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& RESEARCHERS

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SCOTTISH GOVERNMENT

**REGISTERED SOCIAL LANDLORD  
MISSING SHARE CONSULTATION**

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## 1. Executive Summary

### Introduction

1. Under the Tenements (Scotland) Act, 2004 a majority of owners in a tenement can make a binding decision to carry out maintenance and repairs. The Housing (Scotland) Act, 2014 introduced a discretionary power for a local authority (LA) to pay a 'missing share' on behalf of owners who are unable or unwilling to comply with the majority decision. The local authority is entitled to recover its costs and can use a repayment charge, a kind of security against the property.
2. The Housing (Scotland) Act, 2014 also includes a regulation-making power for Scottish Ministers to allow RSLs a similar discretionary power to pay and recover 'missing shares'. Before Scottish Ministers can make regulations the Act states that they must consult bodies representing LAs and Registered Social Landlords (RSL) and "such other persons" as they think fit.
3. The Scottish Government commissioned Anna Evans Housing Consultancy Ltd to carry out a consultation to seek views on a 'missing share' power for RSLs.

### Housing condition and legislative background

4. It is estimated from the Scottish House Condition Survey that there are 139,400 properties in the RSL sector with common parts. It is estimated that there are between 4,200 properties with critical, urgent and extensive disrepair (3% of RSL properties with common parts) and less than 10,500 properties where elements have a limited life even after repair work is completed. There are likely to be fewer properties in a poor enough condition to be subject to some form of repair order, or to justify the use of 'missing share' powers.
5. The Scottish House Condition Survey estimates that 18% of those living in properties with common parts said that it was difficult to get common repairs undertaken, while 7% said they knew of an instance where someone had failed to pay towards a repair. Just 1% of social tenants with common areas said they were aware of someone not paying for works needed to common areas. However, this might underestimate the issue of non-payment if tenants are not aware of when repairs are needed.
6. Missing share powers are used by a minority of local authorities, either under the Housing (Scotland) Act, 2006 or 2014 to enable common repairs to be undertaken where one or more of the owners cannot be found, or are unwilling or unable to pay for the associated works. LAs can use charging order powers to pay the outstanding 'missing owners' costs and should the owner still refuse to pay, the LA places a charging order on the owners' property. An amendment to Housing (Scotland) Act, 2014 proposed extending this missing share power to RSLs.
7. The financial leverage that LAs have in encouraging owners to get involved in common repairs has reduced over the last decade with removal of 'ring fencing' of certain local authority budgets since 2007, with the emphasis of Scheme of Assistance now being on advice and assistance, with only discretionary financial assistance.

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## **Debt recovery mechanisms used by RSLs for missing shares**

8. While the number of RSL properties with common elements which are in very poor condition are relatively small (see above), for those RSLs affected, 'missing shares' can be a significant and perennial concern. Further, they cause problems for RSLs in meeting their statutory and regulatory requirements in respect of housing conditions.
9. There are two main groups of non-payers for common repairs – low income owners, and absentee or non-co-operative private landlords. The culture, and lack of responsibility around ownership and property repairs is seen as one of the main causes of problems relating to common repairs.
10. Mechanisms used by RSLs to recover 'missing share' costs include early engagement and recovery including phone, letters and face-to-face contact, internal debt recovery processes, or use of external debt collection agencies, small claims through the Sheriff Courts, flexible payment options as an alternative to Court action, use of Inhibition Notices and Notices of Potential Liability, as well as sequestration.

## **RSLs' experience in facilitating common repairs and using LA missing share powers**

11. RSLs respondents highlighted a range of methods used to encourage owners to cooperate. The rights and responsibilities set out within the title deeds are critical in this regard, as are the provision of any associated Deed of Conditions that sets down property factoring or management practices. The quality of such documentation varies considerably, and where titles are silent then the common law as set out in the Law of the Tenement, 2004 comes into play. While sinking funds can be agreed, within newer properties, these are rare. More commonly, and typically within older properties there is a lack of responsibility in relation to such matters, and a generally poor culture around property management. Many participants agreed that mandatory sinking funds should be part of the long-term solution to address poor and deteriorating housing conditions where there are shared elements.
12. Where a common repair issue arises the involvement of local authorities is seen as key in obtaining payment prior to works commencing and owners incurring debt with the RSLs, and in avoiding disputes in relation to 'missing shares'. In some areas this can include repair grants to aid the process. But there is frustration from some RSLs over the lack of consistency of approaches by different LAs, given some have proactive approach to 'missing shares', whereas others do not. For those authorities that do not operate such procedures, this appears to be driven by the LA's overall financial resources.
13. Experience of utilising 'missing share' powers has been both positive and effective, from the perspective of both RSLs and LAs. The 'carrot and stick' approach involves the stick of being faced with additional costs for 'missing share' owners, given the addition of administrative costs, interest payments added and registration fees for repayment charge, while the carrot can be the offer of grant, in some instances. Other advantages include access to credit facilities which some owners may otherwise be unable to obtain.
14. Consultees suggest there is an emerging 'two tier' maintenance service for social landlord tenants – with those living in mixed ownership blocks where their landlord was the majority owner within the block often benefitting from better housing standards, as a result of completed maintenance programmes, compared to those living in mixed blocks where the landlord is the minority owner within the block suffering from a lesser maintenance standard given the impact of uncooperative owners.

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15. Some RSLs have chosen to respond when they find themselves with a property in the later position, actively disposing of such affected properties. Others have deferred maintenance works, or reduced the specification and thus the associated costs to enable owner involvement. By comparison, some LA private sector condition officers suggest that RSL can 'over specify' works where common repairs are involved. This highlights the tensions between RSLs' statutory and regulatory requirements under SHQS and EESSH, their factoring roles where the Repairing Standard applies for private rented properties, and their co-ownership role where they must come to a scheme agreement with other owners. This is not a new issue, as there has long been an issue in common property maintenance, as to whether a repair is actually of a higher standard and thus actually constitutes an improvement and, therefore, beyond that which statutory repair powers demands.
  16. These asset management conflicts are also found in the LA social rented sector. Two LAs described 'missing share' policies for the Housing Revenue Account (HRA) whereby the HRA underwrites the 'missing share' debt. It was suggested there is a parallel here between the HRA tenants underwriting 'missing shares', and RSL tenants potentially underwriting 'missing share' costs if the powers are extended to RSLs. Transferring private debt associated with Right-to-Buy owners common works contributions onto the HRA was unofficially long tolerated historically by both the SSHA and LAs.

#### **Stakeholder opinion on the potential RSL missing share power**

17. There was a clear split in opinion from RSLs on whether the 'missing share' power should be extended. Taking into consideration all views provided through both the survey and focus group there were more RSLs against (25) extending the power than there were for it (18). However, if the formal survey responses only are considered then more are in favour (18) than against (11), with three not providing an opinion either way.
18. The argument proffered **in favour of the RSL power** was around having another tool to address common repairs issues, and a concern about ruling out any option which increases the chances of debt recovery. This argument came from the majority of those responding to RSL survey, who were in favour of the power, and the minority within the focus groups.
19. RSLs arguments in favour emphasised concerns RSLs have about the resistance on the part of some LAs to use their 'missing share' powers currently, the different priorities that may exist between LAs and RSLs, in relation to quality, cost and timing, and restricted public sector resources which could mean that LAs could not actually contribute to 'missing share' powers. However, those in favour of the powers provided a range of caveats which were very similar to the reasons for those arguing against the powers.
20. The arguments posed **against the RSL power** were around financial risk and liability, consumer credit considerations, concerns over tenants potentially subsidising owners, administrative and legal burdens, conflict of interest, 'out-sourcing' of LA strategic responsibilities and a perceived Scottish Government responsibility to fund solutions to the problem of poor private sector housing conditions.
21. RSL representative organisations also showed some variation in emphasis in opinion. Glasgow and West of Scotland Forum (GWSF), whose members have a high proportion of older tenemental properties, as well as newer flats, suggested that on balance this potential power should not be denied, assuming the power was accompanied by specific guidance on operational detail and implementation. The Scottish Federation of Housing Associations

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(SFHA) suggested that if the power existed RSLs are likely to be very cautious over its application and would require robust assessment to decide on the balance of costs and benefits. It further voiced concern over the use of tenants' rent to subsidise owners' debts.

