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SPICe Briefing

# Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

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The [Defective and Dangerous Buildings \(Recovery of Expenses\) \(Scotland\) Bill](#) (“the Bill”) is a Member’s Bill, introduced by David Stewart MSP on 30 October 2013. The Bill would allow local authorities to use charging orders as a means of recovering expenses incurred in undertaking repair, and/or associated work, to dangerous or defective buildings.



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## INTRODUCTION

The [Defective and Dangerous Buildings \(Recovery of Expenses\) \(Scotland\) Bill](#) (“the Bill”) is a Member’s Bill, introduced by David Stewart MSP on 30 October 2013. The Bill would allow local authorities to use charging orders as a means of recovering expenses incurred in undertaking repair, and/or associated work, to dangerous or defective buildings.

## WHAT ARE DANGEROUS AND DEFECTIVE BUILDINGS?

A dangerous building is any building that constitutes a danger to one, or more, of the following:

- people in or around it
- the public generally
- adjacent buildings or places.

A defective building is any building suffering from a defect that requires to be repaired to prevent significant deterioration to the fabric of the building.

## LOCAL AUTHORITY POWERS TO REPAIR DANGEROUS AND DEFECTIVE BUILDINGS

The Building (Scotland) Act 2003 grants local authorities powers to repair dangerous buildings (Sections 29 and 30) and defective buildings (Section 28), as described in the sections below.

### Dangerous Buildings

Where the local authority considers that a building poses a danger to its occupants, or occupants of adjacent buildings, it must require those occupants to vacate the building. In addition the local authority must carry out any necessary work to prevent access to the building, and any other areas that are in danger due to the state of the building. This work can include demolition. The local authority can recover any costs associated with such works from the owner of the building.

In addition to work to prevent access to dangerous buildings, local authorities have the power to carry out any work they consider necessary to make such buildings safe after giving the owner notice of their intention, if circumstances permit.

Where a local authority considers a building to be dangerous, and it does not intend to carry out the necessary work to make the building safe itself, it can serve the owner of the building with a dangerous building notice.

The notice will specify the dates by which the owner must have started and finished the required work. Failure to start or complete the necessary building work by the specified dates is an offence. Where an owner fails to comply with a dangerous building notice the local authority can carry out the necessary work itself and recover the costs from the building’s owner.

### Defective Buildings

In addition to these powers to deal with dangerous buildings, local authorities have the power to deal with defective buildings through the issue of defective building notices. A defective building notice specifies particular defects in a building that must be rectified to bring it up to a reasonable

state of repair for its age, type and location. The notice will require the owner to commence work on a date not less than 7 days after the issue of the notice, the work must then be completed by a specified date, which must be at least 21 days after the date work was due to commence.

Failure to start or complete the necessary building work by the specified date is an offence. Where an owner fails to comply with a defective building notice the local authority can carry out the necessary work itself and recover the costs from the building's owner.

## **CHANGES TO THE BUILDING CONTROL SYSTEM INTRODUCED BY THE BUILDING (SCOTLAND) ACT 2003**

The powers described above are established in the Building (Scotland) Act 2003 ("the 2003 Act"), which replaced the Building (Scotland) Act 1959. The 2003 Act updated the operation of the Scottish building standards system, including the powers available to local authorities for dealing with dangerous and defective buildings. The changes made to these powers were relatively minor, however the power to use charging orders to recover costs incurred in carrying out works to dangerous and defective buildings was repealed and not replaced.

### **WHAT IS A CHARGING ORDER?**

A charging order is a method of debt recovery available to local authorities under certain statutes. Generally, where a local authority has incurred expenses in undertaking certain works to a building and the debt cannot be recovered by other means, it may make a charging order.

The terms of a charging order are set by legislation. The following section describes a charging order as it would be established under the Bill. The specifics of a charging order established under other legislation may differ from that described below. A charging order declares that the building is burdened with an annuity (i.e. an annual payment due to the local authority) to repay the expenses incurred by the authority. An annuity is normally set at six percent of the total expenses incurred, which gives a repayment period of 30 years beginning on the date the order is made. A charging order only becomes operative after any appeal has been heard and determined.

A charging order must be recorded in the appropriate register of sasines<sup>1</sup>, where applicable, or in the Land Register of Scotland. A charging order has priority over most other debts attached to a property.

Any owner, or other person having an interest, in land that is the subject of a charging order can redeem the annuity (i.e. make full payment of the debt) by paying an amount to the authority as may be agreed upon, or, in default of agreement, determined by the Scottish Ministers.

