are even smaller where the property factor was found to have breached either the Statutory Code or the factors duties, or both. Clearly, this evidence needs to be treated with some degree of caution, given its likely that only serious complaints are pursued by aggrieved clients all the way to the Tribunal.

As mentioned previously, Scotland traditionally holds a deep seated cultural prejudice against factors, and given this the profession has long found itself being treated as a convenient 'punch bag' when common property matters go wrong. However, such criticisms are both unfair and unjust, given the real challenges and complexities posed by current arrangements for common property maintenance and repair. Property factoring and property management, in general, is core to finding solutions to this problem, and not, as some might like to suggest, the prime cause of that problem. Property factoring has, over the last decade, become far more regulated and is now expected to be a more customer focused service, right across the board. That constitutes a major challenge, given the complex, challenging and highly unpredictable environment property factoring is now required to operate within.

LOCAL AUTHORITY ENFORCEMENT POWERS

The guidance issued in relation to the production of Local Housing Strategies make explicit reference to, and indeed requires all local authorities to include a strategy to improve housing quality (Scottish Government, 2014). In practical terms local authorities have a number of discretionary powers under housing, building control and environmental health provisions to deal with the problems that eventually arise when buildings are not properly maintained, and become a matter of public concern. Local authorities are thus subject to a range of duties and powers, under the various pieces of housing, building and public safety legislation, including still being expected to address latent BTS housing, along with any defective and dangerous buildings issues that arise. Discharging these duties and exercising these powers often involves ensuring appropriate repair and safety work has been carried out. Once contacted, and after undertaking a survey, and if the local authority is satisfied remedial works are required, it can then issue a statutory notice on all the owners. If these owners then fail to meet the obligations set down in the notice, the local authority may opt to undertake statutory enforcement action that requires them to undertake the actual works. When works are carried out by the local authority 'in default' of a notice, then all the owners are re-charged for the work and associated administrative costs.

The important term here is 'discretionary', which allows local authorities to decide whether or not to act, rather than being obliged to do so. Building control powers focus primarily on dangerous buildings and involve closing powers and the instigation of compulsory repairs. Dangerous building and defective building notices come under the Building (Scotland) Act 2003, whereas works notices fall under the Housing (Scotland) Act 2006. Both require owners to carry out remedial work, within a specified period. When such a notice is served it also requires to appear on the Property Enquiry Certificate, which a prospective buyers' solicitor should always request from the local authority and, in theory, should make the property harder to sell. Surprisingly, work notices are used by very few local authorities, essentially Glasgow and Highland. In 2017-18 there were around 362 work notices served, of which 311 were in Glasgow. The city still continues to dominate spend on sub-standard and poor quality housing, as it has done for the last 150 years.

There is a general feeling on the part of local government officials who deal with such matters that work notices have not proved to be a particularly useful means of achieving compliance on the part of property owners, which perhaps explains their limited use. Unlike other provisions, if the recipient chooses not to comply there is no option to report them as being non-compliant to the Courts, as is the case with other such notices. So if the owners opt to do nothing, the local authority either does nothing itself, or carries out the specified work in default, and then seeks to recover its costs. So unless the local authority is willing to undertake that work in default, and incur the risks involved, then there is little point in using these procedures.

Where owners fail to undertake the specified works, then the local authority has the power to take remedial action 'in default', and charge the owners for the cost of undertaking such works, as well as an administrative fee. As these are defined as a 'scheme cost', then these costs are apportioned on that basis. If an owner then fails to pay for their share of the works, the local authority then has the power to secure the outstanding debt against the actual property, by means of a 'charging order'. Charging orders are, in effect, loans and as such accrue a specified chargeable interest rate. This typically has the effect of encouraging the owner to find the means to extinguish the debt before the order is actually laid. It is also the case that such a charge requires to be recorded as a priority charge on the owner's title, as held by the Registers of Scotland (RoS).

Some local authorities prefer use the Statutory Nuisance powers under Part III of the Environmental Protection Act 1990 to address: "*any premises in such a state as to be prejudicial to health or a nuisance as a means to address building defects*". Local authorities under these powers have a duty to make periodic inspections of their area, or act in response to a complaint from the public. Under Section 80 the local authority serves the owners with an abatement notice to cease the nuisance. Owners can appeal the notice to the Sheriff Court within 21 days, otherwise it becomes a crime to fail, without reasonable excuse, to comply with the notice, punishable by a fine, which rises by 10% for every further day the specified nuisance continues. Where the notice is not complied with, as there are no charging order provisions within this piece of legislation, costs require to be recovered as a civil debt. Where such notices are employed default work was typically carried out via the local authority engaging a lead consultant to project manage the scheme. Default works did, however, tail off some five years back, not because local authorities had difficulties in recovering costs, but rather because of the increasingly burdensome administration generated by FOI requests, formal complaints, legal actions, referrals to the Ombudsman, many of which originated from owners who had benefitted from such default works being carried out.

A few local authorities also make use of maintenance order powers, under the Housing (Scotland) Act 2006, which were designed specifically for tenements. Through analysing 'scheme of assistance' statistics it would appear that only 28 of such orders were made between 2014-15 and 2017-18, and these were almost exclusive to either Glasgow or North Lanarkshire. The explanation for their lack of use is that the powers are considered cumbersome and thus labour intensive from a local authority point of view. Further, if a local authority puts in place a maintenance plan for a tenement, given it has to last for five years, the authority also then needs to ensure both staff and resource are available to service that plan over that period.

The overall emphasis is to intervene only to the extent necessary to protect public safety, given owners are still hold responsible for their buildings and the persons in and around their buildings. This might not involve a repair, but perhaps the actual removal of say a chimney head, or spawling masonry. It is primarily reactive, therefore, rather than pro-active. For example, if stonework is spawling and falling into the street, rather than address the cause of the problem, such as clearing and repairing gutters, a protective scaffold could be placed around the building to protect those walking along the street. By its nature, it can also be very resource intensive, often peaking at times of poor, or severe weather (Green, 2018). As such it can suddenly draw in a large part of available local authority staffing and financial resources, for several months or even years. A good illustration of this is provided by the Glenrothes case cited in Appendix One. It therefore can, and does impact detrimentally on any planned program of preventative work the local authority has drawn-up, which seeks to encourage early owner intervention before a building deteriorates into a dangerous condition (Green, 2018). That said, such interventions do need to be undertaken. As illustration, from December 2016 to December 2017, Fife Council dealt with a total of 129 reports of dangerous buildings. The comparable figure for Edinburgh over the same period was 170, averaging out at 14 per month. These instances generally represent the extreme end of property maintenance spectrum, where a serious failing has occurred.

As was noted earlier, the Housing (Scotland) Act 2006 introduced a major change to the previous repair and maintenance culture by placing responsibility for ensuring a property is properly maintained firmly onto the owners themselves, rather than viewing it, in part, as a local authority responsibility. With the previous policy focus being on addressing slum housing conditions, local authorities were obliged to survey for the presence of BTS housing, and then take appropriate action to eradicate such conditions within a fixed timeframe. With the slum housing problem largely addressed, the policy focus was recalibrated to encouraging owners to meet their repairing and maintenance responsibilities. Experience to date, throughout Scotland, shows that after more than a

decade there is still a great deal of work needed to embed this major culture shift. Significant numbers of owners and, in particular, private landlords are still failing to engage property with their responsibilities.

Although an owner is responsible for the repair and maintenance of their property, as set out under their title deed, it is still the case that owners can receive local authority support to undertake such works. So while the 2006 Act abolished the HAA regime, and the previous private sector capital grant scheme which financed the supporting improvement and repair grant system, it did set a requirement for all local authorities to provide a 'Scheme of Assistance'. Such support can take the form of advice and guidance, as well as practical help or grants and/or loans. However, it is for the local authority to determine exactly what kinds of assistance are made available, on the basis of their particular local priorities and budgets. The accompanying Scottish Government guidance does, however, explicitly discourage the use of capital grants. Further, under Section 73(1)(a) of the 2006 Act, it states assistance must be provided when a work notice is served, but that does not need to be in the form of financial assistance. There has thus been a clear stepping back on the part of local authorities from providing direct financial assistance to support owners when serving such a notice.

Interestingly, in the Scottish Government original guidance for the Housing (Scotland) Act 2006 there had been a well worked out proposal for a National Lending Unit, that would provide local authorities and government with different types of financial support, largely in the form of loans (Scottish Government, 2008). However, post the Financial Crisis and the advent of Austerity, the National Lending Unit failed to materialise and this has proved to be a critical omission from the envisaged 'Scheme of Assistance' powers.

What monies are available have been stretched that bit further as the 2006 Act regulations make it clear that mandatory grants need to be provided for the provision of standard amenities for a disabled person, and for the provision of adaptations again for disabled people, where these are deemed essential. Hence, the marked skewing of 'Scheme of Assistance' monies in that direction, as was noted previously.

Crucially, any preventative work is dependent not just on the legislative powers but on the annual allocated budget for such work and staff capacity to pursue and then undertake these activities. Also under the peculiar housing capital funding system that now operate in Scotland, both Glasgow and Edinburgh have dedicated grant awarding powers, devolved to them from the Scottish Government, whereas all other local authorities require to make individual applications to the Scottish Government. This is a legacy of the stock transfer era, when there was an expectation that both Edinburgh and Glasgow would no longer have any council housing, so thus merited their own capital grant funding facilities to support strategic housing interventions. In the event, the Edinburgh stock transfer fell through, but by then the capital funding powers were already in place. Glasgow by contrast undertook the country's largest ever stock transfer, originally to the Glasgow Housing Association and, subsequently, part of that transferred stock went from them to a number of other local associations (Robertson, 2019 forthcoming). Given both these city authorities still dominant in relation to the public funding of repair and renovation work, it is worth examining how they have gone about pursuing that task, over the last 20 years, given this provides some insight into how this policy change has actually impacted on the ground.

City of Edinburgh Council

As was previously noted, Edinburgh made extensive use of the powers conferred on the authority to tackle BTS housing, primarily by co-ordinating the use of enhanced improvement grants to owners within HAAs declared by their own dedicated Housing Renovation Unit (Robertson and Bailey, 1996). Edinburgh long had the second largest Non-Housing Revenue Account budget after Glasgow, public

monies used to fund improvement and repair grants to owners throughout the 1980s and 1990s. Edinburgh had also actively engaged in the development of improvement powers and techniques in relation to tenement improvement. Overall, this resulted in a marked reduction in BTS housing across the city, which then allowed the council to move onto a strategy whereby it effectively became the 'factor of last resort', sorting out disrepair situations where owners were unable to resolve matters (Robertson and Bailey, 1996).

As noted previously, while in the West of Scotland there had long been a tradition of property factors, who organised and managed smaller landlord holdings that characterised ownership of the tenement stock, in Edinburgh, with its larger landlord holdings, this was not a feature. As a result, when private flats in Edinburgh were sold into owner-occupation, from the late 1950s onwards, there were no legacy property factors to draw upon to help organise on-going maintenance works, or repairs. Where owners could, or would not organise the works themselves, the Council was called on to step in and carry out remedial works in default. They would then charge all the owners for the works and for their administrative time in organising it. If any owners failed to pay, a charging order was set against their property.

The City of Edinburgh Council still employs its own legislation for this purpose, by issuing statutory notices under Part VI of The City of Edinburgh District Council Order Confirmation Act 1991. Between 1991 and 2011 such work was co-ordinated by the Council's Property Conservation Service. Demand for this default service was high, averaging some 300 enforcement notices a year. In 2010 for example, £18.4m of common works were carried out by the Council 'in default'. These monies then had to be recouped by the Council, along with a linked administrative charge.
However, following a Police Scotland fraud investigation into allegations that Council staff were commissioning works in collusion with local builders carrying out these works, the Property Conservation Service was closed down in 2011. Although no criminality was found, a number of staff were subject to disciplinary action. However, the financial repercussions and reputational damage suffered by the Council as a result of this serious management failure proved substantial (Stockdale, 2013).

Closing the Property Conservation Service was a complex exercise, taking five years to complete. Related consultancy fees from accountants to audit the completed works and those works still outstanding amounted to £8.3m. The bad debt legacy amounting to £8m, while unbilled projects totalled some £30m, and outstanding contractors' claims stood at £2m. The 990 outstanding customer complaints for the overcharging of such building works and associated poor project management generated much negative and sustained media attention.

The mismanagement also negatively impacted on property sales, given the need to have retentions in place to cover any outstanding common repair costs, the need for proper accounting for any owner payments made to address outstanding notices and what proved to be a protracted process of cancelling disputed notices. When this long-standing administrative system fell apart, it created so many consequences and thus additional costs. It had been a service that property owners throughout the city had long relied heavily upon, because it offered a way to sidestep the protracted and often difficult discussions with neighbours and other owners. In receiving a notice, owners were forced to get the necessary common repairs carried out by, in effect, allowing the Council to take charge. It is also worth saying that the now discredited Property Conservation Service had, at the time, been considered an exemplar. The fact that it was poorly managed towards the end of its lifetime should not take away from the major benefits it brought to the city's building fabric, helping Edinburgh retain and improve a substantial number of unique historic tenement neighbourhoods.
As a result of this major debacle, a total of 33 lessons were learned, each of which were then used to design an entirely new service, the Edinburgh Shared Repair Service. Central to this new service was

a drive to bring about a major cultural shift for the city's flat owners, namely that of empowering owners to take responsibility for their repairs themselves, rather than simply relying on the Council to sort such matters out. Further, it also sought to restore confidence in the Council through delivering a well-designed service. Whereas in the past direct engagement with owners was somewhat lacking, the emphasis was now on offering professional advice. The timely billing of owners for their costs has been achieved through adopting tight accountancy procedures. Any complaints that now arise go through the Council's official complaints procedures. Managing the Council's financial and reputational risks, severely dented by past events, demanded tight regular performance scrutiny and caseload control. Overall governance of Edinburgh Shared Repair Service now relies on reporting to a decision-making panel and a board of senior Council officers, as well as reporting regular updates to the Finance and Resources Committee of elected members.
Four core services are now offered: advice and information, covering any repair situation; intervention, where if owners cannot agree a course of action, so-called 'missing share' powers are utilised (see below); enforcement action, but then only as a last resort; and, finally, emergency repairs, in order to make a building safe in dangerous, or emergency situations.
In assisting property owners to progress common repairs, Edinburgh Shared Repair Service sets itself four objectives: to help maintain the fabric of the city by supporting, encouraging and enabling owners to take responsibility for planning and organising repairs and maintenance, which is achieved through offering Advice and Guidance; to intervene when public health and safety is at risk due to unsafe buildings, via the use of the Emergency Service; to intervene when owners have exhausted all other reasonable means of agreeing and undertaking a repair through the use Enforcement and 'missing share' powers. The legislation employed here is from both the Tenements (Scotland) Act 2004 and the Housing (Scotland) Act 2006, in relation to advice, the Housing (Scotland) Act 2006 which also provides local authority 'missing shares' powers, the Local Government (Scotland) Act 2003 for utilising the powers to advance wellbeing, the City of Edinburgh District Council Order Confirmation Act 1991 where works need to be carried out and charged for in default, which are similar to the provisions of the Building (Scotland) Act 2003 in relation to dangerous and defective building notices and again the Housing (Scotland) Act 2006 for the issuing of work notices.