22. For the 12 LAs responding to the survey, all but one agreed with the merit of a power being extended to RSLs, but within focus groups most LAs saw more disadvantages than advantages.
23. The key argument proffered in favour of the RSL power, from a LA perspective was welcoming any additional method of cost recovery, and suggesting that sharing this power with RSLs would help to defray some of the administrative and financial burden of 'missing shares' currently borne by LAs.
24. For some of those LAs that were in favour of extending the power to RSLs, there was however a caveat that they would want a joint process with LAs – with LAs agreeing priorities and ensuring that the 'missing share' procedures were undertaken correctly and acting as final arbiter in scheme decisions to avoid conflicts of interest. There were other practical and legal concerns raised from those in favour, which were shared by those against the RSL power.
25. The arguments posed against the RSL power from LAs were around potential conflict of interest, concern over ability to implement the regulations correctly, and confusion caused in ranking of standard securities. This was an overriding concern from those LAs in favour and against the extension. It was argued that if RSLs are to have this power, then the regulations must provide clarity over ranking and that a Repayment Charge raised by a LA should still take precedence over the RSL's charge
26. A view expressed by ALACHO was that so long as the power was limited to those properties in which RSLs had a direct ownership interest and did not replicate the more general enforcement powers that more properly rest in the public sector, then subject to getting some concerns over operational detail resolved, then it made sense to add this mechanism to the range of options for addressing common repairs issues.
27. The Scottish Housing Regulator has been consulted on the possible extension of this power to RSLs. The SHR is aware that problems can arise for RSLs in undertaking common repairs. The SHR takes account of whatever legislation applies to RSLs in its regulation. It also confirmed it will regulate RSLs in accordance with its statutory objective to safeguard and promote the interests of tenants and other service users.
28. The view expressed by the Scottish Association of Landlords (SAL) was that while, in principal, they had no objection to such a provision being extended to social landlords they wondered whether, in practice, they would actually use such powers. They also raised the question as to whether RSLs carrying out common repairs works would be properly registered as factors, a legal requirement under the Property Factors (Scotland) Act, 2011.
29. The Property Managers Association of Scotland (PMAS) have considerable direct experience of working with local authorities in order to overcome 'missing share' issues when taking forward common repair works for other owners, but have been obstructed by the reluctance a minority of other owners, whether they be landlords or owner occupiers. These working arrangements have built up over the years, especially with Glasgow City Council, and they consider they work well. Although there can be coordination issues, in relation to timings of

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notices and the securing monies, given the demands of differing timeframes, most difficulties can be worked around. They were also conscious that the issue of standards can arise especially when the factor is acting for a housing association given they require SHQS standards whereas a private landlord only requires to meet the lesser PRS Repairing Standard. So while they had no objection to the extension of such powers, in common with SAL, they wondered how often such powers would be used, given the potential costs these repair works could accrue.

## Conclusions

30. 'Missing share' provisions do work within the narrow context they are designed to address. Thus they were seen by the participants to be valuable in extending the RSLs property maintenance toolkit. However, no-one saw them as a solution to the serious and growing problem of inadequate property maintenance and its management within commonly owned property.
31. Over and above the extending of the toolkit, arguments for and against tended to concentrate largely on potential debt burden and financial risk, whether from the local authorities' or RSLs' perspective. Potential reputational damage is also seen as key. Concerns were raised over whether it is appropriate for private owners' debt to be carried, in effect, by rent paying tenants. This also relates to the appropriateness of RSLs being able to place a debt on a property owner's title. While this is accepted for a local authority, it was seen as unusual to give a private entity such powers, and goes beyond existing debt recovery provisions, namely the placing of a first level debt order on the property title of an individual owner, without any recourse to the courts.
32. Overall, this consultation exercise has found that extension of the power may add to the current common repairs enforcement toolbox, for the odd occasion that an RSL might consider it worth using after the risks are fully assessed. But against this are the potentially considerable complications it may introduce in the public's mind. Perhaps encouraging more local authorities to use the powers they currently have might offer a better and more workable solution.
33. Finally, it can only ever be a 'sticking plaster', and a small one at that, for what is a much more serious issue; how do you engender a culture change on property maintenance, a task that will demand far more creative thinking and subsequent action.

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## **2. Introduction**

### **2.1 Brief and background**

The Scottish Government commissioned Anna Evans Housing Consultancy Ltd in association with Professor Douglas Robertson, Regina Serpa and Mandy Littlewood to carry out a consultation to seek views on a ‘missing share’ power for registered social landlords (RSLs).

Under the Tenements (Scotland) Act, 2004 a majority of owners in a tenement can make a binding decision to carry out maintenance and repairs. The Housing (Scotland) Act, 2014 introduced a discretionary power for a local authority (LA) to pay a ‘missing share’ on behalf of owners who are unable or unwilling to comply with the majority decision. The local authority is entitled to recover its costs and can use a repayment charge, a kind of security against the property.

The Housing (Scotland) Act, 2014 also includes a regulation-making power for Scottish Ministers to allow RSLs a similar discretionary power to pay and recover ‘missing shares’. Before Scottish Ministers can make regulations the Act states that they must consult bodies representing LAs and RSLs and “such other persons” as they think fit.

### **2.2 Methodology**

The consultation exercise has been wide ranging and has involved:

- A legislative review to scope out the background to this consultation;
- Analysis of the Scottish House Condition Survey (SHCS) to understand the extent of common repair issues in the RSL sector;
- Key player interviews to understand RSLs’ and LAs’ current position, and what methods they currently use to undertake common repairs;
- A survey across all Scottish RSLs and LAs to give the opportunity for all these stakeholders to have their say;
- Focus group consultation with LAs and RSLs;
- Individual consultation with representatives of the Scottish Federation of Housing Associations (SFHA), Glasgow and West of Scotland Forum of Housing Association (GWSF), the Association of Local Authority Chief Housing Officers (ALACHO), Scottish Association of Landlords (SAL), the Property Manager’s Association Scotland (PMAS), The Council of Mortgage Lenders (CML), and the Scottish Housing Regulator (SHR). CoSLA did not respond to the consultation invitation.

### **2.3 Key player interviews**

Key player interviews were undertaken to scope the consultation exercise and involved one ex-Member of the Scottish Parliament, and representatives from six RSLs and one LA.

### **2.4 Online survey**

All RSLs and LAs in Scotland were invited to complete an online survey on the ‘missing shares’ consultation in September 2016.

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A total of 32 RSLs (or their subsidiaries) responded to the survey from the total population of 161 RSLs in Scotland. That said, the responses represent housing associations with a large proportion of social housing property with common parts, and includes both large and small scale organisations, mostly operating in urban areas. They include RSLs with significant stock of traditional pre-1919 tenemental city centre properties, and those with more modern post-war properties where common repairs are required given the presence of Right-to-Buy owners and their successors whether home owners or private landlords.

The responding RSLs collectively own over 135,000 RSL properties, ranging in size of ownership from 366 to over 39,000. Of course, not these properties will involve common parts, but all the organisations responding to the survey owned properties with common parts, and had experience of dealing with common repairs. The Scottish House Condition Survey estimates there to be around 139,000 RSL properties with common parts. Many of the responding organisations also factor private dwellings with common elements. The RSL survey sought to establish RSLs' experience of dealing with common repairs, current mechanisms for debt recovery, and wider asset management considerations relating to the on-going management of common repairs.

In total 12 LAs responded to a separate survey, representing over a third of all LAs and included all the cities and other urban centres where common ownership and tenemental properties are prevalent. Out of the twelve, nine stated that the currently make use of 'missing share' powers. It should be noted that most authorities have had no need, or choose not to make use of these powers.

Responses to the survey have been anonymised, except in cases where organisations gave express consent to share information. Five organisations agreed to follow-up telephone interviews, two LAs and three RSLs.

## **2.5 Focus groups**

In addition to the online survey, three focus groups were undertaken with RSL representatives, and two focus groups were completed with LA representatives. All the participants in the focus groups came from factoring or repairs and maintenance backgrounds, or in the case of LAs, from private sector property condition and scheme of assistance roles.

Representatives from 26 RSLs and 18 LAs participated in the focus groups.

Taking account of all forms of participation, 43 RSLs and 19 LAs provided their views on the proposal.

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### 3. House conditions and ‘missing share’ legislation

#### 3.1 Introduction

The following section outlines the background and context to the ‘missing share’ powers. It sets out analysis of house condition and common repair issues for RSLs, and then provides background to the current ‘missing share’ legislation.

#### 3.2 The scale of common disrepair in the RSL sector

To examine the potential scale of the demand for the use of the discretionary power to pay and recover missing shares among RSLs, data was examined for common repairs in RSL properties from the Scottish House Condition Survey.