Failure to make an annual payment can result in a local authority taking further civil debt recovery action. It is important to note that a charging order applies to land and buildings and not to a particular owner.

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<sup>1</sup> The Register of Sasines was established in 1617 to record deeds relating to rights in property. This register was the mainstay of the Scottish system of land ownership and interests from the 17th Century until the introduction of the Land Register, in 1979, on to which properties are now registered on creation or sale.

## WHAT DOES THE BILL PROPOSE?

The [Explanatory Notes](#) (Scottish Parliament 2013) which accompany the Bill provide a detailed description of its contents. A short summary of the key provisions of the Bill are set out below:

**Section 1:** This section amends the 2003 Act to allow a local authority to make a charging order in respect of certain expenses incurred in undertaking work to a dangerous or defective building. It provides definitions of the key terms “qualifying expenses” and “repayable amount”, sets out the core terms of a charging order and how these are to be repaid and discharged. It sets out how a local authority should register, and discharge, a charging order and inserts a new Schedule into the 2003 Act, which establishes what a charging order and discharge should contain.

**Section 2:** Commences those parts of the Bill that deal with subordinate legislation three days after Royal Assent, with the remainder coming into effect six months after Royal Assent.

**Section 3:** Establishes that the short title of this Act is the Defective and Dangerous Buildings (Recovery of *Expenses*) (Scotland) Act 2014

## FINANCIAL IMPLICATIONS OF THE BILL

A detailed estimate of the cost implications of the Bill can be found in the Financial Memorandum (Scottish Parliament 2013), which summarises the financial impact of the Bill as follows:

“The costs of implementing charging orders are likely to be minimal for the Scottish Government and local authorities. The Bill has an overall positive financial impact for local authorities. The use of charging orders enables local authorities to improve their cost recovery rates to recover more of their outstanding costs, while also providing further savings over the existing cost recovery procedure. There is some impact on owners of dwellings or non-domestic premises where owners have not maintained their building and the local authority has had to step in to undertake the necessary work and recover its costs thereafter.”

The Financial Memorandum indicates that the proposals in the Bill would result in savings for local authorities, due to as an increase in debt recovered would exceed charging order administration costs. It also indicates that the new duties on the Scottish Government could be met from existing resources and that there would be very small financial implications for the Scottish Courts Service, Registers of Scotland and Scottish Legal Aid Board. The key financial impact would fall on the owners of defective or dangerous buildings, who previously may have avoided paying for works undertaken on their properties by local authorities.

## VIEWS ON THE PROPOSALS IN THE BILL

During Session three of the Scottish Parliament, David Stewart MSP consulted on proposals that are very similar to those in the Bill, plus proposals to introduce a regular inspection regime for buildings. This [consultation](#) (David Stewart MSP 2010) ran from 16 December 2010 until 11 March 2011. A total of 43 [responses](#) (David Stewart 2011) were received, of which 21 were from local authorities, five from community councils, five from individuals, four from representative bodies and one each from the Scottish Government, the Scottish Federation of Housing Associations, Glasgow Housing Association, Age Scotland, Consumer Focus Scotland, a property management company and Sandra Osborne MP (Labour - Ayr, Carrick and Cumnock).

The consultation posed fourteen questions, of which four related to charging orders, these were:

1. What do you see as the benefits of charging orders in enabling local authorities to recover costs from owners of dangerous and defective buildings?
2. What do you see as the disadvantages of charging orders?
3. What do you see as the benefits of charging orders to owners of dangerous and defective buildings?
4. What do you see as the disadvantages of charging orders to owners of dangerous and defective buildings?

Given the nature of the questions posed in the consultation, which asked for respondents to point out both positive and negative aspects of the proposals, it is not clear whether some respondents support the proposals or have a neutral view of them. Given this, the figures mentioned below for those supporting, neutral or opposed to the re-introduction of charging orders are based on an assessment of each response by the author of this briefing. It is also worth noting that two of the responses submitted by individuals have not been made public.

Approximately three quarters of respondents, covering a wide range of organisations, were clearly in favour of the re-introduction of charging orders, e.g. the Scottish Association of Building Standards Managers (SABSM)<sup>2</sup> state:

“SABSM are clear in their view that the re-introduction of Charging Order powers would re-invigorate the actions taken by Local Authorities under the 2003 Act as cost recovery procedures would be robust and workable as evidenced under the 1959 Act.”

