Powers available to local authorities, other bodies and tenants to require landlords to undertake improvements and repairing

SECTION A: LOCAL AUTHORITY POWERS

General Powers Available for use in the Private Sector
Mandatory Powers

1. The only mandatory power available to local authorities is set out at section 85 of the Housing (Scotland) Act 1987. This power requires local authorities to secure that all houses in their district which do not meet the tolerable standard are closed, demolished or brought up to the tolerable standard within such period as is reasonable in all the circumstances.

Discretionary Powers

Background

2. The main statutory powers available to housing authorities to assist in improving conditions in private sector housing are set out in the Housing (Scotland) Act 1987. For the most part they were developed in the context of a housing renewal programmes concentrating on the eradication of slum conditions in tenement property. In particular to secure the demolition of blocks of flats lacking standard amenities and in a very poor state of repair or through the improvement of flats to provide standard amenities and alleviate overcrowding.

3. Specific and equivalent powers also exist to address disrepair or BTS conditions in individual properties, for example those in rural areas.

4. Powers to serve notices are all linked to mandatory grant requirements and or powers to acquire by compulsory purchase.

Housing (Scotland) Act 1987

5. The act contains a range of local authority powers and provisions that have developed over time. These include the basic "standard" to be met by all houses, the tolerable standard and a duty to identify such houses and make provision for there improvement or removal (details of the tolerable standard and the issues associated with it were examined in paper SGA2/21-06-01 considered at the second meeting of the sub group). To achieve this a range of more specific powers are to make orders and carry out work. The key ones are as follows:-

> 5.1 Section 88 Improvement Order: For use in respect of BTS houses not in housing action areas. An Improvement Order requires an owner to bring a house up to the tolerable standard and to put it in a good state of repair. Enforcement options do not include the carrying out the works by the Council other than after acquisition voluntarily or by CPO. Owners who agree to carry out the works have a mandatory right to grant aid towards the cost of works arising from such an order

5.2 Section 108 Serious Disrepair Notice: For use in respect of individual properties that the Council considers to be in a state of serious disrepair. The notice specifies defects to be repaired within a given period. Owners have a right of appeal to the sheriff court within 21 days. Enforcement powers include the execution of the works required and any other such works "that could not reasonable have been ascertained to be required prior to the service of the notice" that are required to bring the house up to a reasonable state of repair having regard to it's age, character and location. Where work is carried out under enforcement powers the local authority has the power to apportion costs between owners; there is no statutory provision as to how this should be done.

5.3 Section 89-91 Housing Action areas: Where the local authority are satisfied that a majority of houses within a defined areas do not meet the tolerable standard the council may make an order creating one of three types of housing action area as follows:

- HAA for demolition, where after the making of the order all the properties covered will be acquired and demolished.
- HAA for improvement, where after the making of the order all the houses covered will be improved to meet the tolerable standard and brought up to a good state of repair.
- HAA for demolition and improvement, where specified properties covered by the order will be demolished and the remainder improved.

The creation of a housing action area requires a number of stages including: -

1) the making of a draft order by the Council
2) Reference of the draft order to the Scottish Executive for consideration, the Executive may rescind the draft order, take no action or instruct further consultation on the order.
3) Notification of all the owners and advertising the draft order in the local press. Owners and tenants have two months to respond to the making of the order.
4) Make a final resolution confirming the creation of the HAA.

Enforcement options include powers to acquire and demolish houses, control the occupancy of houses and to carry out works of improvement where the owner agrees. Where owners do not agree to carry out the works the only option open to the Council is to seek to acquire the property. Owners permanently displaced as a result of action under these provisions have a right to be re-housed and to compensation and mandatory grant aid for the costs of the works. Owners involved in carrying out of improvement works have a right to mandatory grants and will generally be provided with temporary accommodation during the course of such works.