The Scottish House Condition Survey collects information on the condition of internal and external common parts during the physical survey. In order to generate a large enough sample to provide sufficient data for some broad analysis, the survey team grouped together data across the 2012 to 2014 datasets. That provides 395 cases across three years where a surveyor collected data on the condition of common parts, which when weighted is equivalent to around 139,400 properties in the RSL sector<sup>1</sup>.

Of the RSL properties with common parts, the physical survey found that –

- Two-thirds or 65% of the RSL properties with common parts had some form of disrepair recorded (c. 91,400 properties) – encompassing all types of disrepair, however minor<sup>2</sup>
- 36% had an urgent repair<sup>3</sup>, or urgent maintenance need (c. 50,300)
- Given the small sub-sample available for the analysis, we were only able to estimate that somewhat less than 8% of properties needing repairs to common parts (less than 10,500 properties) had elements with a short residual life – just 1-5 years of residual life even if outstanding repairs/maintenance were completed.
- A significantly smaller number of RSL properties would be expected to be subject to a repairs notice for the common parts. However, the numbers involved are too small to extrapolate an estimate from.
- The 2014 Scottish Household Survey Report<sup>4</sup> found that 3% of RSL properties had critical, urgent & extensive disrepair. If we assume a similar level of serious disrepair in the 139,400 RSL properties with common parts, that would constitute around 4,200 properties.

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<sup>1</sup> A grossing weight is applied to the SHCS data to provide dwelling estimates. The weight takes account of sampling/selection and also calibrates the sample based on dwelling age and type and urban/rural classification. More detail is provided in the Technical Reports - <http://www.gov.scot/Topics/Statistics/SHCS/Downloads>

<sup>2</sup> Any (basic) disrepair is the minimum threshold of disrepair measured in the SHCS and relates to any damage where a building element requires some repair beyond routine maintenance.

<sup>3</sup> Urgent disrepair relates to cases requiring immediate repair to prevent further damage or health and safety risk to occupants.

<sup>4</sup> Scottish House Condition Survey: 2014 Key Findings, Scottish Government, 2015 (Table 45)

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- In overall terms, disrepair in the RSL sector is similar to Scotland's housing stock as a whole (3% RSLs compared to 4% all stock with critical, urgent and extensive repairs) but better than LA/other public and private rented stock - both 7%. This may reflect the relative ages of the stock.

The estimates above are based on data collected over the three-year period, so may slightly over-estimate the scale of the issue, as we would expect that some of the disrepair captured in 2012 may have been dealt with by 2013 or 2014.

The estimates are also subject to the confidence limits for the survey. The SHCS is a sample survey and all survey figures are estimates of the true prevalence within the population and will contain some error associated with sampling variability. For a sub-sample of 395 cases, the confidence interval (excluding design effects) would be +/-1.4% for an estimated proportion of 3% and +/-4.7% for an estimated prevalence of 36% or 65%. That means the estimates above need to be considered as the mid-point of a range.

A conservative estimate of the scale of more pressing repair need in the RSL sector would be an estimate somewhere between the 4,200 properties with critical, urgent and extensive disrepair, based on the overall estimate for the RSL stock and the estimate of less than 10,500 properties where elements have a limited life even after repair work is completed. There are likely to be fewer properties in a poor enough condition to be subject to a repair order, but the data is too limited to allow us to estimate that.

These properties are a sub-set of the 50,300 properties with an urgent repair or maintenance requirement. That is, just under 1 in 10 properties with urgent common parts repair needs would appear to have more significant problems, or on-going issues. Of the remaining 46,000 or so properties, some may be repaired in time, while others may deteriorate without intervention to become more urgent, or be in need of extensive repair in future.

### 3.3 The types of repairs needed

With just 395 cases, of which 146 yield information about urgent repair needs, it is not advisable to generate estimates by the type of repair or maintenance elements. However, broadly speaking, the types of common elements most commonly in need of urgent attention are more commonly exterior elements.

- The most common works (each needed in a quarter of the properties with urgent repair or maintenance needs) are to gutters and down-pipes, soil waste and vent pipes and exterior wall finishes.
- The next most common groups of repairs (each needed in about 1 in 8 of the properties needing urgent works) are to roofs, flashings and exterior paintwork.
- The most common interior works identified as urgent were works to stairs, landings and balustrades, doors, screens, windows and roof-lights, communal security, bin stores and the décor of the common stairs.

In the small number of cases where it was expected that there should be a repair order, works were identified as needed to numerous elements including roofs, roof gutters and down-pipes, wall structure and wall finishes.

### 3.4 The experiences of tenants

The Scottish House Condition Survey also collects householder information from the accompanying social survey. There are questions about how repairs to common parts are organised and whether there have been recent issues in managing or organising repairs. In 2012, across tenures, around a third of households living in properties with common areas said that the local authority or housing association looks after the common parts<sup>5</sup>.

**Table 1: Who repairs and looks after common parts (all tenures)**

Who repairs and looks after common parts	%
Owners/Residents	21.6
Owners/Residents pay factor/property management company to arrange it	13.7
Council/housing association	34.6
Landlord	15.2
Owner pays cleaner/some-one	0.6
No-one	5.0
Other (specify)	0.9
Don't know	8.3
Total	100.0

SHS 2012 (SHCS module), base: all households in properties with common parts

Among local authority or RSL tenants, the vast majority had their repairs managed by the council or the housing association, or their landlord, while in around 1 in 10 cases there was some other arrangement. This might indicate that around 1 in 10 social rented properties with common parts are of mixed tenure.

Overall, 18% of those living in properties with common parts said that it was difficult to get common repairs undertaken and 7% said they knew of an instance where someone had failed to pay towards a repair. In half of those cases the repair had been done anyway, while in 1 in 4 cases the repair could not be done and in 1 in 4 cases there had been legal action of some sort.

Just 1% of social tenants with common areas said they were aware of someone not paying for works needed to common areas. However, this might underestimate the issue of non-payment if tenants are not aware of when repairs are needed.

### 3.5 Legislative context

The Housing (Scotland) Act, 2014 passed an amendment, in the name of Sarah Boyack, then MSP for Edinburgh Central, to allow missing share powers to be awarded to RSLs. The Scottish Government accepted the amendment on the proviso that there was a consultation exercise conducted to ascertain views on this provision, prior to any regulations being implemented.

<sup>5</sup> 2012 Scottish Household Survey Dataset – SHCS module data

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This amendment within the 2014 Act provisions (Part 6, Section 85, Subsection 3) was an amendment to the Tenement (Scotland) Act, 2004 where powers were made to address the issue of a non-cooperative owner in a common repair scheme with the other participating owners seeking to recover the 'missing share' costs. In such cases the other owners could collectively pay the 'missing share' costs, and then seek to recover them through a small claims case in the Sheriff Court. This has proved a fraught and challenging approach to pursue and is little, if ever, used. The local authority can, in such circumstances, use charging order powers to step in, pay the outstanding 'missing share' costs to allow the works to proceed, and should the owner still refuse to pay, the LA can place a charging order on the owners' property. This means the local authority has first call on monies when the owner's property is sold, which is a first ranking security and takes precedent over the claim of the mortgage provider. The LA may also charge an administrative charge.<sup>6</sup> The LA power does not require to take this decision through the Sherriff Court, and so there are no costs other than 'internal' legal and administrative costs. There is no appeal provision around the actual 'missing share' decision itself, although owners can appeal the against the actual scheme decision which must proceed any 'missing share' decision. However, owners can appeal to the Sherriff Court around the period of repayment and number of annual instalments.

Local authorities' power to charge for and recover 'missing shares' is made possible through the Housing (Scotland) Act, 2014 and the Housing (Scotland) Act, 2006. Through this consultation exercise it has been established that only a minority of LAs operate 'missing share' schemes. The Scottish Housing Network indicated that 7 LAs have published 'missing share' policies, and from the 12 LA consultation survey responses received, 9 stated that they use 'missing share' powers either under the Housing (Scotland) Act, 2014 or under Section 50 of the Housing (Scotland) Act, 2006. It should be noted that a key difference between the 2006 Act and 2014 Act is that LAs may charge administrative costs *and* interest through the 2006 Act, but administrative charges only through the 2014 Act. This is an important difference discussed later in the report, as interest can act as an additional 'stick', or reason for owners to avoid the LA using this power.