While the Scottish Federation of Housing Associations (SFHA) states that:

“SFHA welcomes the proposal for a Building Repairs (Scotland) Bill. It would give a better incentive for local authorities to get involved with repairs to defective building and make it easier for them to recoup their expenditure on both dangerous and defective buildings. This would have a beneficial impact on our sector, as its investment in mixed tenure accommodation would be better protected and the immediate environment for tenants would be improved.”

Around a quarter of respondents provided a neutral response, neither supporting nor opposing the proposals. Key amongst these neutral respondents was the Scottish Government, which states:

“Although cost recovery must be a disincentive for LAs to take formal action there is no certainty that their introduction would result in defective buildings becoming a higher priority.

The current legislation is wide ranging and deliberately flexible to allow each case to be dealt with on its own merits. The Building (Scotland) Act 2003 powers covering all types of defective buildings, including most Crown buildings.

Building Standards Division are currently reviewing the debt recovery powers in the Act to consider introducing charging orders or similar mechanisms to those contained in the Housing (Scotland) Act or Historic Environment (Amendment) (Scotland) Act 2011. The purpose is to provide LAs with improved powers to recover their costs for dangerous or defective buildings.”

Only one of the individual respondents, Ian de Sales La Terrine, was directly opposed to the introduction of charging orders.

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<sup>2</sup> SABSM are now known as Local Authority Building Standards Scotland (LABSS)

While respondents raised a number of issues regarding the possible implications of the re-introduction of charging orders for owners, local authorities and the state of the built environment, the following four key issues were raised by multiple respondents. It is important to note that this is not an exhaustive list of issues raised by respondents, rather an attempt to highlight issues of concern raised by a number of respondents.

- Charging orders are a long term solution to debt recovery. Charging orders will require payment over a period of thirty years, although they can be redeemed sooner, while local authorities still have to make payment for works up front, e.g. Clackmannanshire Council considers that “The principal disadvantage is the inevitability that there will be a long delay, usually several years, between the date on which the local authority incurs the cost and the date on which the cost is actually recovered.”
- Charging orders may impede the sale of a building, potentially reducing the opportunity for an authority to recoup costs incurred in repairing that property, e.g. Highland Council stated that “A Charging Order will place a burden on a property or site. This might reduce the value or attractiveness of a site or building to a potential purchaser meaning the Local Authority may wait a long time or may never recover the expenses incurred if the site cannot be sold.”
- The fact that local authorities are required to fund works up-front but cannot charge interest to building owners is a concern for many local authorities, e.g. the City of Edinburgh Council states that “Councils are required to fund the costs until recovery although interest charges do not apply.”
- Several respondents raised concerns about the complex and fragmented nature of the legislation governing the repair of dangerous and defective buildings, e.g. the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) state that:

“The consultation paper rightly refers to the other legislation which is available for local authorities in the case of dangerous or defective buildings, most notably the Civic Government (Scotland) Act 1982 (The 1982 Act) and the Housing (Scotland) Act 1987 (The 1987 Act)... SOLAR considers that there is probably a need for an overall review of the legislation relating to dangerous or defective buildings. The 1982 Act, in particular, takes no account of changes to the law of the tenement and, whilst the 1987 Act has a specific relevance to housing, ultimately the problem of dangerous or defective buildings covers the full range of building types. With that in mind, it would make sense for a single piece of legislation to apply consistently across all building types unless there were particular aspects relating to dwellings which it was thought were worth keeping.”

## **THE DRAFT COMMUNITY EMPOWERMENT (SCOTLAND) BILL**

The Scottish Government launched a Consultation on the Community Empowerment (Scotland) Bill on 6 November 2013. This proposes to amend the Building (Scotland) Act 2003 as follows:

“Draft Bill: Part 4 "Liability for expenses under Building (Scotland) Act 2003"

51. Part 4 of the draft Bill inserts new sections into the Building (Scotland) Act 2003 which allow for a "notice of liability for expenses" to be registered in the appropriate property register in relation to a building on which work has been done. Where such a

notice is registered, if the building is sold, the previous owner and the new owner become severally liable for the debt; in other words, it can be recovered from either of them.

52. In practice, a potential buyer (new owner) will want to ensure that the debt is paid and will negotiate the purchase price accordingly. If the new owner pays the expenses, they may recover that amount from the former owner (seller), if the former owner is liable.”

This proposal does not replicate the provisions of the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill and it may be possible that both proposed debt recovery mechanism could operate alongside each other.



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