5.4 Section 114 Closing order: Where a local authority are satisfied that a house does not meet the tolerable standard and that it ought to be demolished but the house forms only part of a building then a closing order may be served. The order has the effect of prohibiting occupation of the dwelling and is intended for use where a BTS dwelling forms only part of a building that includes either houses that are not BTS or non housing uses like shops. Occupation of a dwelling known to be subject of a closing order is a criminal offence punishable by a fine including a daily fine for continued occupation.

Where it considers it appropriate a local authority my purchase any house subject to a closing order. Where a building is comprised wholly of closed dwelling the orders may be revoked and replaced with a demolition order. By definition this approach is not available where a building is in a mixed use. In such circumstances the HAA for demolition route would be used.

5.5 Section 115 Demolition order: Where a local authority are satisfied that a house (or a building wholly made up of such houses) is BTS and ought to be demolished they may make a demolition order requiring that the building should be vacated and demolished. Enforcement powers extend to acquisition and demolition of houses covered by a demolition order. Special provisions are made in respect of the demolition of listed buildings. In the case of both Closing and Demolition orders a local authority may accept an undertaking on the part of the owner to bring the house up to the tolerable standard within a specified time. In such circumstances the order may be suspended.

5.6 Section 125 Demolition of obstructive building: This section provides a power for the making of a resolution to require the demolition of all or part of an obstructive building. The power is subject to the right to a hearing on the part of the owner and is very rarely used.

5.7 Section 251 Grants for improvement of amenity: This section provides a discretionary power for a local authority to make a grant for works of “improvement of amenity” where an area is “predominantly residential”. There is no definition of any of the key terms in this section and it has been widely interpreted by some authorities to provide funding for owners either in mixed tenure areas or tenemental renewal schemes for such works as door entry systems, bin stores, drying areas and the demolition of former wash houses or outside WCs.

5.8 Sections 236, 244, 248 and 250 Repair and Improvement Grants: It is not intended to provide a detailed description of the grant regime here. There are essentially two types, grants for specified improvements and grants for repair work in properties with significant repair defects. Grants may be either mandatory, that is the applicant will have a statutory entitlement to the grant arising, for example from the service of a notice, from a declaration that the property is BTS or in the case of grants for the provision of standard amenities accessible to disabled occupants; or discretionary where no notice has been served.

The Housing (Scotland) Act 2001 extended the scope of the grants system to include:

- The installation of heating systems
- Insulation
- Replacement of electrical wiring
- The installation of smoke detectors
- Fire doors to flats off closes
- Door entry systems

The act also brings the definition of a disabled person into line with that in the Disability Discrimination Act 1995.

The act also introduces a general test of resources for all grant applicants subject to a range of situations where a minimum grant level can be specified by the Scottish Executive and increases the maximum approved expenditure for all grants to £20,000. These provisions have not yet been commenced.

5.9 Section 214 Home loans: Provides a general power to provide loans for the purchase, repair or improvement of a house.

5.10 Part VII, Housing (Scotland) Act 1987: Duties and owners in respect of over crowding. These provisions provide two definitions of over crowding, the room standard, calculated on the basis of number of rooms and number of occupants, and the space standard calculated on the basis of the floor area available per person.

5.11 Section 146: creates a duty on a local authority to inspect their area (either when the authority believes it appropriate or at the instruction of the Scottish Executive) and make reports and proposals in respect of overcrowding and submit the report to the Scottish Executive

5.12 Part VII: includes details of offences on the part of landlords in permitting overcrowding, makes provision for landlords to gain possession of an overcrowded house. It also provides for the local authority to enter and inspect houses and to require information from landlords as well as powers for the Local Authority to take steps to remove occupants from an overcrowded house as if they were the landlord.

5.13 Section 6: Duty of local authority to have regard to the amenities of locality, etc: This section requires an authority to have regard to "artistic quality, the beauty of the landscape or countryside and other amenities of the locality and the desirability of preserving existing works of architectural historic or artistic interest" in making any proposal for the provision of housing or taking any action under the Act. This is effectively a general duty to have regard to issues of "quality".