It is important to note that decisions about such works rest with its owners, as it is 'their' repair scheme, although as found through this consultation, where a social landlord is a majority owner, this can heavily influence the scope of works. Previously, the LA would have had a more direct say in the works, particularly where repair grants were involved. However, following the Housing (Scotland) Act, 2006 which, in effect, reduced the level and scope of improvement and repair grants, local authorities lost that leverage. Improvement grant awards had existed since the Housing (Scotland) Act, 1969 initially obliging local authorities to offer grant assistance where properties were deemed to be below the Tolerable Standard. Later under the Housing (Scotland) Act, 1974 repair grants were introduced as a means to assist with associated serious disrepair matter.

Now, under the Scheme of Assistance, local authorities are still obliged to offer assistance, but there is greater discretion in relation to grants and other forms of financial assistance. This consultation exercise has found that grant is still offered by some LAs as an incentive to move the works along, but not in all cases. The extent to which LAs are able to do this will depend on the budgets allocated for the Scheme of Assistance; the consultation with LAs identified the

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<sup>6</sup> It is at the discretion of the local authority what administrative costs are applied.

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vulnerability and progressive reduction of these budgets since the removal of 'ring-fencing' post the Concordat between Scottish Government and Scottish local authorities agreed in 2007.

Local authorities also have a duty to address Below Tolerable Standard (BTS) housing, a requirement that was also introduced under the Housing (Scotland) Act, 1969, which enacted the recommendations of the Cullingworth Report published the previous year. How they choose to address BTS housing is again at their discretion, as the previous automatic availability of enhanced grants for such housing no longer applies. Such powers are generally now pursued by either Environmental Health or Building Standards officers, as dedicated renewal units within Housing Departments have by now long since gone, with perhaps the exception of Glasgow which like Edinburgh has unique capital grant issuing powers from the Scottish Government.

Consultation with LAs showed that in many cases, where following a common repair being pursued using the 'missing share' procedures, when a repayment charge is progressed to recoup costs, the owner may often then accept responsibility, pay it, and avoids the charging order being placed on the property. That said, there are those who choose not to pay. Glasgow City Council provided an example of currently progressing its first sequestration proceeding on a private landlord with multiple debts of this type.

The Glasgow Factoring Commission (2013) in examining this issue made recommendations that thought should be given into how to better finance such works by bringing forward a Government-backed low cost loan fund; interest-only loans, advice on equity release; 3rd party acquisition and conversion to rent. They also argued for a simplification of redress procedure which would allow factors/property managers and owners to pursue those owners who will not pay through a fast-track housing court, arbitration panels and/or extension of powers of Homeowner Panel. They also suggested there was a need to strengthen the powers of debt recovery for local authority in respect to collecting debt incurred through application of such 'missing shares'.

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## 4. RSL missing share experiences

### 4.1 Introduction

The analysis below is based on all findings from consultation exercise conducted with RSLs and LAs undertaken through individual interviews, online survey and five focus groups. A total of 43 RSLs and 19 LAs participated in the consultation. The consultation approach is described in full in Section 2 above. A number of case studies are included to provide examples of practice and experience.

### 4.2 Barriers to achieving common repairs and recovering costs

The survey and focus group findings suggest that 'missing shares' is a '*significant and perennial concern*' for RSLs that own housing stock with common parts and in mixed ownership. RSLs state that the problem causes difficulty for them to fulfil statutory and regulatory requirements associated with Scottish Housing Quality Standard (SHQS) and the Energy Efficiency Standard for Social Housing (EESH), and for some organisations it presents a financial burden or potential financial risk. Consultees were asked what the main barriers were to delivering common repairs and to recovering common repair costs.

A strong theme from consultees is that owners are often unwilling to pay, but this is commonly associated with the owners' inability to pay. It was also explained that where RSLs had arranged the common repairs and paid costs upfront for owners, then the owners may agree to an initial repayment schedule, but subsequently fail to keep up with payments, either due to an inability to pay or because of some other difficulty with managing finances. Even where Court action had been taken, enforcing decree was not possible in many cases. One RSL gave an example of owners entering a debt arrangement scheme after the repairs had been agreed and commissioned, which meant the RSL had little prospect of covering the debts. Some RSLs discussed using a range of legal mechanisms to recover costs (further discussed below). The type of household unable to pay are often first-time buyers, households in negative equity, and older people that had bought their homes through Right-to-Buy. RSLs noted that owners may be unemployed, or retired, or do not have bank accounts which makes arrestment of wages or accounts impossible. Access to credit poses a problem for lower income and older households for repair works. The issues for RSLs providing credit and requiring consumer credit licences were discussed at length in one of the focus groups (see below).

Another barrier to achieving common repairs is around the lack of owners' knowledge, but also resistance to taking 'ownership' of common repair responsibility. RSLs and LAs identified that a change in culture is required, and discussed the role that solicitors and surveyors could play by ensuring the common repair arrangements are properly set down within the Home Report requirements within the conveyancing process as this would help educate purchasers over common repair responsibilities. Typically, that part of the Home Report is left blank. Many RSLs spoke about the lack of understanding and a 'dependency culture', and there was a common opinion that Right-to-Buy owners are particularly averse to paying for common repairs, which derives from their lack of understanding and education about the actual responsibilities they have taken on and the actual cost of property repairs, when they bought the discounted property some time ago. The dependency culture was defined as people expecting the Council (often seen as the landlord regardless of whether it is the Council or RSL) to pay for all housing repairs, internal and external, including those to common parts. One LA representative recounted the sentiments

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of an owner who had bought a council property: *“I paid £6,000 for this house, and now you are asking me to pay the same again to repair the roof!”*.

Different types of ownership, particularly where private landlords are involved is also commonly identified as a barrier to common repair and cost recovery, with private landlords choosing to ‘sweat’ the property asset, or landlords being either absent, or difficult locate. It was noted that the dramatic increase in individual private landlords, over the last 10 years, with an associated increase in non-payment of factoring fees and repair bills has become a growing problem.

Respondents also mentioned the difficulty of recovering ‘missing shares’ from commercial owners, who rarely support works, but who can often carry a heavy common repair proportion, so if they choose to be uncooperative it makes achieving common repairs very difficult. RSLs spoke about the difficulties experienced where they have a minority share, and several discussed developing and pursuing stock disposal policies, typically where there is one or two RSL property remaining in the block or stair. In these cases, tenants are offered a transfer, or the RSL waits for the property to be vacated before selling on the open market, following consent from SHR for disposal. Sale proceeds are then used to acquire a more suitable alternative property, or to contribute to new build or improvement programmes.

A small number of survey respondents indicated that they had administrative barriers to debt recovery that could only be resolved if there was dedicated internal administration teams, and/or strengthening policy and procedure. This was reiterated through the focus groups where some RSLs talked about the amount of time involved in pursuing common repair debt. Some RSLs discussed that now they take a much harder line, pursuing common repair debts earlier, which meant increasing staffing resources and costs, but such action had achieved a big difference to the amount of debt being recovered.

#### 4.3 **Current debt recovery mechanisms used by RSLs for missing shares**

Of the 32 RSL organisations responding to the survey, 31 respondents reported having to recover common repair debts from owners, with 20 RSLs currently pursuing owners for ‘missing shares’. Participants were asked about the mechanisms employed to recover such costs: half confirmed that debt is recovered through internal processes, with the other half also having to resort to small claims court action. About a third of this group also rely on external debt collection agencies to recover costs. Most respondents stated that they do not have a specific policy relating to the recovery of ‘missing shares’. The policies and procedures used include: factoring debt recovery procedures; general policies within written statement of services; property management policies; communal repairs policies; and applying standard internal and external debt recovery procedures.

Consultees agreed that no ‘one size fits all’, with different mechanisms employed depending on the type of work undertaken, the number of co-owners involved, and the value of works undertaken. Half of all survey respondents explained having to modify existing policies and procedures to overcome the barriers to recovering costs associated with undertaking common repairs. These changes included:

- Providing early information to owners, with advice on financing
- Earlier recovery action, including increasing letters, phone and face-to-face contact

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- Developing flexible payment options as an alternative to court action
  - Debts for large maintenance projects pursued by the RSL rather than factoring subsidiary
  - Contractual Factoring Agreement, rather than one based on the properties titles
  - Greater use of Inhibition Notices and Notices of Potential Liability for Costs

The focus group participants discussed the fact that Notices of Potential Liability for repairs (NOPLs)<sup>7</sup> and Inhibition Notices<sup>8</sup> to prevent the sale or transfer of ownership until the debts are repaid are, in effect, types of ‘missing share’ schemes, but in the case of NOPLs they have shorter timeframes of three years and renewal requirements. However, these consultees also noted that recharging orders placed by LAs are considered to have greater ‘weight’ and ‘status’. This is due to the perceived ‘authority’ which comes from the LA, the flexibility over the number of years that the LA can use for the recharging order, and the administrative and interest charge costs that can be charged with the LA ‘missing share’ powers, which can act as a powerful incentive for owners to get involved in advance of a recharging order being served.