The Service was launched in April 2017 and by August 2018 the owners of 132 tenements had sought assistance with their common repairs. Shared repairs have been carried out in 90 cases, whereby the owners were able to progress their own repairs, without any enforcement action, with the total value of enforced repairs amounting to £0.5m. Enforced action has only occurred in 11% of all cases, with 70% of these being successfully closed so far. Successful closure of cases without enforcement cannot be achieved without the support of case officers and, on occasions, the threat of intervention. Debt recovery has ensured 85% of all debt so far has been collected and the speed of payments shows 85% of those required to pay, paid within three-months of receiving bills. Inhibitions orders are then pursued for those debtors not in payment plans.
With this new system now in place, which is administratively quite different to previous flawed administrative practices, it has become evident that the actual scale of works is far lower, at £1.6m, rather than the £18.4m in default works undertaken back in 2010. This is a concern, given the mass of grant aided renovation work on that stock occurred some 40 years back, a decade beyond the planned 30-year life span of such works, so is now itself in need of further on-going renewal. Evidence if this is now emerging given the significant amount of remedial work needed to address previous poor-quality cement-based stone repairs. The use of cement, rather than lime causes saturation within the sandstone because it reduces the free flow of moisture within the stone and, with frost action, a spawling of the masonry occurs, especially to facings and mullions. Examples of poor-quality stone repairs, largely grant funded as part of previous renovation works, features prominently in a number of the cases studies discussed in Appendix One.

Edinburgh Stairs Partnership

Edinburgh had also sought to encourage pro-active grassroots action on tenement maintenance through promoting 'stair committees' during the late 1990s. This initiative, in part, tied into a particular pervasive narrative that had gained currency at the time, namely that owners were largely ignorant of their property's physical condition, so needed help, support and advice in relation to organising its on-going maintenance and repair (Leather et al, 2001: Leather, 2000). The Stairs Partnership, a form of factoring business, involving 100 stairs, incurred an annual running cost of some £300k, so was closed down as part of the Council's response to Austerity cost cutting measures (*The Edinburgh Reporter*, 2011).

Recent research re-examined the notion of owner ignorance in relation to block disrepair, revealing that there was no lack of knowledge on the part of owners about the condition of their property, but rather personal embarrassment about their inability to properly address it (Serpa, 2011). Through re-working Scottish House Condition Survey data, it was possible to show that although people might feign ignorance about their buildings overall state of repair, when asked direct questions about specific disrepair matters, as revealed by answers provided as part of the actual survey, they responded in a way that revealed a clear understanding of both maintenance and disrepair matters (Serpa, 2011). Owners further explained they were unable to contribute to the costs of repairs, because they would save to facilitate a move up the property ladder, rather than accept that they would remain in their current property.

This conclusion clearly dates the work, as it was undertaken prior to the Financial Crisis. At that time the 'cheaper end' of the housing market was still a prime market for owner-occupation, rather than being dominated by 'Buy-to-Let' investment, as is the case today. This switch to private renting has further impacted negatively on property maintenance given the landlord's rental return versus investment in the property focus. Recent SHCS results act to hide this to a degree, because they record a slight improvement in overall housing quality. That, however, is likely to be a function of the sector's recent expansion, given it has grown through acquiring better quality, previously owner-occupied stock. However, because many of these privately rented properties are already old, and are thus already in poorer condition, the inevitable lack of future investment will compound this situation, especially in particular pockets. It is within these localities that that serious disrepair has already become a major problem for all concerned, as a number of the cases featured in Appendix One ably illustrate.

Glasgow City Council

As will already be evident, over the last 50 years, Glasgow has invested a disproportionate amount of time, energy and capital addressing first BTS housing, before then trying to resolve major common repair issues through the co-ordinated use of enhanced improvement and repair grants. The city's scale of involvement has long appeared disproportionate when compared with all other Scottish local authorities (Robertson, 1992; Robertson and Bailey, 1996). The only other local authority which operated this scale was Edinburgh.

Since the advent of the 2006 reforms, Glasgow's level of activity still reflects that marked difference, although the overall scale of investment is markedly lower than had been achieved previously, as is the case for all other local authorities. In response to this changed situation, Glasgow City Council has pioneered the use of so-called 'missing share' powers, and utilising the broad range of other available powers to try to clear particular log-jams. Through adopting this approach, the Council has found that the threat of use, given the wider implications of having a linked charging order imposed, has encouraged many reluctant owners to pay up and this, in turn, has helped to generate additional investment in common repairs. The Council has also contributed to the establishment of the 'Under

One Roof'[4] website, which seeks to inform flat owners about repair and maintenance matters, along with a number of other bodies. This builds on from the earlier tenement owners' handbook, again supported by Glasgow City Council, that Gilbert and Flint (1993) developed for home owners' buying into flatted property.

Currently, Glasgow has just over 76,000 properties that were constructed prior to 1919, the vast majority of which, around 70,000 are tenement flats (GCC, 2018). In a recent committee report, officials noted serious concerns about rapidly deteriorating housing conditions in part of this stock, especially in the tenement districts of Cessnock, East Pollokshields, Govanhill, Ibrox and Strathbungo, all in the city's Southside, and Haghill and Dennistoun immediately to the east. What is interesting about these particular neighbourhoods, with the exception of Govanhill, they had not been the focus of the previous HAA programme, pursued throughout the 1970s and 1980s so, in large part, had missed out on comprehensive improvement works. Govanhill had, but the programme had been cut back due to the lack of resources, so properties once destined for HAAA status were by-passed. It is also the case that these very same neighbourhoods have been the focus of disproportionate private rented sector investment, encouraged because these are cheap places to buy into, given their generally poor condition, so the return on investment is better (GCC, 2018).

The recent City Council report (GCC, 2018) also notes the current challenges being faced in trying to take forward common repairs: owners lack of knowledge and understanding of their responsibilities; affordability issues with owners being either unwilling, or unable to pay for repairs; the organising of works which is not helped by outdated title deeds, whose provisions and apportionment rules often create barriers to repair, allowing some individuals for whatever reason to abdicate their responsibilities; the unprecedented recent growth of the private rented sector, increasing the number of owners unwilling to properly maintain their stock. They also note that none of this is helped by the lack of maintenance plans and/or block building insurance cover. The report also raises concerns about the availability of resources and whether some of the work being pursued is in fact 'value-for-money'. Finally, there is also a mention of the fact that the legislation, as currently set out, presents a high degree of risk to local authorities, in that if they decide to take on the works and then seek to recoup the costs, as well as their administrative time, getting reimbursed can still present something of a challenge.

Around £5m-£6m per annum has been earmarked for pre-1919 tenement repairs in recent years, but that budget is constantly challenged by the scale of severe problems that have emerged over the past few years, with a growing number of tenement property evacuations, emergency stabilisations, or tenements being classed as dangerous buildings (see Appendix One). Many require extensive repair works, typically costing in excess of £500,000 to return them to a habitable condition. Govanhill, in particular, has already undergone a number of these high cost schemes. The issue, in this part of Glasgow, has proved so challenging an entirely new area improvement measure had to be legislated for. Under Schedule 6, of the Housing (Scotland) Act 2014, local authorities can now seek additional powers, through designating what is termed an Enhanced Enforcement Area (EEA). To date, only Glasgow has made use of these powers to address the extremely poor conditions prevalent within some private rented homes in Govanhill. As already noted, these blocks had originally been part of a HAA programme, some 40 years back. The re-emergence of serious slum housing conditions, with quite significant public health and public safety implications, not only reveals the folly of that earlier decision, but also the scale of potential future challenges.

Repair and maintenance strategies are currently being worked up for Ibrox, Cessnock and East Pollokshields. As part of this, although Glasgow's Affordable Housing Supply Programme primarily

[4] Under One Roof can be accessed here: http://www.underoneroof.scot/

focusses on delivering new build housing, a budget of £5m has been set aside to support an acquisition strategy, whereby local housing associations are assisted to acquire flats within targeted closes, so that they can then put in place effective property management practices to help protect such housing well into the future. Govan Housing Association plans to acquire flats in over 30 tenement blocks in both Ibrox and Cessnock, while Southside Housing Association has already acquired 50 flats across East Pollokshields.

In addition, as the works carried out on the tenement stock during the renovation period are now well beyond their planned '30-year life', there are a growing number of repairs emerging: failing window replacements, poorly executed and inappropriate stone repairs, leaking roofs and compromised lead flashing work, often caused by the use of Nurolight, a cheaper, but inferior, lead substitute. The long-standing culture of 'patch and repair', only as and when a crisis emerges, has also not served the building fabric well. Looking to the future, there are also new issues arising for this older stock, most notably whether it will ever be able to meet the thermal efficiency standards whether EPC 'D', let alone the future envisaged 'C' (Scottish Government, 2019a). There is also an assumption that such disrepair and build quality issues relate solely to the older housing stock, but as both the fore-mentioned Scottish House Condition Survey (Scottish Government, 2018d) and Appendix One ably illustrate, more modern flatted developments, such as a pioneering scheme built back in the 1980s, and even properties constructed this century, are now showing serious and worrying disrepair issues.

That said, given disrepair displays a marked increase with age, again as evidenced by SHCS data, Glasgow City Council is currently developing a comprehensive database covering all pre-1919 properties across the city. This will be further informed by soon to be commissioned detailed stock condition survey, designed to help reprioritise work programmes. A short-life working group has also been formed, comprising of both commercial property factors and property owners to determine and quantify the extent of disrepair within the pre-1919 tenement stock. The findings and report are expected by December 2019.

'Missing Share' powers

A 'missing share' is where the local authority pays an owner share of repair or maintenance costs in an agreed scheme where the owner is either unable, or unwilling, to pay their share of such costs, or where the owner cannot be identified or found. Critically, a 'missing share' covers costs arising from maintenance, with maintenance defined by the TMS provisions under Schedule 1 of the Tenements (Scotland) Act 2004, as being: "*repairs and replacement, the installation of insulation, cleaning, painting and other routine works, gardening, the day to day running of a tenement and the reinstatement of a part (but not most) of the tenement building, but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance*".

As was noted earlier, local authorities have two separate 'missing share' powers, under two separate legal provisions, namely Section 4a of the 2004 Act and Section 50 of the 2006 Act. These powers were then further enhanced by the Housing (Scotland) Act 2014, which included a provision for Scottish Ministers to make regulations to give Registered Social Landlords a discretionary power to also pay for and also recover such 'missing shares'. Following consultation with both local authorities and registered social landlords these new powers were confirmed in April 2018.

Section 4A of the the Tenements (Scotland) Act 2004, inserted by Section 85(1)(b) of the Housing (Scotland) Act 2014, provides local authorities with discretionary powers to pay an owner's share of scheme costs, the so-called 'missing share'. The work required needs to be covered under a tenement burden, within the title deed, and costs arising must come from a majority decision under the TMS provision of the Tenements (Scotland) Act 2004 (Scottish Government, 2015).

The ‘missing share’ in this instance can be paid into a bank account created to fund the works, or to a property manager who is taking the project forward. The local authority then has the right to recover the costs of paying the ‘missing share’ from the owner, including both the cost of the ‘missing share’ and any administrative expenses connected to it. The local authority can also issue a repayment charge against the property to recover the expenses, but under these provisions interest charges cannot be levied by the local authority.

The guidance also recommends that although local authorities may want to provide advice and guidance about the ‘missing share’ powers, it is for owners to make decisions about maintenance and apportion the associated costs, under the TMS provisions. As a consequence, the local authority's role is essentially limited to responding to specific requests from owners to pay the ‘missing share’. Further, it is at the local authority's discretion as to whether a ‘missing share’ should be paid in any circumstances. Local authorities are also encouraged to consider just how ‘missing shares’ fit into their ‘Scheme of Assistance’ provisions (Scottish Government, 2015).
Under the 2006 Act, local authorities were given new powers to pay ‘missing shares’ directly into a maintenance account, as defined by the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004. The power to pay ‘missing shares’ into a maintenance account is quite separate from the power to pay a ‘missing share’ towards work under the TMS, which is covered above. Paragraphs 5.4 to 5.9 of the 2006 Act set down the provisions by which a local authority can pay a ‘missing share’ into a maintenance account. These provisions ensure the decision-making procedure is correct, the works are necessary and clearly specified, that the timeframe is provided, what the respective shares are, and whose names are on the bank account. Under these provisions the ‘missing share’ can only be paid where the owner is unable, or unwilling to pay, or it is unreasonable to ask them to do so, or the owner cannot be identified or found by reasonable inquiry. Further, while the definition of maintenance is similar under the 2006 Act, it also includes “*the installation of insulation*” which was added by the Climate Change (Scotland) Act 2009 (Scottish Government, 2015).