5.14 S. 85 General duty of local authority in respect of houses not meeting the tolerable standard: This section provides a general duty on every local authority survey there area to identify BTS houses and to secure that all houses that do not meet the tolerable standard are closed demolished or brought up to standard within a reasonable period.

5.15 Sections 109 and131 Charging order: (and schedule 9): Provides a power to create a charging order against the titles of any property in respect of which they have incurred expenses. The charging order is a first charge on the title (that is it takes precedence over all other charges including a mortgage) and requires the owner to make an annul payment for a period of up to 30 years. This annual sum is calculated on the basis of principle and interest in respect of the expense incurred by the Authority. A charging order may be discharged by the payment of a lump sum at any point in the 30-year period.

5.16 Sections 315 and 316 byelaws in respect of accommodation for agricultural and seasonal workers. These sections create a duty on local authorities to make byelaws setting standards for the provision of accommodation for seasonal workers. The Scottish

Executive may waive this requirement were the Council can demonstrate that it is unnecessary.

5.17 Other housing act powers: The housing act also provides for entry and inspection as well as a range of powers for the registration and control of Houses in Multiple Occupation. These powers are, however, seldom used.

Civic Government (Scotland) Act 1982

6. The provisions of this act are not specific to housing but there are two powers that can be used in respect of houses and housing areas.

6.1 Section 87: A local authority may require the owner of a building to rectify such defects specified in the notice to bring the building into a reasonable state of repair having regard to its "age type and location". Enforcement options include carrying out the works and extend to carrying out the works without first serving notice where they authority believes this is in the interests of health and safety or of preventing damage to another building. (Separate powers in respect of "Dangerous Buildings" exist under the Building Acts). The authority also has a right to apportion costs between owners as appropriate and recover its costs. Entitlement to a mandatory grant is only created under this notice where the works were such that they could have been the subject of a notice under the Housing (Scotland) act 1987 that would have carried grant entitlement.

6.2 Section 95: This makes it a duty of owners of open space in public locations or housing areas to maintain that space and its fences and boundary walls to "prevent nuisance to the public". The section also provides for the owner of such open space to recover costs from those that are entitled to use it. A local authority may serve a notice on such an owner requiring them to comply with this provision. The act also includes a power for the local authority to carry out the works required by a notice served under this section where an owner fails to do so.

Environmental Protection Act 1990

7. Section 79 defines statutory nuisance and imposes a duty on local authorities to inspect their area to identify any statutory nuisance that should be dealt with or to investigate any complaint of a nuisance made by a person living in the area. S. 80 provides a power for a local authority to serve notice and in default to take action to stop or prevent any "statutory nuisances. The definition of a nuisance has a number of elements those likely to be of relevance in housing areas are:

- Any premises in such a state as to be prejudicial to health or a nuisance
- Any accumulation or deposit which is prejudicial to health or a nuisance
- Any fumes or gasses emitted from premises as to be prejudicial to health or a nuisance
- Any animal kept in such a manor as to be prejudicial to health or a nuisance
- Noise emitted from premises so as to be prejudicial to health or a nuisance

8. The act also allows for individuals to take action through the courts in respect of any statutory nuisance that they feel aggrieved by.

Local authority intervention and enforcement in practice

9. Intervention by a local housing authority through the use of statutory notices or enforcement action is for many Councils relatively unusual and only likely to occur in respect of buildings in the very worst condition or where the consequences of further deterioration are considered to be unacceptable. (Local authorities may intervene using other powers for other reasons including to make safe dangerous buildings, these are however, not generally prompted by concerns relating simply to housing condition). Some authorities (notably Edinburgh) have adopted a fairly pro-active approach to the use of notices in response to contact from owners having problems in carrying out repairs (see above) but it unclear whether other authorities have adopted a similar approach (we are not aware of any). In general, intervention may be:

- The result of an obvious health and safety risk
- At the request of the owners of a particular building
- Associated with the authorities own stock housing investment plans
- As part of a planed area improvement strategy
- To achieve some broader objective (town centre renewal for example)

10. The period since 1996 has seen overall resources available for investment by local authorities fall from £121,000,000 to £56,000,000 As a result, statutory action is increasingly limited to situations where an authority's own investment plans require it or where a public safety risk exists. Where local authorities do use notices to support their own investment programmes there is a perceived risk of conflicts of interest arising and of the action being challenged in the courts.