However, while some advantages were raised about the LA ‘missing share’ powers, one problem highlighted was around the amount of time that these procedures can take to put in place and the impact this can have on the timing and associated funding of maintenance programmes. The judgement over what ‘missing share’ route to take appears to rest on the cost of the repair with the lower cost repairs often covered by the factor/RSL upfront (although not in all cases), and more expensive ‘missing share’ works routed through the LA in some way, where this is an option. Most survey respondents and RSL focus group participants reported paying for common repair ‘missing shares’ up front, and as a result either increasing their debt position, or covering costs through the RSL reserves, until that debt was recovered. Otherwise, the repair works are just left by RSLs, for reasons of financial risk.

Legal processes and costs associated with pursuing debt claims through the small claims or other court action pose one of the biggest issues to recovering costs of ‘missing shares’. RSLs spoke about judgements being taken over the scale of costs which make it viable to taking common repairs through the Sheriff Court. One RSL suggested the common repair debt needed to be at least £1,000, leaving the majority of smaller debts having to be recovered through internal processes, or external debt recovery companies. Another RSL stated that they only used NOPLs as taking owners to court: “*was like throwing money down the drain, unless you know the owner has assets and you can get hold of them*”. From this perspective, some thought extending recharging powers to RSLs was seen as a potential solution by removing the need to fund court action. However, this may not compensate for the financial risk of waiting extended periods until the debt could be recovered.

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<sup>7</sup> Notice of Potential Liability for repairs makes a selling owner and a new owner jointly responsible for the repair costs. Any owner in the same building, or property manager can serve this notice. The notice lasts 3 years but can be renewed. Typically, it costs around £50-60 in legal fees and £130 to renew every 3 years.

<sup>8</sup> An Inhibition can be taken out against an owner to stop them selling or transferring ownership of the property, or take out any secured loans on the property until you pay off the debt and the creditor discharges the inhibition

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One RSL provided examples of using sequestration, arresting bank accounts and wages, and even taken ownership of a car to recover costs. However, even where decree is granted, many RSLs talked about the difficulty in recovering costs due to lack of information about owners, bank details, their employers and mortgage providers. It was noted that RSLs do not have the wider powers that LAs have to source information to trace owners (e.g. council tax, sourcing title deeds, approaching lenders etc.) or the ability to combine these with these much wider powers including private landlord registration, and the potential review of the associated ‘fit and proper’ person test.

Very few RSLs said that their organisation would cover the cost of ‘missing shares’ without pursuing repayment. It was noted that failure to pursue arrears would have implications for RSLs’ charitable status, loan covenants, and also have ethical implications concerning the use of tenant rent payments to pay for investment in an owner’s property. Exceptional examples of writing off debt, included where owners had entered into a trust deed, a debt relief order, or the individual was declared bankrupt. A number of RSLs stated that in their experience these circumstances were increasing, making it more difficult to recover ‘missing share’ debts.

Castle Rock Edinvar Housing Association uses a range of measures to try and recover costs, such as sending solicitor letters to owners, but have not as yet taken any small claims action. The RSL has a dedicated factoring team to facilitate common area repairs. In instances where work was undertaken where the RSL has had to pay the upfront costs and the owners failed to cooperate, the organisation has relied on the legal process of applying an Inhibition Notice that places a prohibition on the sale of the property to compel the owner to engage in a repayment plan with the RSL.

New Gorbals Housing Association factors for over 1,800 properties. To date, the RSL has never had to pay upfront for repairs and has not had an issue with ‘missing shares’. NGHA has a debt recovery process in line with title deeds. The vast majority of their factored stock is relatively new and built within the last 20 years, so these properties have strong title deeds which require cyclical maintenance funds to address common repair. Older properties, however, do not have such a sinking fund arrangement and may present an issue in the future. These properties were transferred from Scottish Homes (ex-SSHA stock) and involved considerable capital investment up-front as part of the transfer deal.

#### 4.4 RSLs’ experience in facilitating common repairs and use of LA ‘missing share’ powers

Survey responses and focus group discussion suggested that RSLs make every attempt to work with co-owners in achieving a mutually agreeable solution, and to avoid imposing debt unnecessarily on common owners. Respondents referred to proprietor meetings which are “*notoriously poorly attended*” and require significant amounts of time and resource to try and get owners involved. It was noted that for tenemental stock, in particular, individual title deeds often set out different responsibilities for different properties within the same block, which makes the RSL’s and factor’s job that much harder than it should be. This is less of an issue for new build stock. Variations within the title deeds on flats within the same block is a common feature in Edinburgh, depending on when the flat sale, or ‘break off’ took place. Within Glasgow, given a differing landlord heritage, with fewer larger owners, flats a tended to have an accompanying

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Deed of Conditions which covered the factoring arrangements and this transferred to the home owners upon the properties sale from a rented portfolio.

RSLs varied over whether they will pay for repairs upfront and then pursue owners for the costs, or whether they require the funds upfront from owners, or in stages before works are commissioned. This decision often depends on the scale of the works, although some RSLs stated they have a policy of not getting involved in non-emergency common repairs regardless of cost, if owners do not pay upfront. For non-emergency repair and maintenance, most RSLs stated that they first consult with other owners about necessary works, often taking the lead in obtaining quotes to facilitate joint decision-making, even in circumstances where they were not the majority owner. In circumstances where the RSL is the minority owner, these were identified as being very difficult to deal with, to the extent that many RSLs said they chose to '*walk away*' and leave the repair.

The involvement of local authorities is seen as key in obtaining payment prior to owners incurring debt with the RSLs, and as a means to avoid disputes in relation to 'missing shares'. Methods include involving the local authority by asking them to write a formal letter informing owners of their financial and legal responsibilities. In some cases the local authority case officers get involved early on through pre-intervention work, and used factors (where this is not the RSL) to facilitate discussions to encourage early engagement and signing up to payment plans. Success of these methods often depends upon individual relationships with local authorities. Some frustration was expressed by a number of RSLs over the lack of consistency of approaches pursued by different LAs, particularly from those RSLs working across a number of different LA jurisdictions. A number of RSLs identified examples where the LA provided grants ranging from 35% to 50% grant, which proved very useful in facilitating common repair participation, sometimes used in conjunction with the LA's 'missing share' powers, whereas other RSLs noted examples where no grant funding was forthcoming from the LA, just limited advice and assistance, and no LA 'missing share' policy.

Reference was also made to use of sinking funds which a minority of RSLs have put in place within the title deeds, although almost exclusively within newly built property given that altering existing titles is a very difficult and expensive process. Owners in such cases pay into a sinking fund for repairs, and the funds remain there even if the owner moves on. Many consultees commented that this mechanism should be mandatory, and should be used as a means of changing both the culture and standard approach to common repairs. It was noted that the provisions of the Tenement (Scotland) Act, 2004 talks about establishing sinking funds, but this has to be through majority agreement and many factor consultees agreed that it is very difficult to achieve amongst owners of older properties due to the variety in standard of title deeds, the cost of getting all parties (owners and their lenders) to agree to any title changes and the more transient nature of people living in flats, who are often unwilling to invest in the structure of their property.

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A number of RSLs discussed the use of 'missing share' schemes through their local authorities, and for all of these RSLs this was seen as an effective means of facilitating common repairs, although it does take time. These always appear to be used by the LAs as the very last resort after other forms of encouragement and pre-intervention methods have been exhausted. That said, a number of LAs also make use of statutory notices.

For one community-based housing association in Glasgow with 4,500 stock, 'missing shares' has not been a major problem, despite the majority of its stock being inner city tenemental with common elements. It has a strong policy and procedure on common repairs, does not always lead on projects, and repairs are tailored by affected owners. Where owners are happy for the RSL to take the lead it holds meetings, gets the quotes, takes them back to the owners and makes recommendations. In the past 11 years the RSL has only had to make an application to Glasgow City Council's Missing Shares Scheme on two occasions. On one of the schemes the three 'missing owners' were older people, who had bought their property through RTB and could not afford the essential repairs. In such cases intervention from the Council is highly effective in ensuring funds were made available for necessary works without having to incur any upfront costs for the RSL. The 'missing share' money required for the repairs were paid into the owners' maintenance account and the Council directly pursued these owners for the recovery of their full share of costs, plus a 15% fee. If the owners did not pay at the point of completion of works, then the owners pay the 15% plus annual interest at the Bank of England base rate. This RSL does not think acquiring 'missing share' powers for RSLs was the 'magic wand' needed, as it is a small community-based organisation and does not have the resources to put cash upfront into common repair projects.