The critical issue being addressed here, by all three Acts, is to ensure that the money required to take forward specified works is available to allow them to actually proceed. Clearly, the other owners do have the option of covering the cost of a ‘missing share’ themselves and then pursue the non-paying owner through the Courts to recover these costs. However, as was noted earlier, this is considered problematic, in large part, because the procedures for lay people are considered complex (Glasgow Factoring Commission, 2014). Hence, this provides for a backstop, which allows local authorities to support owners who recognise the need to undertake regular property maintenance.

These provisions are, however, as detailed above, tightly prescribed and discretionary. The local authority or housing association pursuing such an action takes on the risk of then recovering payment for the debt. And it is perhaps this reality, that helps to explain why, again, in examining the ‘Scheme of Assistance’ statistics, it appears that only Glasgow and Aberdeen have made use of these provisions. There is also evidence of local authorities having a preference for using the 2006 Act provisions, as they are able to charge interest on the outstanding debt, whereas this is not possible under the 2014 Act.

Given recent experiences in Edinburgh, where the local authority had previously acted as the ‘factor of last resort’, it is clear what the associated financial risks are when dealing with owner debt. Perhaps this explains why these provisions place the owners in the driving seat, and not the local authority. However, if ‘missing shares’ are not being employed, then alternative measures to stop further serious deterioration are now thin on the ground. Further ‘missing shares’ are certainly not, at this point in time, the means to ensure a level of activity commensurate with the scale of the

disrepair across all multi-owned flatted property. Their importance in helping to support common repair work should not, however, be underestimated. The City of Edinburgh Council has only used 'missing share' powers since 2017, but over that period they have enabled £800k of common repair work to be pursued on 19 tenement blocks, with the Council's financial commitment being only £56k (to end Sept 2018). Such action has thus reduced the possible enforcement action by the council on these buildings and also reduced the financial risk of trying to recover considerably more potential debt.

ROLE OF BUILDING PRESERVATION AND CITY HERITAGE TRUSTS

Conservation and building trusts focus on the preservation of Scotland's historic buildings, whether, public, private, civic or commercial. Their focus is thus not primarily on domestic buildings, but covers a wider range of structures of historical importance or interest. The recommendation to establish a heritage trust model, covering each of Scotland's cities emerged from the Scottish Executive's (2002) *Cities Review*, and was based on the perceived success of this model elsewhere and, in particular, the work of Edinburgh World Heritage Trust. Following on from that recommendation, City Heritage Trusts were then established in Aberdeen, Dundee, Inverness and Stirling from February 2003, and subsequently in both Glasgow and Perth. There are, in addition, a large number of other heritage bodies involved in the preservation and conservation of historic buildings as well as landscapes throughout the country[5].

Given this context, it is worth briefly tracing back the core role played by Edinburgh World Heritage Trust. It is important to appreciate that historically a stream of public funding had from the 1970s been made available to support the Edinburgh New Town Conservation Committee pursue a sustained program of communal repairs across Edinburgh's New Town, which was quite separate from the city's non-Housing Revenue Account grant monies. This initiative was instrumental in addressing the serious backlog of property repairs, through providing much needed investment into the built fabric of the New Town. Ultimately this helped secure the areas World Heritage Site designation from UNESCO. Indeed, it can be argued that the availability of this particular stream of public funding, to support a wide variety of initiatives, was not only key to sustaining this quite distinctive part of Edinburgh's historic built form, but also provided the prototype for all other City Heritage Trusts.

Stirling City Heritage Trust

By contrast, the Stirling City Heritage Trust began its operations in December 2004. It defines itself as an independent organisation which aims to work in partnership with like-minded people in order to promote and encourage the protection and preservation of the architectural, cultural and landscape heritage of Stirling. It works in partnership with the Scottish Government and the local authority, and receives a core grant from Historic Environment Scotland of £250,000 per year and a partnership grant from Stirling Council of £25,000 per year. It is worth noting that Historic Environment Scotland (HES) has also been supportive, given such projects generate specialist work for the range of traditional building skills, such as stone masonry, slating, lead work, woodwork, glazing and blacksmithing.

The Trust, rather than intervening when a particular crisis arose, decided to focus energy on changing the culture of local property owners and instigate pre-emptive works. Given this, its work has great relevance to this study. The Trust, in effect, piloted a Scottish 'Monumentenwacht' scheme, which they termed the Traditional Buildings Health Check. This was based on a European inspection service model for listed buildings, which has operated across the Netherlands for 40 years, and in Flanders since 1990s. A number of other related models operate in other locations right across Europe. Under the Stirling scheme, the property owners are part funded and supported to commission an independent external inspection of their property, and then helped to repair any defects identified, before then setting in place a regular programme of maintenance work.

The Stirling Health Check scheme was designed, delivered and managed by the Stirling City Heritage Trust. The pilot, funded by Historic Environment Scotland and the Construction Industry Training

[5] For a listing of historic buildings preservation and conservation trusts see http://www.heritagetrustnetwork.org.uk/about-us/areas/scotland/

Board Scotland, ran for a five-year period, between 2013-18. Designed to be pro-active, the Health Check helped owners to get their property into a condition that they then could maintain. It was a membership-based service, that provided impartial and expert advice on the maintenance and repair of the external fabric of traditionally constructed buildings. Members paid an annual fee of £45 to join the project and then, if they wanted an inspection undertaken on their property, there was an additional £150 payment. Not everyone within the block had to be a member to access this survey, though there had to be at least one member. For the inspection fee, the member received an external fabric condition report, which was detailed and also illustrated, setting out a list of priority repair tasks that should be undertaken over the subsequent 12-months. The Trust was also in a position to offer a small supportive repair grant of up to £5,000 per building.

As the Trust had no powers other than those of persuasion, through raising the awareness and knowledge of owners, the owners had to be willing to instigate the work on any highlighted repairs. It also did not involve the local authority in the actual Health Check scheme, and no grant monies were sought, although Stirling Council was a participating member. The Trust, some time back, had worked with the Council to grant aid the repair of buildings subject to repair notices and it still from time-to-time discusses potential dangerous buildings with the Council's Building Standards officials, but this is not part of its core service.

The Trust also gained experience of working on a street basis, in a project involving six commercial properties in King Street, previously the core shopping locale, prior to the development of the Thistle Centre Shopping Centre in the 1970s. Between 2012 and 2018 the King Street Funding Initiative undertook comprehensive building repair on these buildings, involving a overall spend of £1m, a figure which relates solely to capital works and takes no account of the actual development time involved, borne by both the Trust and Stirling Council. Again, Stirling Council was not involved practically in the execution of the King Street works, though it initially funded a Façade Enhancement Scheme, chiefly involving renewing traditional shop-fronts.

One of the Trust's findings, in reviewing the King Street Funding Initiative, was that the project proved very challenging for a small organisation, without any redress to statutory powers. If such a project were to be repeated, they would want to work with the local authority both on strategy, and on pragmatic assistance, such as the use of the Repairing Standard for assessing private landlord properties, and would also seek to pursue the option of using 'missing share' powers on selected properties, as a pilot, where the Trust were offering grant. None of this is, however, being pursued because funding is not currently available. This project, however, clearly illustrates the complexity caused by the now fragmented nature of possible interventions as well as the limited role local authorities can choose to play in both initiating and supporting such work.

The Stirling pilot ended in March 2018 and was evaluated by HES in relation to possible expansion, although the Trust still operates the service as a core activity. Between 2005 and 2012 the Trust provided over 270 grants, which drew in match funding of approximately 65% from the property owners. Overall, that has resulted in £5.15 million invested in Stirling's unique historic built environment. While other Building Trusts are actively engaged in historic building preservation work, Stirling, through its development and promotion of the Traditional Buildings Health Check has been able to demonstrate how an inspection and report system can assist owners to bring their property up to a standard, from which an on-going, regular and planned repair and maintenance program can proceed. The scheme also shows how a survey can then lead directly to an organised repair plan for owners, so has much to say about the necessary processes involved from planning repairs to their execution and the amount of planning and persuasion involved in such work. It has also illustrated the value, but also the costs associated in helping property owners in this way.

Given the role played by Conservation Trusts in addressing the deterioration of important historic buildings the development of a pro-active owner-facing tool is a useful development. Plans are currently being assessed as to the viability of rolling out similar schemes for the Trusts operating in both Falkirk and Perth, and throughout Fife. The Edinburgh World Heritage Trust, which pioneered such interventions, is also reviewing the long-term impact of its previous grant funded work. Hence, it is currently undertaking a study to check whether its requirement for receiving grant, namely to undertake follow-on regular planned maintenance, have been undertaken by pro-actively monitoring projects that received grant since 2005 under their Conservation Funding Programme. Where repairs or maintenance have not been carried out in a timely way, the owners in receipt of these awards will be required to undertake the necessary remedial action. In this way the Trust can ensure a cycle of repair and maintenance on traditional properties is being pursued, while ensuring the public investment made is properly protected. In light of this follow-up action, it is worth noting that, throughout the 1980s and 1990s, Glasgow District Council had in place a similar covenant, when making the offer of grant, but there was no evidence that this was ever followed-up by either property owners or the Council. It was also the case the Council did not have a monitoring system in place to ensure this was done (Robertson and Bailey, 1996).

However, at the same time, it is important to appreciate that the prime focus for all Trusts is the preservation of historic buildings, and not the 'box standard' flatted housing which exists right across Scotland. While much of the focus in this report is inevitably on the traditional Victorian four-storey walk-up sandstone tenement, located in both Edinburgh and Glasgow, given the level of disrepair in this older housing stock, and its spatial concentration in these two cities, as has already been made clear the actual legal definition of a 'tenement' relates to all properties with two or more related, but separate flats divided from each other horizontally.

As noted in the Background section, other flats or apartments, and properties defined legally as 'tenements' in Scotland account for 895,000 properties (Scottish Government, 2018d). The Scottish House Condition Survey estimates that tenements alone amount to 584,000 properties, equating to almost a quarter of the countries entire housing stock. Almost a third (29%) of these are the traditional tenements, built before 1919, which equates to 7% of the country's current housing stock (Scottish Government, 2017). Given this context it is important to appreciate the piloting work of the Stirling initiative focuses on a very small, but none the less important element of that stock, historically important buildings. It is also important to realise such stock has long benefited from dedicated funding, topped up by additional grants and, in the main, supported by interested owners and organisations dedicated to preserving these special properties.

The Stirling pilot has helped greatly in the preserving many important buildings within what is a unique historic Scottish townscape. While the Traditional Buildings Health Check clearly illustrates the value and importance of a technical building survey and, crucially, dedicated owner support in order to initiate repairs, which then leads to a follow-on programme of owner initiated regular property maintenance, given the actual scale of the issues being addressed by this report, it can only ever provide one part of any solution. Critically, it does shed light on the need to have direct hands on support, rather than just advice, in order to encourage even the most interested owners to take forward the on-going management and maintain of their property. As ever, the real value with any pilot is when, based on the evidence gleaned about the impacts it generates, a decision is then made to mainstream it nationally.

CURRENT REFORM OFFERINGS

Emerging reform agenda

Scottish public policy has long adopted a tendency of contenting itself with incremental legislative reform, typically presented as a simple 'common sense' solution to help solve a particular problem. Conversely, public policy of recent has also displayed a deep reluctance to grabble with the hard questions and challenges needed to come forward with a more considered and carefully thought through strategic offering (Christie Commission, 2011). Consequently, both policy-makers and politicians appear to content themselves with the task of seeking out the 'quick fixes', plucking the 'low hanging fruit', for this allows them to show not only are they alert to the problem, but have just the solution to placate these concerns. Nowhere is this better illustrated than in relation to ensuring the owners of private flats regularly maintain and repair their property.

Over the last decade and a half, housing policy has been very much directed to addressing these very common repairs conundrums. An inordinate amount of Scottish Government policy-making time, energy and expenditure has been expended on the pursuit of such incremental solutions. Yet, as this report records, property owners are still clearly failing to take responsibility for managing, maintaining and repairing their property. The desired cultural change which underpinned to move away from direct public intervention in these matters has failed to materialize, reinforcing the view that the laws and practices that relate to the repair and maintenance on common ownership buildings are quite simply not 'fit for purpose' (Gilbert, 2016).

In the main, flat owners' have still not stepped up and taken responsibility for the on-going upkeep of their properties. Worse than that, however, in many cases their inaction, prevarication, or stubbornness, justified on the grounds of their personal property rights, has seriously undermined for others these very same rights, some of whom are also their immediate neighbours. Deep down this is the core consideration in all of this, for it's about a property ownership culture, in part, both shaped and moulded by the existing rules, regulations and practices that have been considered thoroughly by this report. Consequently, any proposed reforms will of necessity need to bring about a fundamental shift in these prevailing attitudes and behaviours. As Weatherall, McCarthy and Bright (2017) perceptively observed, becoming a flat owner in Scotland has never entailed becoming a member of a collective, neither legally nor, and this is critical, culturally. Purchasing a flat is still viewed in the same broadly individualistic way as purchasing a detached, or semi-detached house. But clearly that is just not the case, a fact other legal jurisdictions have acknowledged years back, by developing tailored legal frameworks to help ensure the effective management of flatted property and in doing so protect the property rights of all the owners.

The challenges this presents are certainly not new, namely those sit between individual and collective property rights. During the Enlightenment Period, the Dutch advocate and philosopher Hugo Grotius, noted that: "*Experience also taught that the nature, circumstances and inclinations of men being very different, and one man needing more than another, common ownership could bring nothing but discontent and dissention*" (Hugo Grotius, 1695, II 3, 2). This very aspect of property rights even presented a challenge 700 years earlier, for Roman legal thinking, as was noted earlier with its succinct, yet astute observation: '*Communio est mater rixarum',* meaning 'co-ownership is the mother of disputes'.