11. Available evidence suggests that the main reason for the decline in the use of statutory powers to require improvements or repairs to flats and houses has been the reduction in the availability of resources through the former Non HRA capital allocation. However, the success of the slum clearance and improvement programmes up to the mid 1980's has removed most of the concentrations of BTS properties that the Housing Action Area procedures were designed to address. As a result the number of action areas being declared has fallen significantly over the past 15 years.

12. During this period much of the statutory action undertaken by authorities has been focused on addressing disrepair problems in older houses. Whilst the geographical pattern of disrepair also shows distinct concentrations associated with the age and built form of the houses there is no area based power to tackle disrepair.

13. It should be noted that where enforcement powers are used and owners are sent an account for the work, that account is regarded as "out with the scope" of the VAT regulations. No VAT is payable by owners on works carried out under enforcement powers.

14. There are a limited number of more general powers that can be used to address wider "quality" related problems in housing areas. In particular S.6 the Housing Scotland Act 1987 requires local authorities to have regard to a range of narrowly defined aspects of the amenity of housing areas in planning new provision whilst S.251 allows for the making of grants for "improvements of amenity" in housing areas. The Civic Government (Scotland) Act 1982 provides a power to ensure that amenity space in housing areas are maintained to a safe standard. The Environmental Protection Act 1990 also provides a general power to require the removal of any source of "nuisance" as defined by the act.

Powers specifically for the privately rented sector

15. The main powers available to local authorities to ensure the standards of accommodation in the private rented sector in their area are maintained to a set standard are those relating to licensing of HMOs.

Mandatory Licensing

Background

16. Houses in multiple occupation (HMOs) are shared accommodation, such as shared flats and houses (often rented to students and other young people), bedsits, lodgings, student residences, and hostels. Most are found in the cities, particularly Glasgow and Edinburgh. There have long been concerns about standards of accommodation, safety and management within some HMOs, particularly since many vulnerable people live in shared accommodation. Furthermore, a situation where a family lives together is generally considered safer than when unrelated individuals are sharing a property. It has also become clear that many neighbours of HMOs experience nuisance and sometimes more serious problems caused by some HMO landlords and their tenants, and changes to the nature of an area are a common cause of complaint.

17. The Scottish Office carried out in 1998 a wide consultation exercise on proposals to introduce mandatory licensing of HMOs. The great majority of respondents was in favour of mandatory licensing and it was decided to take the proposals forward in the form of an Order under the Civic Government (Scotland) Act 1982. The Civic Government (Scotland) Act 1982 (Licensing of Houses in Multiple Occupation) Order 2000 was approved by Parliament and came into force on 7 June 2000.

Legislation

18. The licensable activity is knowingly permitting a house to be occupied as an HMO. The licensable person is the owner of the HMO. The Order defines HMOs as properties occupied as their only or principal residence by a specified number of people, being members of more than two families. The definition of family includes two people living together as a couple.

19. From 1 October 2000 the occupancy threshold was more than five persons. This reduces by one annually until it reaches more than two persons on 1 October 2003. It was decided to reduce the threshold to this point because conditions in small HMOs can be as bad as those in larger ones. Introduction of licensing is being staged to enable local authorities to deal in an orderly manner with applications for licences. The definition of an HMO explicitly

includes accommodation occupied by students in term-time, provided that it comes within the occupancy levels.

20. In order to obtain a licence, the owner of the HMO has to be a fit and proper person and the premises have to meet standards relating to physical conditions and safety and also tenancy management issues. A working group representing various interests drew up Guidance for local authorities on the implementation of mandatory licensing, which the Scottish Executive issued.