However, it was noted from the survey and focus group discussions that only a minority of LAs operate 'missing share' schemes: as noted above, the Scottish Housing Network suggests that only seven LAs have published 'missing share' policies and from this consultation we have found from the 12 LA survey responses only nine LAs use 'missing share' powers, either through the 2006 or 2014 Act – although most consulted do not yet have procedures in place for the 2014 Act.

There are also other mechanisms being used by LAs: Notice of Potential Liability; Scheme of Assistance funding; debt recovery procedures under the Tenements (Scotland) Act, 2004; Edinburgh's Confirmation Act, 1991; and a range of other notices (Defective Buildings Notice, Works Notice, Closing Orders, Demolition Orders). Several respondents from Glasgow specifically mentioned its Missing Share Scheme as minimising the need for RSLs to recover debt from common owners, and the positive outcomes achieved. By comparison, a number of other RSLs talked about LAs' resistance to use 'missing share' powers due to lack of funding to support a scheme. This was confirmed in focus groups by several LA representatives. where private housing staff were pressing for use of 'missing share' and recharging orders, but finance and corporate officials were resisting this move because of concerns around financial resources and long-term risk.

LAs involved in this consultation that made use of 'missing share' powers, consider the mechanism to be very effective. In all examples discussed, the emphasis is on encouraging owners to take responsibility for their property, through participating in the work proposed by the RSL. The aim is to ensure that payment is made before a charge has to be put on the property: *"It's amazing how the threat of use of 'missing shares' makes owners change their mind – we use*

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*the threat of the charge on the property, the administrative charge and interest as a stick to get them involved.*” It was also identified as being a useful leverage with lenders, so that if an owner has been declined additional borrowing to fund the repairs, then the LA can contact the lender, or provide proof to show that a first ranking security charge may be taken on the property if the owner does not cooperate. The administrative charges are used to cover the LAs’ costs, and interest rates charged normally around base rate, or the prevailing LA debt recovery rate. There is also registration fees payable for the Register of Sasines to record the charge over the property.

Some LAs noted that using an interest rate is also a means to ensure that there is a self-financing pot to fund future projects. One LA stated that there was an advantage in using the 2006 Act over the 2014 Act (amendment to Tenements (Scotland) Act, 2004) as their understanding was that the 2004 Act does not allow LAs to charge interest; given the interest charge also acts as another incentive to ensure owner compliance. It was pointed out that some owners who have no access to credit will use this method to obtain a loan for the works. The interest charged is the rate at the time that the repayment is agreed e.g. 4% of 30 years, and does not vary over the period of the loan.

An example of the effectiveness of the power can be seen from evidence provided by Glasgow. Since February 2012 GCC has paid out £497,295 which has allowed £4,226,251 worth of common repairs to be undertaken across the city. In addition, by taking forward these actions a further £2,091, 485 worth of common repair works have progressed without the Council having to draw on their own monies. The threat of action, and the surcharging has encouraged parties to get works carried out.

LAs outlined that the flexibility of timescales for repayment is key and is often applied according to the circumstances of the owner. One example was that a LA would be happy to use a 30 year repayment for an older lower income household, whereas it may be much firmer on a private landlord and expect repayment within five years. The point at which the charging order is placed also varies by LA; some will give owners the option to enter a repayment plan, but place the charge on the property in the case of default, whereas others will put the charge on the property on completion of works and at the start of the repayment plan. The decision over which approach is taken often depends on the scale of the works, but LAs did also highlight the risk of not placing a charge immediately as owners may sell the property. A number of examples of charges are provided below.

### Examples of charges for missing share schemes

*Aberdeen City Council* – Admin charge flat rate of £50, interest rate currently 4%, plus registration fees of £60 for placing charge on the property.

*City of Edinburgh Council* – pilot ‘missing share’ scheme – Admin charge 10% of ‘missing share’ works cost, interest rate currently at 8%, plus registration fees of £60 for placing charge on the property.

*Dundee City Council* – Admin charge flat rate of £75, interest rate currently 4.13%, plus registration fees of £60 for placing charge on the property.

*Glasgow City Council* – Admin charge 15% of ‘missing share’ works cost, interest rate currently at base rate, plus registration fees of £60 for placing charge on the property.

#### Example of a missing share costs provided by Dundee City Council:

Amount for ‘missing share’ is	£5,000.00
Admin charge	£75.00
Cost of registering Repayment Charge is	<u>£60.00</u>
	£5,135.00
Multiplied by interest rate of 4.13% =	<u>£212.01</u>
Total repayable amount	<b><u>£5,347.01</u></b>

This can then be divided by between 5 to 30 years.

For Example:

For 5 years the annuity is **£1,069.40**

For 30 years the annuity is **£178.23**

## 4.5 Asset management and customer service

The survey and focus group findings suggest ‘missing shares’ do impact on some RSLs’ asset management programmes. As discussed above, this has resulted in some cases of disposal strategies where RSLs are unable to meet the SHQS standard, particularly where they are minority owners within a block. RSLs have also made decisions to revise or defer particular maintenance programmes. Out of the 32 RSLs responding to the survey, 23 stated they had deferred necessary work to common owned property. One explained how the organisation would plan for more enhanced external improvements, where they were the majority owner, and another

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described how a large refurbishment programme was revised to exclude entire blocks where there was mixed ownership. A further RSL explained how the scope of repairs programme was reduced on the assumption that shares would not be recovered from all owners. Here there was an initial plan to replace doors to the front and back of the property, but then after consulting with neighbours decided to minimise risk by only replacing the front door. Discussion in one of the focus group suggested ‘missing shares’ was resulted in a ‘two tier’ service for RSL tenants paying the same rent – with those living in mixed ownership blocks where the landlord was in the majority more often benefitting from better housing standards, as a result of maintenance programmes, while those in mixed blocks, where their landlord was in the minority within the block, suffering from the impact of uncooperative owners.

It should be noted that these RSL experiences are also commonly found within the LA social housing sector, with the LA focus groups discussing the impact of ‘missing shares’ on LA tenants. Again those tenants in mixed ownership, where the LA landlord is in the minority, often experience poorer conditions compared to those that are not. Two LAs described policies for the Housing Revenue Account (HRA) ‘missing shares’ (see below). It was suggested there is a parallel here between the HRA tenants underwriting ‘missing shares’, and RSL tenants potentially underwriting similar ‘missing share’ costs if these powers are extended to RSLs.

One LA has developed a ‘missing share’ policy specifically where there is mixed ownership with majority ownership in HRA blocks or estates. Here the Council is still using the repayment charge and ‘missing share’ process through Section 50 of the Housing (Scotland) Act, 2006, but it is the HRA which is specifying the works, procuring the works and with the debt coming into the HRA and underwrites the debt. This avoids the situation where all ‘missing share’ General Fund (GF) funding is soaked up with HRA mixed ownership works, and enables the GF funding to be focused solely on private ‘missing share’ common repairs.

RSLs’ perspective on asset management should be compared to opinion from some LAs on how some RSLs approach common repairs. A number of LA consultees suggested that in their experience, RSLs had been found to ‘over specify’ the works required if they were the majority owner and had taken the lead in the repair work. It was suggested that if owners had been leading the process they would have been able to secure lower prices. Two LA consultees gave examples of LA intervention in these circumstances which helped deliver lower the costs for owners. Other LAs suggested that some of the RSL cyclical repair work was not essential repair and was sometimes undertaken in advance of when it was required and so the LA considered that to be improvements, rather than repairs. Improvements are not eligible under the 2014 Act legislation with the exception of some energy efficiency works. This highlights the tensions between RSLs’ statutory and regulatory requirements under SHQS and EESSH, their factoring roles whereas the private rented sector Repairing Standard applies, and their co-ownership role where they must come to a scheme agreement with other owners. This, of course, is not a new debate, given it was a regular issue when undertaking tenement property repairs using grant monies, under the 1974 Act provisions.

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## 5. Stakeholder opinion on the potential RSL missing share power

### 5.1 Introduction

The following discussion sets out stakeholder opinions over whether RSLs should have the 'missing power' share. This was established through individual interview, consultation survey and focus groups. Consultees are categorised as RSLs and their representative organisations, local authorities and their representative organisations, the Scottish Housing Regulator (SHR), the Scottish Association of Landlords (SAL), the Property Manager's Association Scotland (PMAS), and the Council of Mortgage Lenders (CML).