Scots property law, perhaps reflecting its Roman Law heritage, has always chosen to stay well clear of co-ownership, given the need for unanimity in decision-making. So as has been noted, under Scots property law, almost all building elements within a 'tenement' structure are assigned to individual owners. By contrast, under co-ownership arrangements, which are commonly used elsewhere, while each owner owns their own individual flat, the building in which these flats are

situated is owned by the flat owners as a whole, so they must be consulted with regard to all matters that affect that property. In accordance with the unanimity rule, each co-owner therefore has a right of veto, and this can, and often does, lead to deadlocks. For these reasons, Scots property law regards co-ownership as a restriction on ordinary property ownership and so, for centuries, has consciously and explicitly sought to avoid creating it. Yet, as the report illustrates, despite its best efforts, we still find ourselves effectively caught within that very same bind. This may not be in terms of actual decision-making, given the reformed Tenements Act now allows for majority decision-making, and not unanimity (but only if the deeds are silent, or inoperable), but in respect of the actual payment required to progress such a majority decision. That is because, as detailed both in the report and in the specific disrepair examples provided in Appendix One, if just one owner then refuses to pay their contribution to these works, then, in effect, unanimity is evident.

So whether three hundred, or a thousand years further down the line, we are still having to contend with these very same rights issues, and no doubt we will always be required to do so, given that over the last millennium no ideal arrangement has yet emerged. However, by putting in place a system which actively seeks to narrow down individual options, for the benefit of the majority of owners, given the collective nature of the actual built form, would certainly represent something of an advance. Problems clearly do arise within other legal jurisdictions, but they are not as marked as those detailed here, given that elsewhere the legal arrangements both challenge and alter cultural behaviour. The introduction of car seat belts, motorbike crash helmets, the smoking ban in public places and gay marriage each provide a recent illustrations of the potential for legislation to alter public attitudes and behaviour even although, of course, some legacy attitudes and disquiets still remain.

The world expert on common property legal matters, Professor van der Merwe, concluded that a 'properly structured organisation' is a necessary requirement for any apartment ownership scheme.

> *"The community of apartment owners cannot function effectively without a properly structured organisation to handle the many problems and everyday details in keeping the scheme functioning smoothly and efficiently. The inevitable chaos caused by the lack of a central management body is strikingly illustrated by the problems experienced by the earlier types of apartment ownership schemes . . . All modern statutes recognise the need of effective management and either compel all apartment owners to participate in the management of the scheme or organise them in a management body for this purpose".*
> (Source: Van der Merwe, 1994, p.234)

Scotland, with almost a third of its housing stock in 'tenements' or flatted accommodation, the equivalent of Van der Merwe's 'apartments', still persists with what is an 'earlier type of apartment ownership scheme'. It is thus perhaps no real surprise that we still find ourselves experiencing, as van der Merwe put it: "*the inevitable chaos caused by the lack of a central management body*". The findings in this report certainly reinforce that very conclusion and thus constitute a direct challenge to persisting with this approach. Surely now is the time for some visionary thinking on the part of both politicians and policy-makers to resolve this quite unacceptable state of affairs.

That said, changing the law to impose membership of a collective on flat owners would, in some ways, would represent the easy part. As McCarthy *et al*, (2018) rightly observe, supporting flat owners to understand themselves as a collective, and to operate in that way, will constitute a major challenge to our property culture. That said, this challenge to our understanding of what it means to own a flat is essential if any new law redefining the nature of flat ownership is to work effectively. Hence, the advent of any 'tenement' ownership law reform needs to be backed up with a package of

other measures designed to help support and re-enforce the importance and centrality of that very change.

Some initial thinking went into what these supporting provisions need to be, and these were then in turn discussed and debated with key stakeholders and interested parties (as detailed in Appendix Two), in order to come forward with the core components of a strategy to address this issue. Such a strategy, therefore, seeks to set down a series of distinct stages, each of which designed to bring about incremental change in that very culture. In contrast with what has happened to date, over the past 15 years, these changes need to be considered in their entirety, and not as a collection of individual 'quick fixes'. This strategy is proffered, therefore, as an interlinked reform package, which is explicitly designed to address all the challenges that have emerged from undertaking this study, but does so by tying them all together in order to support the core challenge, that of changing the current prevalent and damaging individualistic property ownership culture.

In order to set down this strategy, each potential reforms measure that emerged when undertaking this work was carefully considered by those who have direct day-to-day knowledge and expertise of the challenges involved in instigating such works, albeit from a variety of quite differing perspectives. Although each of these suggested reforms has been typically presented as a one-off 'quick fix', the approach adopted here was to consider how they could best contribute to the construction of an all-embracing and integrated strategy.

So before working through that strategy, each of these emergent reform ideas are listed, and the justification for that specific reform detailed. From that the critique offered by the stakeholders and interested parties is then outlined. There was an attempt to package related reform matters together, in order to suggest how they might be better tied-up. So below the core issues that pertain to that specific reform issue is briefly summarised and that is followed by a synthesis of the critique offered about each of them, which is presented in italics. Following this section, the study concludes by constructing an overall strategy.

Requirement all 'tenements' to have an owners' association

The case here is that having a properly constituted owners' body should become a legal requirement within all flatted properties that come within the legal definition of 'tenements'. Such a body should be able to make decisions about the management and maintenance of the property, which are in the best interests of all owners and crucially the building. Over time, this should assist owners to move away from operating an *ad hoc* crisis based 'patch and repair' basis, when serious disrepair problems arise, to one of ensuring a regular and planned maintenance regime is put in place. As the report from the Parliamentary Working Group on Maintenance of Tenement Scheme Property noted: "*owners' associations are an essential element of tenement maintenance by providing leadership, effective decision-making processes and the ability of groups to enter into contracts*" (RICS, 2019, 6).

Critically, the thinking here is that the owners' association requires a legal personality, so needs to become a body corporate. As such this goes beyond the basic provisions set for the TMS by the Tenements (Scotland) 2003, which provided for a more informal arrangement. What is now being advocated more closely aligns with the provisions set for the DMS. As such, this would then allow owners' associations to hold funds, such as a Building Reserve Fund, which could then be used for planned property maintenance, as: "*defined in Schedule 1 of the 2004 Act – including repairs and replacement, the installation of insulation, cleaning, painting and other routine works, gardening, the day to day running of a tenement and the reinstatement of a part (but not most) of the tenement*" (RICS, 2019, 7).

As already noted earlier, and detailed in the guidance issued for the Tenements Act, such a formal arrangement was deemed unnecessary, given the management and maintenance of multi-owned flats was not considered to be an onerous task (Scottish Executive, 2005). This opinion drew directly from the earlier SLC observation that: "the degree of formality and regulation involved are out of scale with the relatively humble functions performed by the association" (SLC, 2003, n1 para 6.8). The Commission's view was having such a formal legal entity, a body corporate, as the decision-making entity would demand on-going administrative work on the part of all owners, so they might simply opt not to participate. This, would cause more problems as the legal entity charged with management and maintenance of the building would then not be able to legally function.

Unfortunately, there is no data as to whether the current informal management arrangement, as set out in the TMS has encouraged better management of 'tenement' property. However, the evidence presented in this report would suggest not. Further, the ad hoc nature of these arrangements also encourages ad hoc reactions, typically only after a crisis has arisen, and matters need sorted. Again that is not useful in terms of ensuring the proper management and maintenance of any building.

Having the DMS as an option, when planning the development of new development was, at the time, considered a helpful addition. However, as noted earlier, it has taken time for examples of this arrangement to appear albeit, in part, because the necessary enabling UK legislation took many years to be passed. More importantly, however, this management arrangement was not made mandatory for all new flatted developments, rather the developer was able to vary the model, via a 'pick and mix' approach to the elements they wanted, or alternatively they could set down an entirely different governance regime for the development. So again, in terms of overall impact, it is also not clear whether having this 'model' provision available has actually changed anything either. This was considered a quite an unsatisfactory state of affairs, to change the law and then to have absolutely no real idea as to what the actual impact of that change has been.

However, in moving forward it is important to appreciate that over the subsequent decade and a half, other pertinent matters have changed. Most significantly the tenure profile within many 'tenement' blocks has altered. While in the past, if you purchased a flat you would typically be resident, so if and when maintenance issues arose you would work with your neighbours, to resolve them, via an ad hoc arrangement that may, or may not have been drawn from the provisions set down in the TMS. Increasingly now, a flat purchaser will now not necessarily take-up residence in that property and become one of the neighbours. Being a resident owner, underpins the thinking behind the relaxed nature of the TMS system, in that you could easily run up and down the stairs and get a majority decision made if and when an issue arose. But now that has all but gone. Given this significant change, does this make having a properly constituted owners' association for the building more or less important? As private renting, from Scottish House Condition Survey evidence equates, in general, with poorer housing conditions, then is there not a case that the owners collectively should have a properly constituted owners' association in place to ensure the proper management and maintenance of the building is actually being carried out. Given the housing quality expectations that fall from the Repairing Standard, which is expected to be more closely tied to the SHQS then ensuring proper block management will be critical. Further, it was noted that non action caused by other owners should not be allowed to compromise such standards, as is currently the case. So having no formal owners' association in place is arguably now of a more problematic issue.

Having a properly constituted owners' association, a body corporate, as we have seen is considered a pre-requisite within all other legal jurisdictions, as it is considered to be the key decision-making body, given its power to set rules for the day-to-day use of the building, organise common maintenance and repair works and often manage a reserve fund. It is also the case that in these jurisdictions, who operate arrangements that closely mirror the DMS, the common property, what in

Scotland is legally defined as 'scheme property', is generally collectively owned by the owners' association. Under these arrangements, all owners, automatically on purchase of a property, become a member of the owners' association. While no one suggested that a move to such a commonhold model was appropriate here in Scotland, the question arises whether we are still able step back from having such a defined body corporate as a legal requirement for all flatted property?

Require a five-yearly property condition survey

The Parliamentary Working Group also recommended that all elements of 'scheme property', that pertain to all properties defined as 'tenements', should be subject to a five-yearly property inspection. They go on to recommend that the prepared report would then be made publicly available to both existing and any prospective owners (RICS, 2019). Further, as a public record, this survey would also be readily accessible to tenants, neighbours and policy-makers. This survey would not only detail the actual condition of each 'tenement' building, but also provide an estimate of the expenditure required to address any defects found in order to bring it up to standard, and any recommendations as to what is needs by way of on-going maintenance works. Given the specific nature of these requirements, it goes on to recommend such inspections should only be undertaken by qualified building professionals.

This arrangement was seen to have a direct tie into work progressing on the SHQS, in that given the new electrical and fire safety requirements, then the need for a five-yearly survey is becoming enshrined within the social rented sector. Further, as there is a desire on the part of the Scottish Government to see a closer tie-up between the SHQS and the Repairing Standard, then having the survey check would provide a useful support to that ambition. With so much multi tenure evident within the 'tenement' stock overall, then having it apply to all such properties was also seen to have merit. Evidence drawn from the Stirling City Conservation Trust's evaluation of the Traditional Buildings Health Check suggested this approach would provide very useful information to owners. However, there was a view that perhaps more thought was needed as to how such an arrangement would best be organised, and the survey results made easily accessible to the various interested parties. There were also questions about what would happen after the survey was completed? So overall, while the survey was considered an important part of any solution, it can only ever be but one part, and needs to properly tie up with other changes.

- **Provide impartial building inspection service, with aim of encouraging pro-active maintenance by owners**

  The use of the term impartial is important here, in that there was some concern that surveys have a somewhat tarnished image given the level of obfuscation and caveating evident in Home Reports (Black *et al*, 2015). The critical issue here was that such survey work needed to be undertaken by a professional building surveyors and provide objective information on the properties condition to those who have commissioned the work.

  There was a general view expressed that the surveys produced for Home Reports have undermined confidence in the overall value of such surveys. This linked to a concern that Home Report surveys appear to serve the interests of property market players, rather than those of house purchasers. There was thus felt to be something a credibility and quality issue that needed to be addressed, in that there could well be a marked discrepancy between a Home Survey and that of a condition survey covering the exact same property. So while the Stirling evidence clearly suggests such information is critical to property owners seeking to set in place a future on-going maintenance regime, after dealing with any outstanding repairs, questions remain

as to who exactly provides that service, and there are still some concerns about the quality of the potential survey product being offered.

- **Ensure better condition reporting within Home Reports, and ensure valuations better reflect physical conditions**
  This suggestion was to some extent seen as a counter option to putting in place an an entirely new survey system, by arguing perhaps better use could be made of the existing Home Report condition surveys.

  Given the previous discussion, there was some questioning as to the value of this proposal. Firstly, Home Reports tie into the actual sale of a property, and that may not occur within the preferred five-year survey cycle. Secondly, it does not address current concerns about the actual quality of the condition survey element of the Home Report. Surveyors made it clear that these two surveys differed in purpose and content. Given potential legal action in respect of reported Home Report condition survey findings, should omissions or particular fabric faults emerge later, surveyor opt to say little. Equally, it was argued solicitors did not want sales falling through because of revelations about outstanding repair or maintenance matters, so were similarly inclined to descriptive reticence. Although considered by many to be unprofessional, again it was reinforced that it was important to reflect on in whose interests the various parties involved in house sales transactions seek to serve. This is different from who actually pays for the Home Report. As lenders financially underpin the overall transaction, with the survey and valuation underpinning their decision to lend, it is their interests that were seen to be pre-eminent, rather than those of the actual property purchaser.

  There was also felt to be a common and widespread misunderstanding surrounding property valuations. This is because valuations reflect market demand, and not actual property condition. Consequently, two properties within the same block, in quite different physical condition, will generally secure a broadly similar valuation. The core issue here was thought to be quite simple, a basic misunderstanding of how market mechanisms within the peculiarities of the housing market actually function, and how these are to a degree detached from considerations about housing quality.

Introduce mandatory reserve funds

Again the case for having such facilities was outlined in the work undertaken for the Parliamentary Group, which parallels this report (RICS, 2019). Having a reserve fund, which is often also described as a ‘sinking fund’, ensures through owners making regular monthly contributions, that when an issue arises and spending is required, cash is readily available to fund if not all the works, then a significant proportion. Little else was said, in respect of this recommendation, apart from the way such monies could be held with a preference being for a specially established national or regional level fund, similar to the arrangements that currently exist for private tenants rent deposits. The example of Deposit Scotland, as a social and not-for-profit entity was used as an example, although a Credit Union structure was considered equally be suitable. Obviously, the fore mentioned owners’ associations, as body corporates can hold a dedicated bank account, so they themselves could also hold the cash.