Scottish Executive Guidance

21. The Guidance contains benchmark standards on space, kitchens and sanitary facilities, heating, lighting and ventilation, and fire and electrical safety. It also includes tenancy management standards, relating to the responsibilities of landlords and tenants. The Guidance points out that landlords must ensure that their tenants do not behave in a way that interferes with the rights of the neighbours to enjoy peaceful occupation of their homes.

Conditions of Licence

22. The 1982 Act makes it the responsibility of the local authority to set reasonable conditions for the award of a licence, so the Guidance does not have statutory force, but the standards contained in it are generally the basis for the criteria applied by local authorities to HMOs for which licences are sought.

23. Applications for licences have to be advertised, and it is open to anyone to object to an application for the grant or renewal of a licence. Objections must be addressed to the local authority. The conditions for valid objections are laid down in the 1982 Act and include requirements that they be in writing and be made within 21 days of the appropriate date, although the time requirement can be waived by the local authority. Any person who has made a valid objection may be given the opportunity to be heard by the licensing authority. Objectors and applicants for licences have a right of appeal to the sheriff against a licensing decision.

24. The 2000 Order gave council officers an additional power to enter and search premises suspected of operating as an HMO without a licence. (This previously applied only to licensed premises.) Operating a licensable HMO without a licence is a criminal offence, with a maximum fine of £5,000.

Licence Fees

25. Under the 1982 Act it is the responsibility of local authorities to set licence fees. The Act states that the total amount of fees charged by a local authority should be sufficient to meet the total costs of exercising its licensing functions under the Act. Licences can be granted for up to three years.

Impact of Licensing

26. Each application for a licence has to be considered on its own merits, so licensing does not allow local authorities to set a quota for the number of HMOs in a particular tenement or area, but the effect of an HMO on the amenity of an area could be taken into account when considering an application.

Discretionary Licensing

In 1991 an Order under the Civic Government (Scotland) Act 1982 gave local authorities powers to introduce discretionary licensing schemes for HMOs. Only seven local authorities did so. The 1991 Order was revoked on 1 October 2001, although extant licences issued under it will continue in effect until they expire or are revoked.

Powers Under the Housing (Scotland) Act 1987

The Housing (Scotland) Act 1987 Part VIII and Schedule 11 (as amended) gives local authorities various powers over HMOs (defined in this context as houses occupied by more than one family or let in lodgings), although local authorities have complained that these are cumbersome to use in practice. The main powers are:

- To establish a **registration scheme**, requiring owners to register their properties (sections 152 to 155)
- To make a **management order** imposing a **management code** on the owner or lessee of an HMO that is in an unsatisfactory state due to poor standards of management (s157)
- To make a **works order** requiring general repairs to an HMO for which a management order has been made (s160)
- To issue a **notice requiring works to be carried out** where an HMO is not suitable for occupation (s161)
- To issue a **notice requiring works to provide means of escape from fire** (which leads to a mandatory grant from the local authority) (s162)
- To **carry out works** if notices are not complied with (s164)
- To make a **direction limiting the number of people** who can occupy the HMO (sections 166 to 170)
- To make a **control order**, by which the local authority can take possession of the HMO if the owner has not complied with certain requirements or if it appears necessary to protect the occupants (sections 178 to 185)

27. The 1987 Act (s 313) also extends the power under the Public Health (Scotland) Act 1897 to make bye-laws controlling certain aspects of HMOs (such as cleanliness and ventilation), in order to require an owner to carry out works. Although the 1987 Act powers are difficult to use, they will still be available to local authorities as a back up to licensing. A number of local authorities have drawn up registration schemes in the past but, in practice, this power is effectively superseded by the arrangements for mandatory licensing. Other Housing Act powers in relation to HMOs, for example, management and control orders have not been used in recent times. The power to issue notices requiring works in relation to means of escape from fire is used from time to time and the 2001 Act has expanded the scope of the grants that can be paid towards works of this nature.