### 5.2 RSLs and representative organisations

RSL participants were asked if they were likely to use the new recharging order to recover costs of 'missing shares'. Most RSL survey respondents explained that, in principle, they would welcome any additional powers that facilitate the progressing of maintenance works and the recovery of any associated debt, but there were many caveats offered to these responses. There was quite a different emphasis in the RSL focus groups, where most participants showed strong opposition to RSLs having a charging power, although a minority stated that they would like to have the power, but only as a last resort. While there was a difference in response, the number of qualifications to the positive responses and concerns raised in the survey suggests that concerns are more prominent within the RSL community.

The argument posed **in favour of the RSL power** was around having another tool to address common repairs issues, and concern about the risk of ruling out any option which increases their chances of debt recovery. This argument came from the majority of those responding to RSL survey who were in favour of the power, and the minority in the focus groups. This argument emphasised concerns that RSLs have about the resistance on the part of some LAs to use their 'missing share' powers currently (as discussed in the section above), the different timing and quality priorities that may exist between LAs and RSLs and the impact restricted public sector resources could have in restricting LAs capacity to engage with 'missing share' powers. In the majority of cases the RSLs in favour of using the power stated they would do so only in exceptional circumstances, but would still like to have the option.

Some RSLs in favour of the power also suggested that a more fundamental solution is required to address long-term deterioration of properties, such as some form of subsidy or funding pot so that RSLs are not expected to front fund owners' works, regardless of whether there is a 'missing share' power or not.

The arguments posed **against the RSL power** centred on financial risk and liability, consumer credit considerations, concerns over tenants potentially subsidising owners, administrative and legal cost burdens, conflict of interest, 'out-sourcing' of LA strategic responsibilities and perceived Scottish Government responsibility to fund solutions to the problem of poor private sector housing conditions. These are each further discussed below.

Many RSLs responding to the survey and in the focus groups discussed the fact that the 'missing share' powers would not address the fundamental problem of housing associations having to pay up front for the actual costs, and the associated financial risk this brings. Smaller RSLs stated that they were unlikely to use this power for this very reason and where major works are

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concerned, RSLs are still unlikely to initiate repairs because of the length of time it will realistically take to recover such costs. One respondent explained that RSLs might engage in a 'brutal assessment' of which households are likely to sell their home in the near future, such as an elderly owner, thus the debt would be recovered, but could deny others this option where the financial risks looked greater over a longer time period. Another RSL stated their organisation might be able to carry only one of two large 'missing shares', whereas the large RSLs may be able to take on greater financial risk.

RSLs' discussions around financial risk and debt repayment arrangements referred to consumer credit regulations, where a licence has to be in place with the Financial Conduct Authority. This was identified as a potential barrier to extending 'missing share' powers to RSLs, although it should be noted that some RSLs already have such a licence in place for repayments and credit advice for a range of different purposes, beyond that of 'missing share' debt. Some RSLs in the focus group stated that consumer credit licences are required to be in place where they are providing debt repayment options beyond one year, but this was subject to debate by some participants. This area would have to be subject to legal clarification, but should it be confirmed, this would present an additional financial and legal burden on RSLs thinking of using this power.

Many RSLs held the view that the use of funds for 'missing shares' was effectively utilising tenants' rents to subsidise owners' costs. This was supported by RSLs' arguments about the SHR's increasing attention on affordability of rents, and value for money of services for tenants. A small minority of respondents countered this by arguing that charging orders were one way to transfer liability to owners, help improve conditions for tenants, while assisting a change of culture and attitude about owners' responsibilities for common repairs over the long term.

Some respondents were concerned that these potential new powers presented an undue administrative burden, particularly to smaller organisations with limited staff and expertise. While one respondent considered that the new powers should be more straightforward in administrative terms compared to court action or Notices of Potential Liability for costs, others suggested that initiating these new powers would incur upfront legal costs to ensure adequate policies and procedures are in place to protect both owners and tenants. It was suggested that to mitigate this cost, the Scottish Government would need to issue detailed guidance to RSLs on how to use the new powers. This point was also raised by LA representatives who suggested if such a power was to be considered then detailed work would need to be undertaken on implementation, including consultation with LAs on each local scheme and potential conflicts with existing LA schemes. One of the most important potential conflicts is the ranking of standard security where currently the LA has first rank. The question therefore arose just what would the position be if both the LA and a RSL put a charge over the same property?

The conflict of interest issue was raised by RSLs that considered there may be a tension between the works that the RSL wanted to undertake to meet its statutory and regulatory requirements for social tenants, and the works which would be strictly required under the legislation (as discussed above). Who would be arbiter where the RSL had the 'missing share' power?

A significant minority of RSLs consultees considered that these 'missing share' powers are better placed with LAs, given their overarching strategic responsibility for house conditions, wider statutory powers and perceived 'authority', all of which are considered to bring greater leverage to achieving cooperation from owners. This also includes registration powers over private

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landlords. Some consultees also felt extending these powers also puts RSLs into a grey area, as to what extent are they private and public entities, and thought this may have some implications for the Regulator. Finally, some were sceptical that these new powers represented a way in which LAs could effectively shift financial risk onto RSLs and away from themselves.

It was generally agreed that the ability of RSLs to issue charging orders does not address the fundamental problems associated with facilitating common repairs, which are considered to be around owners facing up to their repairing responsibilities, affordability and access to finance to enable repairs. Consultees stated that more work is required by Scottish Government to find ways to finance, to incentivise or require owners funding and taking responsibility for common repairs. As one respondent explained, this is: “*not the magic wand we are looking for*”.

The **Glasgow and West of Scotland Forum (GWSF)** considered the balance of arguments put forward by RSLs, namely the potential advantage of the ‘missing share’ power adding another tool to recovering common repair debts, compared to the counter arguments over financial risk, use of tenants’ money to carry owner debt, consumer credit arrangements, administrative and legal burdens, and potential out-sourcing of LA responsibilities. It was noted by GWSF that the existing arrangements for debt recovery already carries assessment of financial risk and use of RSLs’ resources, and so the new power should be no different to existing arrangements required to manage both debt and credit for owners. The administrative and legal burdens may actually be lessened through use of this power by reducing the need to go to court. The one potential area of concern from GWSF’s perspective would be where LAs potentially withdrew their discretionary ‘missing share’ powers, expecting RSLs to undertake this role when they had an interest in the property. On balance GSWF concluded that the option for RSLs to use this power should not be denied, assuming the organisation had considered all risks and benefits for tenants. It also considered that detailed guidance would be required for implementation.

The **Scottish Federation of Housing Association (SFHA)** considered the arguments raised by RSLs for and against the potential ‘missing share’ power. Its view is that RSL members would need to undertake robust risk assessments, considering whether the potential benefits delivered from individual common repair schemes would outweigh the potential risks to the wider organisation and its tenants. One of the key concerns would be around RSL resources, and ultimately tenants’ rents covering owners’ debts. The SFHA considered that most RSLs would be very cautious about using such a power, if it existed, and would more likely wish to have recourse to LA ‘missing share’ powers.

### 5.3 Local authorities and representative organisations

LA participants were asked if they agreed with the extension of ‘missing share’ powers to RSLs. Like the RSLs responses, there were quite different views expressed between the survey responses and the focus groups debate and opinions. For the 12 LAs responding to the survey, all but one agreed with this power being extended to RSLs, whereas in the focus groups most LAs having debated the issue concurred more on the disadvantages than advantages. It should be noted that the difference in opinion could be explained between the different perspective of officers signing off an ‘official’ local authority survey responses, and those participating within the focus groups.

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The key argument posed **in favour of RSLs having the power expressed by LAs** was a welcoming of any additional method of cost recovery which would help to defray some of the administrative and financial burden of ‘missing shares’ currently borne by LAs.

A significant minority of LAs, in the focus groups, took the view that RSLs have significant resources that could be used to cover any ‘missing share’ debts. One respondent stated: *“they use private finance for new build and repair programmes, why can’t they it to cover some ‘missing shares’?”*. This was suggested as a wise use of resources if RSLs are looking to protect their own assets, particularly if they have a majority share within a block. It was suggested this was no different to the HRA taking the same risk within its maintenance programmes, and that the scheme should be self-financing with adoption of the correct interest rates and administrative charges.

For some of those LAs that were in favour of extending the power to RSLs, there was a caveat that they would want it to be a joint process with LAs – with LAs agreeing priorities and ensuring that the ‘missing share’ procedures were undertaken correctly and acting as final arbiter in scheme decisions to avoid conflicts of interest. There were other practical and legal concerns raised from those in favour of the power for RSLs, as discussed below.