The questions that arose here were all about who actually holds and thus controls that fund? If there is a reserve fund, then there clearly needs to be an owners’ association with an attached bank account, or legal arrangement struck with any potential social investment fund facility. Given the number of owners’ that could be potentially involved, especially across large modern developments,

and the timespans involved, significant amounts of money can quickly amass. Rules regarding reserve funds in France, for example, provide some insight here, in that there are now very tight rules in place regarding the day-to-day management of these funds, which reflect past problems of corrupt practice and outright theft involving individual property managers as well as owners' association office bearers themselves (See Bailey and Robertson, 1997b). In response, there was also a view that by establishing such a fund, at either a regional or national scale, rather than on a block-by-block basis, it would potentially act as a form of insurance against such malpractice.

There were also those who consider such arrangements to be a form of 'forced savings', which would only apply to flat owners. This, they argue, not only represented a challenge to their personal freedom, in how they want to spend their own money, but would also have a detrimental impact on the market for such property given the additional annual outgoings that would be involved.

Introduce mandatory block insurance for flats

This has emerged as an important matter, given the evidence which emerged about either the lack of such cover, or inadequate insurance cover which has had serious repercussions for other owners within a block, as illustrated in a number of the cases featured in Appendix One. Too often the current arrangement for ensuring the block is adequately insured appear to be failing because certain individuals within the block either have adequate, or in some case no proper block insurance cover. As a result, if there is a fire, then the subsequent rebuilding costs cannot be meet so everyone within the block suffers a serious, if not catastrophic financial loss. They could, for example, have to foot demolition costs and still have outstanding payments on the loan for their property.

The provisions in relation to this issue, set out in the Tenements (Scotland) Act 2004, were generally considered to be something of a fudge. It had been argued, at that time, that making block insurance policies mandatory would also help encourage owners' associations to form, given the necessity to come together to agree the policy and the actual level of cover. This was, however, not pursued, perhaps because as we have seen earlier there was a dominant view within the SLC that having a formal owners' association was not considered necessary to undertake the mundane day-to-day management tasks associated with managing a tenement building. If anything, the prevailing view was that having such a requirement in place might actually result in less properties being adequately insured.

It was also noted, there were also serious concerns as to the actual current level of block insurance cover which, generally, is only revealed after a major catastrophe has occurred, such as a fire or structural collapse. There was deep scepticism expressed about the practicality of the current arrangements, whereby owners are able to ask to check the insurance documentation of other owners, in order to satisfy themselves that there is adequate cover overall for the building. Have any owners actually done this, and if so, in finding a problem with a neighbour's policy what did they do then? How, for example, would any owner know what an appropriate level of cover should be? And what actually is the position of insurers in all of this? Unfortunately, despite efforts to engage with both insurance and financial interests on this matter, their views were not proffered.

Improve means to locate absent or missing property owners

It had long been assumed that this was no longer a serious issue, given resolving it had been a major motivating factor behind originally establishing the HITF, the desire on the part of other owners and local authorities to be able to track down 'absent owners' who were holding up action on common repair works. Hence, this was a big part of motivation behind establishing the landlord registration system. At that time, it was assumed absentee landlords, who proved hard to contact, contributed greatly to the deterioration of particular buildings, given the time taken to contact them and then to

ensure their full participation in the subsequent commissioning and funding the required works. Under that scheme all landlords are required to register on a public database which is administered by each local authority. Following recent amendments under the Housing (Scotland) Act 2014 if a landlord fails to so register then they are liable for a maximum fine of £50,000. However, does this arrangement actually assist owners getting in contact with landlords when common repair matters arise?

It was pointed out that because although conceived off as a national registration scheme, the resulting legislation ensured each local authority was left to organise the registration for their own area, so data access and compatibility issues can and have arisen. Recently, partly in light of this, and to improve access, all landlord registration data would be 'hosted' by the Registers of Scotland (RoS), property database given its geocode capabilities. Although this should improve the locating of landlords by those who need to be in touch with them the RoS have made it clear they are not responsible for actual quality or accuracy of that data, given they see their role merely as providing the data holding facility. So future tracing absent owners is likely to still prove problematic, despite the advent of landlord registration.

Given this situation, the City of Edinburgh Council has been in discussion with the Information Commissioner Office about allowing the local authority to provide property owner contact information, drawn from the Council's electronic records, to those who own property within their block[6]. The potential General Data Protection Order (GDPR) issues involved here have now been accommodated to the satisfaction of the Commissioner's Office in that they concurred with the Council's view that the private interests of one owner in a tenement could be out-weighed by the public interests of the tenement community and the wider public. It was felt that perhaps this development takes matters one step further on, in that rather than focusing on landlords per se, it should now be possible for all owners within property in common ownership to be required to have their names, addresses and contact details recorded on a publicly managed and accessible database. It was felt this would allow all owners who have a shared interest in that property the ability to access the names and details of all other owners at their address. It was also felt all other types of absent owners should also be required either to be accessible, or to be represented by an authorised agent who themselves is accessible and contactable. It was pointed out that although private owners can legally still opt to remain anonymous, an agent should be able to act on their behalf and ensure contactability. This particular matter was tested under the agreed Edinburgh arrangement, given that while owners could object to being on an owners' register, this would be assessed by the Council under the 'public interest test' under S38(2B) of the Freedom of Information (Scotland) Act 2002. As has often been said, with property ownership comes responsibilities, and now eventually ready accessibility to other owners within the same building has, by a somewhat protracted and convoluted process come to fruition. Many felt that given the principle has now been ceded a better legal arrangement regarding land ownership registration and accessibility should now be put in place.

Introduce accessible public register of property conditions

Following directly on from the above, there has long been an interest in having a publicly accessible record not only of land, and within that property ownership, but also on property conditions. To a degree, this has been seen to represent a logical development building on from the changes brought

[6] For further information see: http://www.edinburgh.gov.uk/info/20123/shared_repairs/1909/release_of_ownership

about with the introduction of the Home Reports and the linked EPC data. Technically, such an arrangement is feasible, given that currently both the EPC data from the Home Report and now Landlord Registration data is being hosted on the RoS geo-coded property database.

It was understood by many participants that other countries make far better use of available data on property to both protect consumer interests and also to better plan and review the impacts of public policies. It was suggested that the current Home Report, and any common building survey report should be required to be lodged on such a data system. As the proposed common building survey report should be no older than five years, this would act as a further encouragement and official check for owners to organise such inspections, which would help bring about the required cultural change in respect of taking seriously actual property condition.

Such an arrangement would also help address the current limitations of the SHCS, given they could draw the required sample for that data, and in the process act as a quality check on both the Home Report and the proposed quinquennial physical survey. Such systematic sampling from this ever up-dating dataset would also provide individual local authorities better information in order to meet their various statutory housing quality obligations. The ability to conduct specific house type checks could also be a useful additional tool in the governments regulatory functions, as the cladding issue exposed following the recent Grenfell fire tragedy. There are already a number of useful European examples of such property registers operating across Europe that could help bring Scotland's land register up-to-date and more appropriate for various private and public interest needs.

Review existing local authority discretionary powers

As Section Five above detailed, there are currently a broad range of intervention powers open to local authorities. Each of these powers, as illustrated earlier, has a variety of legal and thus practical issues related to their actual operation which requires careful navigation by each authority.

Those with direct experience of local authority enforcement powers were of the view that while they were equipped with appropriate powers, albeit some would benefit from some retweeting, they increasingly proving to be an instrument of uncertain effectiveness. This was because interventions outwith specific emergencies are now determined by budget, staffing and/or policy constraints within what has been a financially squeezed part of local government. It also emerged that it is often reputational damage, rather than any perceived financial risk, which is often the main reason for local authorities pulling back from pursuing a specific intervention. It is these considerations, rather than the actual condition of the building, which now determines local authorities' perspectives and subsequent actions. That said, local authorities still have specific statutory requirements to fulfil in relation of the physical condition of the local housing stock. So are the current powers adequate to that task, and is there a need to look at priorities across local government in respect of this issue. One clear concern voiced that there is an issue about disabled adaptions budget dominating spend within an already seriously diminished 'Scheme of Assistance' budget. It was felt that this was, in large part, because such spend has major revenue fund implications for both health and community care budgets, and currently this is where local government priorities lie.

- **Reintroduce Scottish Government funded Capital Grants, and a realistic annual budget allocation**
  There is a degree of harking back to the previous regime, put in place following the Cullingworth Committee report, and its preference for 'sticks and carrots' provisions of strong enforcement powers backed up with attractive improvement grant subsidies to encourage owner compliance. However, that arrangement was designed to address a very particular and time specific problem, that of sub-tolerable housing which is no longer a major issue. That said, having access to

resources was seen to be core to moving certain serious problems along, and such money helped encourage compliance rather than resistance which now features strongly, as some of the case study examples in Appendix One ably examples illustrate.

Ready access to capital grant monies was long a core feature of UK property owning culture, given it featured in housing policy for almost half a century. This it was felt, led property many owners to assume that the local authority would always be in a position to step in and offer both practical and financial help, if and when a serious disrepair issue arose in their property. That said, no one consulted, thought that the return of the previous grant funding arrangements was actually on anyone's agenda. That said, they did feel there was a need for some access to capital funding, in order to help remedy some of the very serious disrepair issues, given the potential knock-on consequences this can produce for other properties. This was perhaps more of a call to try and find some means to finance for such works, as had been the case in the past.

Further develop 'equity-release' and other lending schemes

In light of the above, there has long been discussions surrounding the use of either public or private loans, rather than capital grants in funding for such works and, in particular, the role that equity release schemes could play. Having such loan facilities in place was planned as a core supportive aspect of the 2006 reforms, given the dramatic policy shift away from the public funding such capital works. Yet, as was noted earlier, one consequence of the the 2007 Financial Crisis and subsequent UK government Austerity measures was that the plans for the National Lending Unit to support these particular policy changes immediately went into abeyance. However, the need for such lending facilities in light of the loss of public capital funding has never gone away.

Accessing capital tied up within property assets has become more common in recent years, especially when it comes to funding further property purchases such as in the case of Buy-to-Let. This, in part, also coincided with recent relaxations of rules governing 'pension pots', so given there was perceived to be a better return from renting property, than staying with a particular pension, then this changes together accelerated the growth in private renting. What is not all clear is whether any of this financial activity helped improve the quality of the private rented offering.

Equity release does present certain challenges in respect of funding major property repairs, given the owner applicant must be over 55 and the property un-mortgaged. It will also need to be in good condition and have a market value above £70,000. There is also a need to pay back any loan, which requires to be repaid at a later stage, usually on the death of the property owner. This reduces the amount of personal assets on death, so has potential inherence tax liabilities. Having said all that, it was clearly seen by those with an interest here to be very niche, especially when compared to the profile of those likely to own properties in serious disrepair.

Some question regarding alternative lending did arise in relation to the potential role and function that might be played by the new Scottish National Investment Bank[7]*, and whether it was able to step into the space left by the National Lending Unit. Currently, the Scottish National Investment Bank has a budget of £2 billion to lend over a ten-year period. As an lending entity, it has developed out from the previous Jessica funding stream, used to manage EU monies, and the Building Scotland Fund. Given this heritage it will be involved in funding new purpose built private rented developments, with*

[7] For further details, *https://www.gov.scot/policies/economic-growth/scottish-national-investment-bank/*

a combination of equity loans and equity stakes, with the repayments then allowing further on-going lending. There is also a direct tie-up with the green agenda and major infra-structure works to help facilitate follow-on private investment in development. Given the housing, green and infra-structure focus a strong case for investing in existing the existing stock was seen to have some merit, but as to the actual mechanics of achieving, stakeholders were less clear. To date such lending has gone to business entities rather than individuals. Establishing a dedicated fund within such a program was seen to one way of addressing this.

That said, as stakeholders pointed out, much of the property in serious disrepair, and in need of some funding to address this, would be unlikely to secure any such loan lending, given that in many cases the cost of necessary works would likely be beyond the eventual value the repaired property would command. Thus, in such cases, the actual decision needed would be be between capital funding from public sources or demolition.

Review title deed provisions

Given the evidence proffered by this report as well as the earlier work carried out by the Scottish Law Commission and the Glasgow Factoring Commission (2014), a case can be made for undertaking a review of how existing title provisions still cause major difficulties in the day-to-day management and maintenance of private flatted property.

From that evidence base, stakeholders felt that they already had a fair idea of what would emerge from such an exercise. Solicitors still exhibit poor practice in drafting title provisions, given the challenges many of the provisions throw-up for those obliged to work them. There are still major challenges in decision-making provisions, and apportionments, though it is in actually securing payment for undertaking any agreed works that really holds matters up, and that is typically beyond the powers of the actual title provisions. There was a feeling that such discussions take us back to earlier discussions, whereby the statutory code detailed in the 2004 Act should become the basic minimum expected within any future title deeds provisions for 'tenements'. Others went further and felt the DMS provisions needed to become the basic requirement for all large scale new developments. Whether there could be a future Act that made all existing common property subject to a bespoke set of common ownership rules was considered to be something of a bigger technical legal ask, if at all feasible. While some felt it would solve some of the current issues, it would undoubtedly also throw up many other new problems.

- **Resolve remaining 'grey areas' as to what constitutes 'scheme property'**

Although the Scottish Law Commission shied away from properly addressing this task, back in 2004, the repercussions of that non-decision are still being played out, so it demands re-visiting.

The core question here is who exactly has maintenance responsibility where there is now a dormer, given that the roof is now 'scheme property'. As such the roof void space no longer exists, rather it is now a room in someone's property. Clearly, consent to use that space from all the other owners within the block would have to be formally agreed, but where exactly does the responsible for the dormer/roof detailing repairs and its on-going maintenance now lie? Unfortunately, the Tenements Act opted not to clarify the matter. Similar issues also arise in relation to the Damp Proof Courses for ground floor flats. The Parliamentary Party Group touched on this very issue by recommending that both these elements should become 'scheme property' (RICS, 2019).

Encourage empowered property managers

This could be made possible through either introducing a requirement for all flats to have a defined property management arrangement, which could either be undertaken professionally, or through self-factoring, or by using it as a sanction when management in the block breaks down. Under either arrangement, an 'empowered' factor would then determine what work should be undertaken, with the property owners expected to go along with this.