Planning and Other Legislation

28. Under planning legislation (the Town and Country Planning (Use Classes) (Scotland) Order 1997), where an HMO does not have planning permission or a certificate of established use as a multiply occupied dwelling (that is, a dwelling that does not fall into the category of a house occupied by no more than five persons living together as a single household) and is not permitted development in terms of use classes, use as an HMO may require a planning application to be made. "House" in this context does not include flats, so local authorities may require a planning application for flats occupied by fewer than five unrelated people.

29. Local authorities have a degree of discretion in planning policy. In relation to HMOs they may wish to consider such issues as density of HMOs in an area, location within tenements or other house types, car parking provision, and the level of occupation which constitutes multiple occupancy and thus a material change of use.

30. Other legislation that might be used to take action in HMOs includes:

- the Building Standards (Scotland) Regulations 1990 as amended (where HMOs require a building warrant)
- the Food Safety (General Food Hygiene) Regulations 1995 (where food is provided)
- the Fire Precautions Act 1971 and the Fire Precautions (Workplace) Regulations 1997 as amended (in some larger HMOs and where there are employees on the premises)
- the Control of Pollution Act 1974 – Part III as amended and the Environmental Protection Act 1990 – Part III (statutory nuisance, including noise)
- the Crime and Disorder Act 1998 (Anti-social Behaviour Orders)

Other powers and provisions

31. The Gas Safety (Installation and Use) Regulations 1994 impose an obligation on landlords to ensure that all gas appliances and associated pipework are maintained in a safe condition. An approved person must make safety checks every year. An approved person can only carry out Work on appliances. Additionally, a safety check record must be kept. Any person in lawful occupation of the premises in question may examine this record by making a reasonable request with reasonable notice. "Relevant premises" are defined as meaning premises (or a part of them) occupied for residential purposes under a lease or licence. The arrangement must involve the payment of money. "Lease" includes a statutory tenancy, but not a lease of seven years or more. Gas appliances supplied by a cylinder are excluded from the terms of the Regulations.

32. In certain residential tenancy situations the landlord is under an obligation to comply with Regulations aimed at ensuring that furniture and furnishings comply with fire safety standards. The Furniture and Furnishings (Fire) Safety Regulations 1988 were enacted under the terms of the Consumer Protection Act 1987. Where a landlord can be considered to be supplying such "goods in the course of a business" he will be required to ensure that such furniture and fittings comply with the fire safety standards set out in detail in the Regulations.

33. If it appears to the local authority that a house let either in lodgings or occupied by members of more than one family is not provided with such means of escape from fire as the authority consider necessary, it may serve a notice specifying the works needed to provide such means of escape on the person having control, or the tenant or the factor/agent, and such notice must stipulate a minimum of 21 days to do the work. Mortgage holders must also be informed.

Housing strategic planning and the private rented sector

34. The strategic planning framework makes not specific mention of the private rented sector however the framework put in place by the Housing (Scotland) Act 2001 is comprehensive and inclusive. There are two key elements:-

- Section 88 Statement on fuel poverty
- Section 89 Local housing strategies

Statement on fuel poverty

35. This section requires that Scottish Ministers must, within 12 months of the act coming into force, publish:

> “a statement setting out the measure which they and local authorities have taken are taking and intend to take for the purpose of ensuring, so far as is reasonably practicable that persons do not live in fuel poverty.”

36. Fuel poverty is defined in Section 95. The statement must set a target date within 15 years for achieving this as well as interim objectives. The statement should be reviewed at least every four years.

Local housing strategies

37. This section requires local authorities, when required by the minister, to carry out an assessment of there area covering:-

- The nature and condition of the housing stock
- The needs of person in the area for accommodation
- The demand and availability of housing accommodation
- The needs of persons in the area for, and the availability of, housing accommodation designed or adapted for person with special needs, and
- Any other mater specified in the requirement.