The arguments posed **against the RSL having this power from a LA perspective** were focused around potential conflicts of interest, concern over ability to implement the regulations correctly, and a potential confusion caused in the ranking of standard securities.

The potential conflict of interest arguments were around the capacity in which RSLs would use the ‘missing share’ powers, and in the specification of such works. One LA questioned why RSLs should be given this power over any other owner, landlord, or property factor, and why there should be a two-tier system between the LA and RSLs in this one specific area. A number of other LAs raised concern over conflict of interest in specifying the repair works, with RSLs perceived to have tendency as landlords being to over-specify works, in line with their landlord responsibilities, and not in line with private sector housing law. This concern was also identified by some RSLs, as discussed above.

A number of LAs also raised concern over the ability of RSLs to administer the ‘missing share’ powers. For those areas that operate ‘missing share’ schemes, LAs have established policy and procedures in place to ensure the charging orders are issued fairly, and in accordance with the law. These consultees questioned whether RSLs could do this correctly, and questioned the value of replicating a system that already operates within a local authority area.

However, an overriding concern from those LAs in favour and against the extension was the ranking of the security, when the charge is taken out against the property. It was argued that if RSLs are to have this power, then the regulations must provide clarity over ranking and that a Repayment Charge raised by a LA should still take precedence over the RSL’s charge.

The view expressed by ALACHO was that so long as the power was limited to those properties in which RSLs had an ownership interest and did not replicate the more general enforcement powers that more properly rest within the public sector, then subject to getting some concerns over operational detail resolved, then it made sense to add this mechanism to the range of options for addressing common repairs issues.

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#### 5.4 **The Scottish Housing Regulator**

The Scottish Housing Regulator has been consulted on the possible extension of this power to RSLs. The SHR is aware that problems can arise for RSLs in undertaking common repairs. The SHR takes account of whatever legislation applies to RSLs in its regulation. It also confirmed it will regulate RSLs in accordance with its statutory objective to safeguard and promote the interests of tenants and other service users.

#### 5.5 **Scottish Association of Landlords**

The opinion proffered by the Scottish Association of Landlords (SAL) was that while, in principal, they had no objection to such a provision being extended to social landlords they wondered whether, in practice, RSLs would actually make use the powers. Again this tied back to a perception about their exposure to financial risk, given that many RSLs were small organisations, and had a different financial standing when compared to a local authority.

SAL also raised the question as to whether RSLs carrying out such common repairs works would all be registered as factors under the requirements of the Property Factors (Scotland) Act, 2011. Under that law all those engaged in undertaking common repairs on multi-owned property require to be registered as factors, but that had not always been the case in the past.

#### 5.6 **Property Managers' Association Scotland**

Property Managers Association of Scotland (PMAS) have direct experience of working with local authorities who pursue 'missing share' powers in order to take forward common repair works specified by the majority of owners within a block, but which have been obstructed in their execution by the reluctance of a minority owner or owners, whether private landlords or owner occupiers. These arrangements have been built of long-standing working practices between factors, and one authority, in particular, Glasgow City Council. While they acknowledge there can be coordination issues in relation to the actual timing of notices and the securing of monies, these can generally be sorted out amicably. That said, both parties do operate within differing time constraints given building contracts and Council committee cycles may not tie when progressing a project.

Further, one PMAS member who had direct experience of providing a factoring services for an RSL was also conscious that the issue of standards does arise, given the differences that can arise between seeking to meet the SHQS and that of the PRS Repairing Standard. That said, mention was made on an on-going Scottish Government Working party that was considering the need for some standardisation in respect of house conditions across tenures.

So overall, while they had no objection to the extension of such powers, they in common with SAL wondered how often it would actually be used, given the potential debt such works could accrue to small landlord organisation.

#### 5.7 **Council of Mortgage Lenders**

The position adopted by the Council of Mortgage lenders (CML) was very clear. If the schemes legislative frame replicates that currently employed by local authorities, one that lenders are already familiar with, then they would be quite happy to see 'missing share' powers extended to RSLs. Such additional powers were seen to offer a completeness, in that serious common repair issues, where the RSL has factoring responsibilities, can be resolved within blocks thus ensuring that the fabric of the building is secured for all those with an interest in that specific property.

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These powers, to date, appear to offer a necessary 'stick' to get matters moving, and is a procedure which is both clear and well understood. For owners not participating extra costs are incurred, and an additional liability is placed against the property. On the issue of placing a first security on the property of a non-participating owner, there was no objection, although it was noted the scale of such activity to date has been very limited. It is not at all clear if this type of action would expand if RSLs then have these 'missing share' powers.

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## 6. Conclusions

It is clear from the evidence gathered through this consultation exercise that the 'missing shares' powers as currently operated by a small number of local authorities are a useful and effective tool when it comes to getting disputed common repairs work undertaken. The threat of significant additional costs, beyond that of the project, appears to overcome these difficulties in many of these cases. It is the threat of action, rather than the action itself which has the desired impact.

While there are clearly coordination issues in relation to legal and financial matters these can be worked through, but this does require extra time being expended and thus additional costs.

There are disagreements between landlords and owners about the work needed to resolve the disrepair. This, of course, is not a new issue in relation to property maintenance, as repair and improvement have always differed in both legal, technical and cost terms. While a default repair standard may resolve the specific problem, it often does not ensure a satisfactory long-term technical solution. 'Missing share' provisions do work within the narrow context they are designed to address. Thus they were seen by the participants to be valuable in extending the RSLs property maintenance toolkit. However, no-one saw them as a solution to the serious and growing problem of inadequate property maintenance and its management within commonly owned property.

Having accepted extending these powers has some merit, the core challenge in most respondent's minds was the management of the resulting owners' debt. Currently, where owner's do not pay up-front the debt is carried by the local authority. The debt is secured against the owner's property, with annual interest charges being accrued. This debt also includes an administrative charge to cover the local authority's costs. If the owner pays off the debt quickly there is not a problem, but given the range of circumstances such debts are likely to build up as more properties come into such an arrangement. That will, in turn, limit the future capacity of the scheme.

So from a local authority perspective, there are benefits in RSLs having the 'missing share' powers, as it reduces their need to carry debt, especially for projects where the RSL has a direct property management interest. Local authorities are then able to focus on the other properties outwith the RSLs property sphere.

That said, the capacity to manage debt differs significantly between these organisations. Local authorities, given their scale, have a larger capacity to carry debt compared to many of the landlord organisations. That said, no organisation has an unlimited capacity to take on debt that they are not sure when it will eventually be paid off. So, while asset management professionals within RSLs were keen on securing such an additional power, this was to a degree reined back by financial management considerations. Undertaking such work will always involve financial risk, and the capacity to manage such risk varies markedly between different organisations.

It should also be remembered that even a local authority can be overwhelmed by debt related issues that can accrue from trying to manage common repair works for private owners. Edinburgh City Council has recently revealed the financial repercussions of being the 'factor of last resort' over the last 25 years. This issue also largely explains the original motivation behind this legislative amendment, namely a concern that without a broadening of the provision of 'missing share' powers Edinburgh might not have had the administrative, nor financial capacity to continue offering a default power for resolving the city's common repair problems. Clearly, basing a new

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power on such a narrow conception of a problem would not make for good legislation, but the issue, as this consultation confirms, is universal within the Scottish property context.

The recent events in Edinburgh also highlight another matter that generated a fair bit of discussion, the issue of reputational damage. The issue raised in this context is whether it is appropriate for private owners' debt to be carried, in effect, by rent paying tenants. Within smaller, more community focused organisations, this was seen to be potentially sensitive, especially if the said debtor was a private landlord.

There was also a related issue, not raised as widely, about the appropriateness of RSLs being able to place a debt on a property owner's title. While this is accepted for a local authority it was seen as unusual to give a private entity such powers.

There is a further sensitivity here in that what is being offered to RSLs does appear at face value to be quite a high level debt recovery power, which goes beyond existing debt recovery provisions, namely the placing of a first level debt order on the property title of an individual, without any recourse to the courts.

So, overall, this consultation exercise has found that extension of the power may add to the current common repairs enforcement toolbox, for the odd occasion that an RSL might consider it worth using after the risks are fully assessed. But against this are the potentially considerable complications it may introduce in the public's mind. Perhaps encouraging more authorities to make use the powers they currently have might offer a better and more workable solution.

Finally, it can only ever be a 'sticking plaster', and a small one at that, for what is a much more serious issue, how can the current culture in relation to property maintenance be changed? This is a task that demands far more creative thinking and subsequent action.