Again the Parliamentary Working Group expressed a view that, in instances where an owners' association cannot be established, or an existing owners' association fails, then compulsory factoring might be the fall-back position. This would likely be triggered by owners themselves through, for example, appealing to the First Tier Tribunal (FTT), or via the local authority as part of an enforcement action. The Group also made passing reference to the possibility of factors being default managers, but did not expand on that suggestion (RICS, 2019).

This proposal was seen, by some, as having intrinsic merit, in that property managers could thus ensure the proper management of a building which had previously been mismanaged by its owners. However, as the factors pointed out, if there had been problems in the block previously, would the owners then be amenable to working with such a sanction? Also what condition would the block be in, and therefore would the factors be able to first get it up to standard before putting in place their own factoring regime? Further the factors role would be limited by the actual title provisions, and the terms of engagement set out in their written statement of service. If owners choose not to participate where would that lead?

Such an arrangement might also be open to a challenge by the Courts in respect of individual ownership rights, as was explored in the Hanover Housing Association (Scottish Courts, 2002) case. It was this case, after all, which led to the 2003 reforms that allowed for the appointment and dismissal of factors, on the basis of a majority vote. The mention of self-factoring also raised some serious questions, as currently such an arrangement operates outwith the powers set down in the Property Factors (Scotland) Act 2011, in that self-factors do not require to be registered. Clearly, it would appear there is no easy default management arrangement available to sort out serious property management problems as some would like to assume. For evidence of this, the challenges thrown up by freehold and leasehold arrangements for flats in England provide a more than salutary lesson of this.

Improve debt recovery actions

As the Glasgow Factoring Commission (2014) ably detailed, owners who have attempted to use the Simple Procedure Court (previously Small Claims Court) to recoup outstanding owner contributions to completed repair works did not consider the procedure to be a straightforward.

Some stakeholders thought there may also be an option for owners to use a Notice of Potential Liability (NOPL) rather than go to Court. However, this still needs case law to help clarify the owners' powers in respect of this provision under the Tenements (Scotland) Act 2004. A secondary point here, is whether having a better vehicle to recover outstanding monies would encourage owners to take such action against their neighbours given the serious personal animosities this could create with fellow owners, some of whom might well be their neighbours?

Establish universal housing quality standard

Having an agreed national housing quality standard was a key recommendation made by the HITF (2003) and, officially, has been worked on ever since. The original housing quality standard had been established by Cullingworth Report way back in 1967, with the introduction of the Tolerable Standard. As we have seen, expectations in respect of housing quality standards have changed dramatically since them, albeit that we now a marked variation in quality expectations depending on the properties actual tenure status.

Having agreed a new universal property standard, then this become the benchmark with the suggested house condition survey, planned every five years, helping to ensure all properties meet that standard. For those properties that failed to meet the standard, all those with an ownership interest in that property would then be expected to address any failings highlighted by the survey and bring it up to that standard within a defined time period. Such an arrangement would also provide a useful means for ensuring both existing and potential owners possess all relevant knowledge about the actual condition of the building. Only by having an agreed national standard and then ensuring properties that fail to meet this standard are dealt with can any tangible improvement in the physical conditions of property be achieved. The recent evidence from the SHQS bears this out, and hence the proposal here mirrors that experience.

Whether this ambition is fully embraced within the latest Scottish Government ambitions for Housing to 2040 Principles, under point 5: 'Tenure-neutral space and quality standards for new homes (and existing homes where possible) should be set specifically to improve and protect quality of living and of place', is perhaps a moot point.

CONSTRUCTING A STRATEGY

Overall, as the length of this report helps illustrate, these are not simple matters to resolve, and there is no ideal solution. So perhaps it's time to stop thinking in that way, for if there was a simple solution, we would surely have adopted it by now. The report also provides clear evidence that what were previously conceived to be simple solutions also have their downsides. For the last two decades we have pursued a somewhat fragmented approach to addressing this issue, through enacting the vast majority of the recommendations set out by the HITF. However, in adopting this fragmentary approach to policy implementation we inadvertently ensured that the core ambition which originally brought about the establishment of the HITF, that of encouraging owners to undertake the maintenance and repairs of their multi-owned buildings, was somehow lost. Consequently, what was delivered were a series of often useful housing reforms, but which collectively failed to provide a solution to that very specific and important problem. So in now returning to address that very same issue, how are we to ensure property owners properly maintain and repair their flatted property? Further, how can we also ensure recalcitrant owners are no longer able to threaten the legitimate property ownership interests and wellbeing of other owners and residents?

Objective

Developing any strategy, first involves **agreeing the objective**. In this case it should be to ensure that all accommodation throughout Scotland, regardless of tenure, meets a specified habitability quality standard within a decade. This was the ambition set by the HITF (2003: 11), and it also draws from the success achieved by Cullingworth's approach Report, namely that of establishing a standard, in that case to ensure the eradication of slum housing, and putting in place measures to ensure that happens. Given the increase in expectations for housing quality standards, set down by the SHQS and the linked Repairing Standard, plus the revisions planned for the Tolerable Standard this clearly ties well with the overall direction of housing policy travel. The emerging Climate Emergency agenda and work to date on ensuring Climate Change targets are met for energy efficiency across all residential property also chime well here. Again this accords with the HITF (2003: 11) ambition for a revised single housing quality standard.

Strategy

Operationalising the objective would then involve setting a **universal housing quality standard**, thus bringing all the on-going technical work undertaken since the HITF to fruition. As noted above, there is a clear tie in here with the work carried out in relation to the EPC, and the requirements recently set down to ensure the ambitions set by the Climate Change (Scotland) Act 2009 are met, again critically for all housing tenures. The current situation that has emerged, namely that housing quality standards vary, depending on who owns the property is clearly incompatible with this goal.

Again as stated before, achieving housing quality improvements, within a large flatted development, where agreed quality standard differs on the basis of tenure is untenable. Further, tenants of private landlords should not be expected to accept a lesser standard than those set for social landlords. If the policy justification to improve housing quality standards in social housing was because of their perceived weak position, then surely this applies more so for the tenants of private landlords. Equally, the position of neither group should be compromised by private owners failing to meet their responsibilities in relation to maintenance or repair, as is currently the situation. Multi-tenure within flatted accommodation does produce unforeseen consequences, but public intervention is there to address such situations, not create them. This is especially true given the increasing importance of **individual human rights** within housing, given the provisions of the Human Rights Act 1998. This situation illustrates a clear need for public policy to ensure the proper balance between individual and community interests. As the HITF (2003: 27) noted there is always a: "*difficulty in balancing*

individual rights with the need to protect common property fabric". What has changed since then, however, is that individual rights are no longer seen solely in relation to property owners, in that rights apply to everyone, hence the use of the term human rights. The critical consideration here for both individuals and government is set out under the Human Rights Act 1998. Protocol 1, Article 1, which protects the right to enjoy property peacefully:

> *"Property can include things like land, houses, objects you own, shares, licences, leases, patents, money, pensions and certain types of welfare benefits. A public authority cannot take away your property, or place restrictions on its use, without very good reason"*
>
> *The government must strike a fair balance between your interests as a property owner and the general interests of society as a whole."*
>
> (Source: Equality and Human Rights Commission, 2019)

Having established this new standard, there is then a need to survey residential property in order to check it against that standard. Such a requirement needs to apply whether the property is occupied or vacant, and whether or not its condition is the result of the disrepair. This is where the recommendation about having a legal requirement for a regular **five-year, or quinquennial survey** for all 'tenements' fits into the overall strategy. This again has a link back to the maintenance plan ambition set out in the HITF (2003: 11). As was discussed above, the information from such surveys would be a public record, so owners and other interested parties, whether potential future owners, current owners, tenants, potential managers or factors, as well as local authorities and government officials would have ready access to that information, both as an individual property record, and also collectively in order to track overall progress in achieving the policy's stated ambition, that of ensuring all residential property meets the specified housing quality standard by 2030. Having a monitoring system that is constantly live and up-dating would prove a very powerful and useful public policy tool.

Crucially, to progress matters within flats, as defined as 'tenements' there does need to be in place a legally defined **owners' association** that is charged with managing the block in the best interests of all owners. It would then be the task of the owners' associations to reach an agreement as how best to go about addressing any failings highlighted by the survey and then, put in place, collectively, the financial means to commission the required remedial works to bring it up to standard. In many instances, a time-specific and costed plan to address any noted failings would be required. In this regard, there would clearly be some value in having in place a **reserve fund**, controlled by the owners' association, that would allow payment for any routine regular maintenance, as well as contribute to any major works or indeed emergencies. The ambition here would be to encourage the adoption of a planned and systematic approach to on-going maintenance and repair, as well as having the possibility of planning future improvements. Climate change is likely to be a major driver in this regard, given it is likely to demand different provisions for such buildings, especially in relation to the capacity of rainwater goods and on buildings energy efficiency performance. Within this planned context, there would also be real value in having **professional factoring** expertise, to help act upon these various management decisions made by the owners' association and to manage the property on their behalf. Planning a regular series works, organising payment for relevant contractors and ensuring the survey is undertaken and registered would all benefit from professional property management. Again, there is a direct tie here with on-going policy work, in this case the Scottish Government's review of the Code of Conduct for Property Factors.

The owners' association would be supported in its endeavours by being able to easily access contact details for all owners, or their agents, in order that they can meet their obligations to bring their block up to standard. The **RoS property database** would, therefore, via their geo-coded property

data set, tie together information on actual property ownership to information as to its condition, as supplied by the quinquennial survey data and any **Home Report**, as well as the **EPC**. This arrangement would also encourage the property purchase process to 'up its game' in relation to the quality of the Home Report survey information, so there might need to be some enhancement of the survey quality requirements, given this information will be made available to anyone with an interest in that property, whether current or future owners, tenants, factors or public bodies. A review of the Home Report was undertaken a few years back and proposed revisions from that exercise are still awaited, so could easily tie in here (Black *et al*, 2015). The wider planning and regulatory benefits of having such a active dataset should also not be underestimated, which perhaps explains why it is common place within other modern European public administrations.

Owners' associations would also need to take responsibility for ensuring proper block insurance cover was in place. **Block insurance** now needs to be made mandatory a requirement for all 'tenements', as the current arrangement is failing and causing serious problems for other owners who are properly covered and for local authorities who are expected to pick up the pieces when it all goes wrong. Organising such policies would provide owners' associations with a key task, and property managers and insurers would develop and market appropriate products.

In addition, there would also be value in having more robust **default arrangements**, whereby the public interest in the property takes precedence over that of individual owners, to ensure that the agreed quality standard is met. The HITF (2003: 12) was clear about the need for such intervention, in stating in was necessary: "*where the actions of the landlord, or non actions compromise the health, welfare and or wellbeing of the tenant*". The only change here is to widen that from landlord to owner. It is here that compulsory improvement powers might need to be further refined to better facilitate this course of action. Where a property fails to meet the standard, then it would require to be closed, given it will then be deemed to be detrimental to the wellbeing of anyone who lives there, and would thus compromise their human rights. Where there is serious disrepair, statutory warning notices will require to be issued by the local authority, to ensure compliance with the required standard, and any failure to act on the notice within a defined timeframe should result in the work being undertaken and paid for by the local authority, with all associated costs recovered from the owners, even if this means they are required to sell their property in order to meet their costs. Refinements in the **small debt arrangements**, via the Simple Procedure Court, as discussed by the Glasgow Factoring Commission (2014), should also be undertaken to make it easier for owners to recoup monies from non-participating owners, where they have had to step in and cover such costs. Having the owners' association, as a legal entity, pursue such matters, rather than individuals, may also help reduce the personal feelings that often constrain the pursuit of such actions.

Again, as a support for owners' associations, the current gaps in **'scheme property' provisions** need to be addressed, and following on from this the Scottish Government now needs to make the DMS provisions of the Tenements (Scotland) Act 2004 a requirement for all future tile provisions for flatted accommodation. This is necessary to **future proof** accommodation given that some quite modern property have vey inadequate title provisions in respect of future management and maintenance arrangements. Developers could clearly go beyond these provisions, but should not be able to undercut them.

The strategy also needs to recognise the value of enforcement, which will be necessary when some owners refuse to go along with any agreed majority decisions, or more critically contribute to the costs. The above reforms, by themselves, would not produce a fail-safe. The current lack of available funding for local authorities, in this regard, makes the potential risks to which they could be exposed, act as a brake on active intervention. Edinburgh's previous default repair arrangements, characterised as the 'factor of last resort', illustrates the potential scale of the financial and

administrative problems that can arise. Consequently, the Scottish Government should, as part of its housing budget, provide **public funding** for pursuing such actions. This is not an argument for a reintroduction of capital grant funding, but rather to ensure funds are available when a serious situation arises and demands public intervention to ensure a resolution. Again there would be human rights considerations here.

Ensuring funding is available to owners to help address their properties failings is another element of this strategy. Access to publically supported lending facilities should thus be provided, given the current limitations of private lending. Again this was fully considered by the HITF albeit, in the event, failed to come to fruition as a result of the Financial Crisis and related Austerity measures. Times have moved on and the Scottish Government has established the Scottish National Investment Bank which currently provides loan funding for mid-market, new build rented housing. Given the critical importance in securing, and then improving the overall condition of existing housing stock, providing similar loan finance should clearly merit a similar priority. Given it is a **lending facility**, and thus the monies are repaid to allow further future lending, some, but certainly not all of the future financing issues can be addressed. What is core here, again articulated in the HITF recommendations, is to encourage a change in owner's attitudes towards managing, maintaining and repairing their property. Further, what this strategy overall adds to that is an encouragement for a wider cultural shift, one that places far more value on housing quality, its long-term sustainability and overall energy efficiency within the wider Scottish housing system. While that has now become a given for social housing, so is now core to management practice, that success now needs repeated within private housing.