38. The strategy must set out the authority’s policy for

- Exercising its functions, and
- Co-ordinating the exercise of those functions and the functions and activities of registered social landlords and other persons concerned (in whatever way) with housing provision and the provision of relates services.

39. The act also provides general powers for local authorities to make grants for the assistance of those providing housing and housing related services.

40. So far as the private rented sector is concerned these provisions allow for its role to be recognised for example in any strategy to eliminate fuel poverty or in the provision of housing and housing related services within local housing strategies.

41. Guidance in relation to local housing strategies has been published in draft form and whilst it is clearly intended to be comprehensive in respect of housing quality and the private rented sector very little specific guidance is provided in this respect.

SECTION B: Powers available to tenants

Landlords' Responsibilities for Repairs

42. The distinction between 'repair' and improvement' is important. At common law and under statute, the landlord has repairing obligations only, therefore if the works can be defined as an improvement and not as a repair, the landlord will not be liable. The Scottish Low Commission has used the following definition in its report on the Tenement:-

"Maintenance should include repairs and replacement, cleaning, painting, and other routine works, gardening, the day to day running of a tenement and the reinstatement of a part (but not most) of a tenement; but it should not include demolitions, alterations or improvements unless reasonably incidental to maintenance."

This definition is also used in the optional Development Management Scheme attached to the Title Conditions Bill.

43. Landlords' responsibilities for repairs to rented property may be found in:

a) statute
b) the lease
c) common law

Statutory Repairing Obligations

44. The two main pieces of legislation which determine the nature of tenancies in the private rented sector (the Rent (Scotland) Act 1984 for regulated tenancies and the Housing (Scotland) Act 1988 for assured and short assured tenancies) do not set out any repairing obligations on landlords. However, the Housing (Scotland) Act 1987, schedule 10, does require landlords with short leases (which would include most leases in the privately rented sector) to help in repair of the structure and exterior of the house (including drains and gutters) and to maintain sanitary facilities and hot water supplies in proper working order. It is also possible, at least in theory, for tenants to take action through the courts to require landlords to take action to tackle "statutory nuisances" as defined under the Environment Protection Act 1990 (see above).

45. In addition to the above sources, the landlord's **liability for failure to repair** can arise from The Occupier's Liability (Scotland) Act 1960. Under the terms of this Act, the landlord may find himself liable for injuries suffered by tenants and indeed others coming on the premises.

The Lease

46. The Lease is a contract and therefore subject to the general law of contract. Parties to a lease are entitled to contract any form of repairing obligations that the parties consider to be appropriate. In the case of a dispute over repairing obligations relating to a lease, specific legal rules on the interpretation of leases will be applied by the Courts in reaching a correct interpretation of the contract.

Landlords' Obligations at Common Law

47. Many Common Law requirements have now been codified in legislation. Where Statute Law or the terms of the lease are silent, at common law, the landlord and tenant each owe the other a number of implied obligations, which apply automatically. The Landlords' obligations at common law are:

a) to provide a property which is 'tenantable and habitable' and
b) to provide subjects which are wind and watertight.

48. At Common Law, the standard of habitability and wind and water-tightness vary according to the rental value of the subject and the 'requirements' of the type of tenant who leases the property. In an equivalent English case as recently as the 1990's, the Judge said ' the standard of repair which would apply to a house in Grosvenor Square would be very different from that which would apply to a house in Spittalfields, and the standard which is expected is that which would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it'.

49. Prior to 2 January 1989, some landlords were successful in excluding Common Law provisions from tenancy agreements. Since the onset of the Housing (Scotland) Act 1987 as amended by the Housing (Scotland) Act 1988, this position has been altered in favour of tenants.

50. During the tenancy, the landlord has a duty under Common Law to maintain the house but this is not a warranty, and a landlord will not be in breach of his obligations until notice of the problem has been served, and the landlord has been given a reasonable opportunity to carry out the repairs. The interpretation of what constitutes a reasonable time depends upon the urgency of the repair, i.e. the extent to which the integrity of the building is threatened, or the tenant's health endangered if the repair were not carried out at some speed. Where for example the repair is such that the bath, WC or heating and cooking facilities are unavailable to the tenant a reasonable period will be fairly short, perhaps 24 hours.

