David Stewart
Room M1.05
Scottish Parliament

Kevin Stewart
Convener of the
Local Government and Regeneration Committee
Room T3.40
Scottish Parliament

21 February 2014

Dear Kevin,

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

Further to the evidence received on my Bill, I thought it might be useful to provide the Committee with some clarification about the operation of the Bill.

In the first instance I would like to deal with a couple of separate areas which were raised by the Scottish Federation of Housing Associations (SFHA) and the Institute of Historic Building Conservation (IHBC) during the Committee's evidence session on 19 February and supported by written evidence.

The first point relates to the extension of charging orders where housing associations have paid for remedial works; the second point relates to the interaction between the provisions of the Building (Scotland) Act 2003 Act (the 2003 Act) and building conservation.

With regard to the extension of charging orders to registered social landlords, this issue was raised by SFHA and Simpson and Marwick (in its written submission). Recovery of housing associations' costs, which can I understand be substantial, is clearly an important matter, however my Bill could have no legislative effect in this area as the relevant parts of the 2003 Act, which my Bill amends, are principally concerned with local authorities' cost recovery when carrying out their duties pertaining to defective and dangerous buildings. I did however note from Susan Torrance's evidence that there might be some possibility of addressing this matter through finding an administrative mechanism to deal with it.

In evidence presented to the Committee (both written and oral) by Dave Sutton of the IHBC, a number of points were raised about the interaction between the 2003 Act defective and dangerous buildings regime and other legislation concerned with conservation of buildings.

While I understand that the IHBC might like to see the Bill embrace other matters these would be well beyond what a Member's Bill could achieve. Its emphasis is, necessarily,

quite narrow and focused. My Bill is not intended to offer a solution for all building repair issues but offers a possible remedy which may be attractive to local authorities in particular circumstances concerning defective and dangerous buildings.

However, Mr Sutton did raise one point which could perhaps be addressed within the Explanatory Notes to my Bill. The IHBC suggests there is a potential conflict between a dangerous buildings notice under section 29 of the 2003 Act, which if applied to a Listed Building or heritage building in a Conservation Area 'would be encouraging the owner to carry out a prosecutable offence', and that the need for relevant consents to be obtained when dealing with such buildings should be highlighted. While those who administer notices under section 29 might be taken to be aware of other relevant legislation to which they may also require to have regard, if the Committee considered it to be useful then I would be willing to make some refinement of my Bill's Explanatory Notes, so far as they refer to section 29 of the 2003 Act, to point up the possible interaction with other legislation.

Moving on to another operational issue, which has been raised in a few submissions (COSLA, the Law Society of Scotland and East Lothian Council), and which relates to the potential to recover an instalment where it has been defaulted upon.

This concerns in particular the repayment provisions which are being inserted as section 46D(1) of the 2003 Act, by section 1 of the Bill, and it may be helpful therefore to set out how these are intended to operate.

Section 46D(1)(a) provides firstly that the repayable amount is payable by 30 annual instalments. The 'repayable amount' is described in section 46C(1) and represents all of the sums which the local authority is looking to recover.

Under section 46D(1)(b), in the event of an annual instalment payment not being made, this would then become separately recoverable as a debt. It could therefore be pursued by means of civil debt recovery procedures. An unpaid instalment, if not pursued by court action, would cease to be recoverable 5 years after it falls due.

Section 46(D)(1)(c) goes on, however, to provide that any balance of the repayable amount (ie the whole amount secured by the charging order) which remains unpaid after the final instalment falls due, is then repayable, and would be similarly recoverable as a debt.

A distinction is therefore made between recovery of individual instalments under paragraph (b) of section 46D(1), and the provision which is made at paragraph (c) relating to any balance of the repayable amount which remains outstanding. The charging order applies to the whole repayable amount, rather than for 30 separate instalments, and the building concerned remains 'charged' with the total amount which is outstanding at any time.

These observations aside, I did indicate at the evidence session this week that I will be looking at providing greater flexibility in setting the duration of a charging order to reflect the level of costs, given the feedback received in that regard from a number of contributors. That will involve consideration being given to the existing provision contained at section 46D(1), and what adjustments might usefully be made to it.

Finally, I would like to take the opportunity to set out my views briefly on a couple of other areas highlighted in written evidence, that of prior ranking of a charging order over other securities and whether a calling-up power should be attached to a charging order.

On prior ranking, there are two reasons why I do not intend to pursue this option. In particular I recognise prior ranking would place local authorities in a stronger cost recovery position, but I also have to balance this view against those of existing fixed security holders such as mortgage lenders. I'd also note that while the most recent comparable charging order which makes such provision for ranking was the 'repayment charge' in the Housing (Scotland) Act 2006, this was as the result of an amendment at Stage 3 and therefore would not have been subject to analysis of any issues arising from it as part of the consideration of the general principles of that Bill. Thus far no evidence has been gathered on the relevant merits or otherwise of this approach.

In terms of providing a limited power of calling-up of charging orders I understand there is such a power in the residential care context under the Health and Social Services and Social Security Adjudications Act 1983 and that those powers are understood to be exercisable under that Act in limited circumstances only. I believe my approach, not to attach a similar power is proportionate for the particular circumstances of my Bill, which is concerned with a quite different subject matter. I believe providing a calling-up power would be likely to raise a number of issues, including some of a potentially significant nature with respect to European Convention on Human Rights considerations relating to property rights.

I hope this letter has provided sufficient clarification on some quite technical issues raised in relation to my Bill. A copy of this letter also goes to Claire Menzies-Smith of the Non-Government Bills Unit.

Yours sincerely,

David Stewart MSP
Member in Charge