Justification

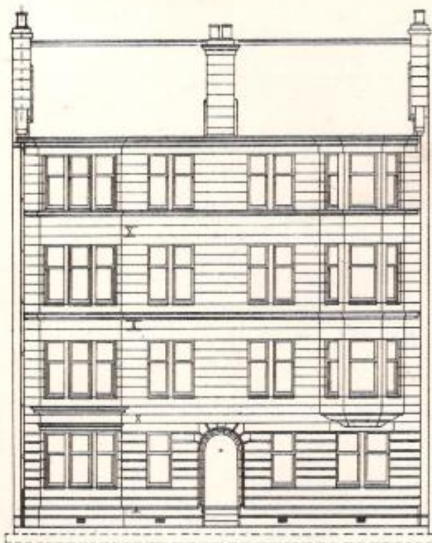
Any competent housing policy needs to properly support the country's existing housing stock, and given the quality problems outlined here in this report there is a clear public interest to do that, in part, through properly protecting all those who reside in flats. As already stated, this is fully accepted in the case of social housing, given the advent of the SHQS and the range of supporting regulations, each designed to ensure such landlords adhere to these housing quality standards. Similarly, yet oddly to a lesser set of standards and regulations, this principle also applies to those renting private property. Yet for whatever reason, the Scottish Government currently, and since 2003, has felt either constrained or unable to insist that owners of private property should be subject to similar expectations. While it could be argued that this is justifiable for those residing in detached, or even semi-detached property, in that your actions, or more correctly your non-actions, might not impinge on anyone else, it is quite nonsensical where property is a shared entity. Trying to ensure a certain set of standards are achieved by one type of owner should not be undermined by the actions, or in-action of another. More concerning is that the actions, or in-actions of certain property owners, in respect of contributing to on-going property maintenance and repairs, can and do seriously impinge upon the **wellbeing** of others. Surely, taking all this together constitutes a case for **public action** to properly address clear **community interests**.

Finally, there needs to be a return to another previous policy goal, that of properly **protecting** the **interests** of all those who choose to purchase a flat. As was well-argued in the past, when introducing the **Home Report**, it should never be acceptable for any purchaser to find themselves involved in what is best described as a 'lottery', in relation to being fully appraised of the property's actual physical condition. Yet, despite the advent of the Home Report, the reality for so many is that they still have no real real idea as to what they have just bought into. Revealing the actual condition of the property can be partial, given that the prevailing interests of the powerful housing market players tend to take precedent over those of the actual individual property purchaser. Beyond that, those buying into flats, generally have no real idea as to the day-to-day management arrangements for the block. In terms of consumer rights, neither situation should not be tolerated, especially given

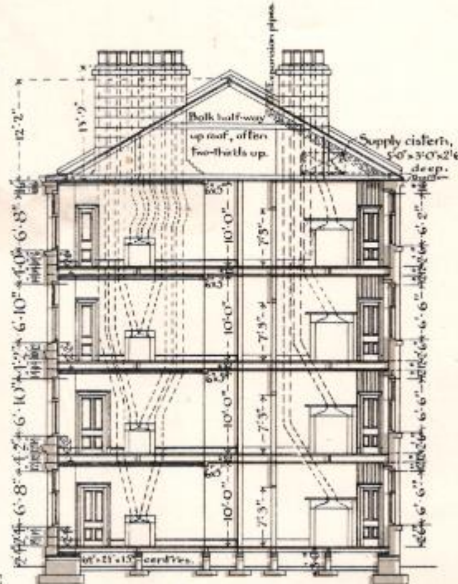
that almost a third of the country's entire housing stock is flatted. So as matters currently stand, this stock of housing is effectively undermined, when compared to other housing types, and is thus effectively discriminated against by those operating the housing market. By changing the rules that currently apply to that stock, such discrimination would be addressed and the overall quality of the nations' housing stock enhanced. That is surely a worthy ambition for any national housing policy, to seek to best serve community rather than special interests.

Elementary Building Construction. Plate No. 22

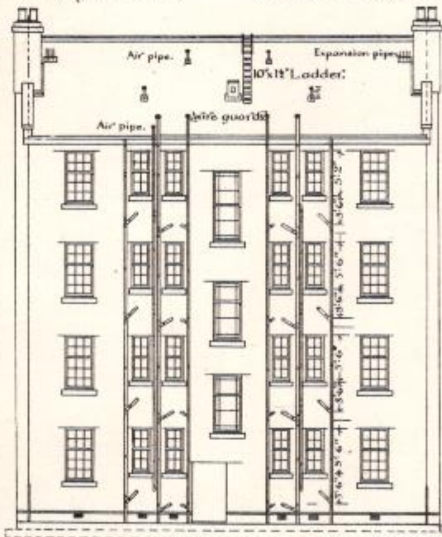
Plans of a Scottish Tenement.



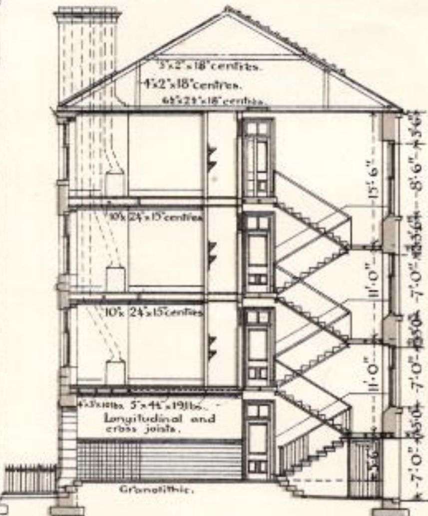
Front Elevation,
with bay window; with oriel window.



Section
on line through bay window and kitchens.



Back Elevation,
commonly built of rough ashlar.



Section
through close and staircase.

SCALE. 10 5 0 10 20 30 40 50 Feet.

This plate to be drawn to the scale of ⅛"=1'.

The Student will sign his drawing here.

Plate from *Elementary building construction and drawing for Scottish students*, Charles Gourlay, 1903; Blackie & Son

APPENDIX ONE: COMMON REPAIR REALITIES

To best appreciate the importance attached to this work, the following on-going case studies are offered up to illustrate the challenges currently being thrown up by present inadequate common repair arrangements. Most owners within most flats do try to carry out essential repairs, although they tend to be short-term in nature, given that securing agreement with all the affected owners to then fund such repairs tends to be fraught with a wide variety of difficulties and challenges, as discussed and discussed throughout this report. Increasingly, flats are not being repaired because of the failure to secure owner agreement, an inability to afford the repairs, or practical difficulties in having the actual work carried out, especially so since statutory notices are now less frequently employed. While owners are not generally unaware of disrepair issues, they might not fully appreciate the extent of works needed to resolve what they consider to be a minor matter. It is also the case that such delays in acting, for whatever reason, tends to ensure that what was initially a small issue, requiring only limited expenditure, quickly becomes a major matter demanding considerable expenditure to properly resolve.

McLennan Street, Mount Florida, Glasgow

Solum immediately below one of the ground-floor flats has been washed out and joists needed replaced, the suspected result of a blocked internal roof drainage pipe the owners were not fully aware of which was subsequently exacerbated by external works that raised the external paving level above that of the ventilation areas. Seven out of the eight owners had actively participated in decision-making and were in full agreement that the issue should be addressed, as a matter of urgency. Action has, however, been delayed by the original agreement around scope for tendering process, divergent quotes, disputes over what constitutes common and private works, including the original proposals for a full refurbishment of the effected flat involving new décor, a refitted bathroom and kitchen. The latter continued for 10-months after the point of majority agreement to act, with one owner disputing the terms outlined in both the Deed and Tenement Management Scheme. Three-years on from the initial discovery of the issue there is still no action on the ground. The common close is now overgrown with damp spores, and the owners await a Council decision to bridge with a ‘missing share’ intervention.

Camphill Gate, Glasgow

Camphill Gate is a ‘B listed’, five-storey tenement, comprising of 24 flats and 14 commercial units. Built in 1906 this landmark building has several unique features, the most impressive of which is a communal roof garden serving the three glazed cupola stair wells. Over the last thirty years, the building has been subject to limited maintenance and many poor-quality *ad hoc* repairs. Some of these relate back to poorly specified improvement work carried out under a common repair scheme in the 1980s, in particular, inferior and wrongly sized replacement rainwater goods.

A full condition survey report of the building highlighted significant major failures and deterioration throughout, that requires urgent remedial action. This is estimated at around £1.2m. Although positive discussions have been held with the GCC and GCHT, regarding contributory grant funding, after a year of discussions, 25 of the 35 owners have signed up, but the other 10, in the main commercial owners, are proving a challenge.

Kilmarnock Road, Shawlands, Glasgow

Skylight needing repaired or replaced within a factored block. While there is a majority to undertake the work, within a block consisting of two shops and eight owners, seven of which are landlords, not all are willing to contribute to the costs. Subsequently, there was a ceiling plaster collapse in the close, resulting in the skylight being repaired. Now there is a similar discussion regarding re-plastering the close ceiling and decorating the close.

Pollokshaws, Glasgow

A prominent tenement block within a conservation area was found to have serious structural defects on one side of the building, which required all residents to be vacated back in 2016. Despite the Council offering grant to help address this problem this has not been taken up by the owners, because of their unwillingness to contribute their share of the estimated £700k costs, hence the entire property still remains defective, empty and boarded up.

Southside, Glasgow

The tenement block has been declared a dangerous building and following a survey paid for by the Council, the cost of addressing the underlying structural instability was estimated at £800k. This means each owner needs to find a £50k contribution. It is still not clear whether the owners collectively are able to cover this cost, and that partly relates to individual instances of underinsurance.

Haghill, Glasgow

A fire within a top floor flat the tenement flat made the block structurally unstable, with all residents having to vacate. As the block was not factored, there was no common insurance policy in place. Of the eight owners, only one had appropriate insurance cover. As noted in the report, although the Tenements Act states block insurance should be in place, it does not insist that this should be a single block insurance policy. Demolition was considered, but this would have meant all owners would have to cover that cost, with those not insured being required to pay for that work, and also for any outstanding mortgage liabilities, if there was one, on what would by then be a non-existent flat. Demolition was also considered problematic as it would impact on the two adjacent tenement blocks. As a result, the Council has undertaken structural works to retain the building, but as yet, has not been able to initiate repairs so that the owners can move back into the flats. To date, the associated repairs are estimated to be somewhere between £500k and £600k.

Southside, Glasgow

Traditional 19th Century sandstone tenement with serious structural problems which suffered a partial collapse. As a result, the owners, residents, shop proprietors and businesses were forced to vacate the building for two-years, and some have yet to return. Owners have thus been unable to sell, let out or trade, and the value of their respective properties has fallen. As a result, there has been litigation between several of the parties including owners, tenants, business owners, factors and the local authority. Glasgow City Council was required to step in, again at considerable cost to them.

London Road, Glasgow

Built in mid-1980s this large-scale Barrett's development was considered, at the time, to be highly innovative given it represented one of the first private housing development to be constructed in the city's east end in more than a century. The development, lying just north of the Peoples Palace on Glasgow Green, consists of 173 properties, constructed within either three-storey walk-up flats, or two-storey 'cottage style' flats. Currently, 48% of the properties remain in owner-occupation, while 52% are now privately rented, a few of which are short-lets. There was no requirement set within the title deeds for there to be a factor. Currently, there are outstanding fabric repairs to the blocks, serious issues in respect of rubbish containment within the bin store areas and many problems associated with the car parking arrangements and the actual condition of these roads.

Glasgow City Council, in partnership with Thenue Housing Association, developed a strategy to acquire property within the development to help stabilise the serious and on-gong deterioration problems. This has involved the use of statutory S30 Works Notices, Maintenance Orders and Maintenance Plans, as well as an HMO landlord crack-down, through setting condition on the licence

that they contribute to the common repairs. Missing share powers have also been used where owners refuse to participate, for whatever reason. This development also became the city's very fist Housing Renewal Area, under the 2006 legislation.

To date over £1.6 million has been expended in grants for the housing association to acquire 19 flats, and monies to support owner contributions to common repair costs. To date there have been two areas of remedial works, the first involving environmental improvements and, secondly, common repairs. The Association was made the managing agent and has organised works to re-clad external walls, in order that they are able to reach specified energy standards. As yet, there are no plans to refurbish the properties roofs. Given the lack of a factoring tradition within this development, the power still lies with the owners to decide what to do in respect of having in place a proper factoring arrangement. Total expenditure to bring this 1980s pioneering private housing development up to a basic standard could involve expending over £5 million.

Clyde Riverside, Glasgow

This modern apartment block, comprising several hundred units, which was built this century, has experienced significant issues related to its original design. The estimated replacement/repair costs for each individual owner is considered unaffordable. Considerable local authority resource has had to be put in place for over the last two-years, and it is anticipated that this will require to continue for some time yet. Further, given the seriousness of the situation considerable overall, Scottish Fire and Rescue resource are also ongoing. Currently, all the property within the development has little or no value, and the rental returns anticipated by many owners have fallen considerably. There is a risk that the blocks overall insurer might withdraw both building and liability cover, deeming the development uninsurable. There is also the potential for the property current factor to withdraw, leaving the massive development without a functioning property management arrangement.

Elderslie Street, Beltane Street, Dorset Street and Kent Road, Glasgow

This stonework project involved a total of 113 properties (69 Glasgow West Housing Association properties, 37 private owners and 7 commercial units). When initiated, in June 2014, the estimated project costs for the six-month contract was £500k. However, when on site the remedial works were complicated by a series of unforeseen events leading to a significant increase in costs, and a much-extended contract period. Hence, project costs escalated by a factor of three, to £1.6m given that three entire front elevations required to be rebuilt because the sandstone had deteriorated beyond being addressed via a 'patch and repair' solution. The average bill for the private owners was £20k, reducing to £15k after receipt of a GCC home owner grant. Four of the commercial owners were billed £75k.