51. Where the repair is of a more minor nature for example a broken sash cord to a window or a windowpane that does not result in the property being insecure a longer period may be considered appropriate (though it should be noted that a broken sash cord could be regarded as more serious where it results in the window being unsafe in ordinary use).

Tenants' Obligations

52. In addition to such specific obligations as may be placed on the tenant by the lease, a tenant has a common law obligation not to 'invert' possession by a course of conduct which may be interpreted as contrary to the intention of the lease. This would include vandalism or other forms of damage caused by the tenant or the tenant's family, visitors etc. It may also include failure to heat the property.

Repairs/Improvements outwith Statutory, Contractual or Common Law Provisions

53. If the tenant wished to repair or make improvements to the property outwith the above provisions, this would normally be a matter to be agreed between them. The landlord would not be entitled to increase the rent as a result of any improvements by the tenant.

Enforcement Options in Terms of Landlords' Repairing Obligations

54. As stated above, once a repair has been reported a landlord will have a "reasonable" period to carry out the repair. The length of that period will be determined by the nature of the problem. The lease will normally set out repair reporting arrangements though it is unusual in the private sector for performance targets to be set for the completion of any repair.

55. Where a landlord does not carry out a repair within a reasonable period the tenant has a number of options under Common Law:

- Give notice and terminate the lease on the grounds that the land lord in breach of the conditions of the tenancy
- Withhold all or part of the rent until such time as the work is done though where a lease prohibits the abatement or retention of rent this option will not be available
- Have the works carried out at their own expense and bill the landlord. Where the land lord refuses to compensate the tenant they will have to raise an action in the sheriff court to recover the money
- Raise an action in the sheriff court requiring the landlord to carry out the works. This last course of action would also be open to the tenant in terms of a landlord's breach of statutory obligations

56. In the case of action by the tenant (or the landlord) in respect of the Public Health (Scotland) 1897, the local authority may serve a notice requiring the nuisance to be removed. If the nuisance is not removed, the Council can apply to the sheriff court for an Order requiring it to be removed. If this Order is not complied with, the Council may obtain a warrant in order that an appropriate person such as a builder may enter the premises and remove the nuisance. The Council can recover its expenses in this regard. Under Section 146 (1), any 10 ratepayers (Council Taxpayers) residing in the local authority area acting as one group, may take action. This might be a useful remedy in the case of a tenemental property occupied by tenants whose landlord has failed to undertake common repairs.

57. In addition to the above sources, the landlord's **liability for failure to repair** can arise from The Occupier's Liability (Scotland) Act 1960. Under the terms of this Act, the landlord may find himself liable for injuries suffered by tenants and indeed others coming on the premises.

58. In real terms, a tenant's ability to assert his rights in terms of a landlord's repairing obligations will depend upon a number of circumstances. As mentioned above, in a situation where a number of tenants were able to co-operate with the local authority to enforce repairing obligations, their chances of success are likely to be higher than an individual tenant working on his own. Critical, however, even in this situation, is the type of lease – and therefore the extent of security of tenure – enjoyed by the tenant.

59. Where a tenant's lease is of a fixed term, a short assured tenancy for example, the risk of being evicted at the termination of the lease will be a powerful disincentive to raise any action against the landlord. Most new leases in the private rented sector are now let with short assured tenancies. Tied tenants are in a particularly vulnerable position. Financial burdens relating to litigation aside, Assured Tenants, Regulated Tenants and Statutory Regulated or Assured Tenants are in the strongest position to enforce their rights.

60. However, in the absence of specialist advice being widely available at no cost, it is unlikely that tenants themselves will have a good understanding of their legal rights or how to exploit such failures in procedures. It is also unlikely that a private tenant would receive legal aid for any of the court actions required to enforce these rights, and the time and cost will certainly be a disincentive.