Given concerns as to how the project had grown in scope and costs, a review report was commissioned by GWHA in early 2015 to both highlight potential learning and support efforts to attract grant assistance for the homeowners from Glasgow City Council. That report was followed-up by a meeting with both the consultants and contractors in June 2015, at which it was noted the extent of the stone decay was far greater than it was possible to assess from ground level. Further, the situation was exacerbated by poorly executed historic repairs and the extensive use made of Linostone, a concrete based material extensively used throughout the 1980s and 1990s when carrying out stone repairs. As concrete does not allow for the free movement of moisture through the stonework, the stone eventually breaks down and crumbles. The consultants noted that this project was, in their professional experience: "*the worst conditions they had encountered with respect to this type of tenement repair.*"

The Association has a number of traditional tenement properties spread across their stock within the G3 and G12 postcode areas that are showing similar signs of stonework deterioration, with

investment currently estimated (in the absence of invasive assessment) to be in the region of £3m over the next three-years. These include a number of iconic streetscapes in Glasgow's West End: Byres Road/University Place, St. Vincent Street, Argyle Street and Claremont Street, all of which had been subject to the same Linostone treatment. All these buildings are now in mixed tenure, with commercial units on the ground floors carrying significant shares of any common works costs. The Association is in the process of appointing consultants to develop these projects.

Gorgie, Edinburgh

Built in 1899, this corner tenement property, which consists of 16 residential flats and two commercial premises is entirely in private ownership. Following a report of stonework falling from the property in July 2011, the Council assessed the risk to public safety. A crash-deck emergency scaffold was then erected, following the issuing of a statutory notice, with the owners notified that they would be liable for all costs incurred by the Council to make their building and surrounding environs safe.

In March 2012, the owners asked the Council to issue a further statutory notice to allow the Council to undertake all necessary repair works, following their commissioning of an architect to carry out an inspection and provided a survey report. At that time, the Council policy was not to issue statutory notices, following the recent closure of the Property Conservation Service and the request was thus rejected. Then, in July 2014, the Council held a meeting with the owners and their architect to review the situation. In the intervening period, the owners had employed a contractor to remove considerable amounts of loose masonry in an attempt to make the building safe. However, as a group they were still unable to get agreement from all the owners to arrange for the necessary repairs to be carried out so again they requested the Council intervene.

In December that year the Council agreed to issue a statutory notice, for safety reasons. As the crash-deck had been in place for three-years, the scaffolding hire costs were also escalating, so there was a further incentive to execute the repairs, in accordance with the report received from the architect. By this time, large stone blocks were in danger of falling, loose masonry had already fallen off and there was now serious water ingress into the top floor flats.

It was not until July 2015 that the project was finally progressed by the Council. In November 2015, a new statutory notice was issued, to reflect the correct scope of works in accordance with the design team's recommendations. This was also the very first project to be undertaken by the Council's new service. The full building survey and report prepared by ESRS estimated the costs at approximately £380k. The successful tenderer was awarded the contract in December 2015 and the owners were notified the total estimated cost was £370k, which included a contingency and the Council's project management fee. The project went on site in March 2016 and was completed by October. The work involved creating a new flat roof, new cupola, renewing 338 sandstone units, re-pointing 100m^2 of rubble wall, carrying out repairs to 30m^2 of stonework using Lithomex, taking down and re-building four chimney stacks and renewing all rainwater goods.

The Council took the view that the statutory notice route was a last resort, given that it has to accept a series of risks when enforcing this type of work, these being a financial risk, a bad debt risk, a construction industry scope risk, capability risk and also a reputational risk. At the same time, it was only the Council which had the power to break the log-jam created by non-participating owners. Overall, it had taken six-years, two-months in total to get a final successful resolution. There had been considerable extra costs incurred in dealing with the further serious deterioration, but also in funding repeat surveys, works costings and also all the related public and private administration.

Broxburn, West Lothian
This traditional three-storey building, fronting the main thoroughfare, comprises eight flats and four shops. Access to the flats is via an external staircase and landings which are located to the rear of the property. Due to a lack of maintenance, over a protracted period, serious water ingress via the roof had occurred, resulting in water penetrating right down through the building and is now evident within the ground floor commercial premises. Further, the rear stair and balconies are defective, though as yet, not dangerous.

The local authority served Defective Building Notices on all owners back in 2008. The building was subsequently surveyed and a scheme of works prepared, at an estimated cost of £240k. Being unwilling to take the financial risk of funding works in default, the local authority approached the owners and asked them to commit half the scheme costs up-front, to reduce the overall financial risk. Although some were willing to do so, others were not, so only some patch repairs were carried out. However, water continues to penetrate into the building, whilst the external stair and landings still slowly deteriorate. Without intervention, some of these properties will soon be declared BTS, either because of the water penetration, or through the access staircase or landings becoming unsafe. In addition, there is a serious risk of wet and subsequent dry rot breaking out. When the flats are closed for human habitation, the rate of deterioration will undoubtedly accelerate. If the building is eventually lost, a large gap site will emerge in what is a very prominent position and it is likely structural support to the adjoining traditional buildings will also be required. The insurance position of all owners to cover such costs is still unclear.

King Street, Stirling
A recently undertaken Home Report survey stated that the roof was in good order, but the subsequent block condition survey undertaken as part of the Stirling pilot project revealed this not to be the case. There were, in fact, three separate elements that made up the roof, each of which was in need of some remedial work. Further, some design detailing was required to stop material building up, which was then impeded the functioning of the roofs rainwater goods, blocking both guttering and downpipes.

Temperance Hotel, Kilmarnock
The Temperance Hotel is a prominent red sandstone property built in the 1890s, which was later converted into eight residential flats above three commercial properties. The Council, in pursuing the then Kilmarnock Townscape Heritage Initiative in 2014, concluded that the building would benefit from some grant assistance to support needed repair works. Despite encouragement, the owners failed to come forward and make an application, primarily because of difficulties tracing an absentee owner, despite adverts being placed in the local press, and others who refused point blank to participate. One commercial owner was adamant that the titles conferred no responsibility for the maintenance and repair for any other part of the property except the external walls and floor.

One owner, who owned the majority of flats within the building, then managed to track down the missing owner and purchased their property, thus giving them a majority within the block. So, whilst a majority now favoured applying for a grant, under the provisions of the Tenement (Scotland) Act 2014, this could only cover addressing essential repairs and would not support the reinstatement of architectural details core requirements for the heritage funding route being pursued at that time. With the timescales for this grant funding by then running out, monies were re-allocated to other projects.
In 2016, East Ayrshire Council established a Grant Scheme for Vacant and Derelict Buildings. Despite failing to access the heritage grants, the owners had continued to maintain contact with the Council in an effort to find a way forward. However, as available funds were less generous, all that could be funded were essential repairs, rather than the refurbishment of the building.

A formal engagement process with the owners was again started, but by then ownership within the building had altered significantly. Although the three-ground floor commercial properties were still occupied, the majority owner's business was now in difficulty and two properties had been auctioned. Environmental Health had served statutory notices on first and second storey flats and these were now vacant and locked-up. Consequently, undertaking the survey work to the building proved impossible without first employing industrial cleaners to carry out a full decontamination of these properties.

Funds were obtained to carry out basic repairs to the roof, windows and stonework, in order to make the building 'wind and watertight'. However, the associated costs were well beyond what most owners could afford, or were prepared to pay. Additionally, the lack of engagement with a number of owners ensured there would be a shortfall, which the participating owners would then have to find. Further, were the repairs to the external envelope successfully achieved, there are still significant repairs required to secure the buildings internal structure. Progress, as a result faltered.

Clune Park, Inverclyde

The Clune Park area consists of 430 flats in 45 four-storey tenement buildings. The majority of the flats are small, with 69 bedsits, 310 one-bedroom flats and 51 two-bedroom flats. The area has one of the highest housing densities within Inverclyde. Inverclyde Council has accorded it the highest priority for investment, in order to tackle both the physical and social issues that have led to the serious degradation of the housing stock. The area, for example, gained a reputation for drug dealing and taking.

There are now no resident owners within the estate, and less than 50 of the flats are tenanted, resulting in an occupancy rate of just 10% across the estate. The remaining properties are either unoccupied, or not fit for habitation. As a result, Clune Park has the highest rate of BTS housing in Inverclyde and the highest void rates. The regeneration plan now simply involves demolishing all 45 buildings and although approved back in May 2011, has progressed only slowly.

Campbeltown, Argyll

Within Campbeltown, there is an Area Property Action Group comprising local authority officers from various services, most notably planning and building standards who have a remit to help deliver priority building repairs. To try to address the disrepair issues in the town, housing services have been active in helping to form owners' associations. The Campbeltown Tenement Maintenance Guide has proved a useful tool to initially help owners to get together and progress their particular project. Owners' associations can then access a Tenement Condition Survey grants, up to a maximum of £250 per unit. To secure such a grant to undertake a survey the owners associations, therefore, need to have a fully functioning committee and a joint bank account. Once the independent housing quality report has been produced, the owners can then decide on their next move. In some cases, this has led to owner-funded repair schemes incorporating the broad mix of owner interests within such blocks. If any grant funding is involved, the owners' association needs to establish a TM Scheme under the Tenements Act and undertake regular planned maintenance. As part of this drive, the Council is also taking the opportunity to promote maintenance by organising joint gutter clearing on tenements to reduce costs, given that on occasions rope access specialists are needed.

Glenrothes, Fife

Due to a lack of action by owners, on-going serious deterioration of the buildings and increasing anti-social behaviour complaints, Fife Council served a closing order in 2011 on what were by then 48 BTS flats within two blocks. These properties had originally been built by Glenrothes Development Corporation. Over recent years they had been sold under the 'Right-to-Buy', before many of them

ended up in the hands of a few local landlords. The closing orders were subsequently converted to a demolition order, and again following failure by owners to take on board their responsibilities, the local authority arranged for the demolitions to be carried out. This was completed in March 2013.

For clarity, it is important to highlight the range and extent of work required in pursuing such a project. The range of work needed to bring this seriously deteriorated post-war ex-New Town property to this conclusion involved:

- Inspection work, involving all 48 properties, with the main issue here being the deterioration of the flat roof and water ingress downward and throughout the buildings, which at first did not affect all the properties
- Legal requirements and process
- Administration which involved liaising with owner/tenants, arranging for compensation payments as required and having regard to the alternative housing options likely to be available for anyone who needed to move from a house, due to action by the local authority
- Procurement work
- Dealing with public services
- Project management and associated financial work
- Work involved in the local authority's entitlement to recover the costs of the demolition, incurred by the public purse, and its entitlement to place charging orders on the title of any property where the allocated debt for those properties has not been settled, or a repayment agreement not put in place
- Work related to ensuring a future for the cleared site
- Ensuring that everyone who needed to be kept informed was kept informed, including dealing with media
- On top of everything else, one of the main property owners was also murdered

This project had an immense impact on staffing and financial resources across different teams within Fife Council, but particularly the Private Housing Standards Team of the wider Building Standards and Public Safety Team. Time and resources are still being expended five-years further on.

All the above examples illustrate the actual complexities and practical challenges which the preceding report seeks to both explain and address. The legal and administrative arrangements established by title deeds, legislation and local authority procedures all play out in different ways, in each of the above cases. Similarly, owner poverty, intransigence or avoidance and, in a few cases, ignorance and arrogance, also contribute. Sadly, in many of these cases, had regular maintenance been undertaken, or basic repairs addressed early on, the catastrophic outcomes detailed here would not have arisen. Now, due to long-term deterioration, exacerbated by the neglect of basic regular maintenance, and also the limitations evident within the current powers of intervention, has resulted in need for major repair works that typically involve very substantial capital cost and serious repercussions not only for the owners, tenants and commercial premises, but also the local authority and the wider local community. A deteriorating building contributes much to perceptions about a particular place or neighbourhood.

The challenge presented by this report is how do we now change this unacceptable situation and the associated poor housing conditions it produces? Then there is the imminent but avoidable loss of much-needed housing stock. The Scottish Government's has a laudable ambition of providing 50,000 new 'affordable' houses over this session of Parliament, a five-year period. Is this not somewhat undermined by the deterioration and, in many cases, the unnecessary loss of so much repairable existing housing stock?

APPENDIX TWO: LIST OF CONSULTEES

Consultee	ORGANISATION
John Allan	Maintain Our Heritage
Kate Berry	Scottish Parliament Information Centre
John Blackwood	Scottish Association of Landlords
David Bookbinder	Glasgow & West of Scotland Forum of Housing Associations
Sarah Boyak	Scottish Federation of Housing Associations
John Boyle	Rettie and Co. Ltd
Tony Cain	Association of Local Authority Chief Housing Officers
Jocelyn Cunliffe	Royal Incorporation of Architects in Scotland
Ali Davey	Historic Environment Scotland
Liz Dickson	Scottish Housing Network
Hew Edgar	Royal Institute of Chartered Surveyors
Annie Flint	Under One Roof
Patrick Flynn	Glasgow City Council
Iain Friel	Spiers Gumley Property Managers
Scott Geekie	Tenement Action Group
David Gibbon	GLM Surveyors
John Gilbert	John Gilbert Architects
Beverly Green	Fife Council
Laura Hainey	A&DS / Retrofit Scotland
James Lafferty	Argyll and Bute Council
Elizabeth Leighton	Existing Homes Alliance
Euan Leitch	Built Environment for Scotland
Terry Levenson	Cockburn Association
Sonya Linskaill	Stirling City Conservation Trust
Luke Macauley	Scottish Government
Frankie McCarthy	University of Glasgow
Alison McDermott	Property Managers Association Scotland
Lori McElroy	Building Research Establishment
John Marr	UK Finance
Andrew Milne	DM Hall Chartered Surveyors
Les Milne	Glasgow City Council
Niall Murphy	Glasgow City Heritage Trust
Susan O'Conner	Scottish Civic Trust
Simon Roberts	Scottish Government
James Simpson	Tenement Action Group
Andrew Steven	Scottish Law Commission
David Stewart	Scottish Federation of Housing Association
Hazel Stevenson	Aberdeen Council
Janet Still	Royal Environmental Health Institute for Scotland
Katy Syme	Changeworks
Jackie Timmons	City of Edinburgh Council
Emily Tracy	Scottish Traditional Building Forum
Neil Watt	Hacking and Paterson Management Services

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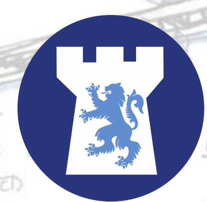

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