

TENEMENTS (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Support and Shelter

Section 7 – Abolition as respects tenements of common law rules of common interest

49. *Section 7* abolishes the common law rules of common interest as they apply to tenements. This section should be read with *sections 8 and 9* which restate the common law in statutory form.
50. Although the doctrine of common interest will no longer apply to tenements, it will still be applicable in any dispute involving a tenement building and any other building (whether a tenement or not) or any land not pertaining to the tenement.

Section 8 – Duty to maintain so as to provide support and shelter etc.

51. This section imposes a positive obligation on an owner of any part of a tenement building to maintain that part so as to ensure that it provides support and shelter (*subsection (1)*). The positive obligation is confined to the “tenement building” itself and does not extend to the solum or to any land which forms part of the tenement (see *section 26*).
52. *Subsection (2)* makes clear that an owner will not be obliged to maintain a part of the building if it would not be reasonable where the building has ceased to be worth repairing. The circumstances to be taken into account include, in particular, the age of the building, its condition and the likely cost of any maintenance. These particular circumstances are also found in *section 5*, when a sheriff is considering an application for the annulment of a scheme decision.
53. Enforcement is dealt with in *subsection (3)*. An owner can enforce the duty under *subsection (1)* if he or she is, or would be, directly affected by breach of the duty. Where a flat is owned in common, any of the owners may enforce this duty under *section 28(5)*.
54. *Subsection (4)* makes it clear that a *pro indiviso* owner of a part of a tenement can maintain that part without the need for the consent of co-owners in order to fulfil the obligation under *section 8(1)*. In other words, where a part of a tenement is owned in common any owner will be able to carry out such work without the consent of the other owners.

Section 9 – Prohibition on interference with support or shelter etc.

55. This section deals with the negative obligation to refrain from any alterations or work which might interfere with the support and shelter of the building. It also covers the rule of common interest relating to the right to light. Unlike *section 8*, this section applies to occupiers of flats (such as tenants) as well as to owners.

56. The prohibition imposed under this section applies to the whole tenement, including the surrounding ground (see the definition of “tenement” in [section 26](#)). This contrasts again with [Section 8](#) which only applies to the tenement building.
57. Any owner who is or would be affected by breach of the prohibition may enforce the prohibition under [subsection \(2\)](#). An occupier, though bound by the prohibition, has no right to enforce. As with [section 8](#), where a flat is owned in common any of the owners has the right to enforce under [section 28\(5\)](#).

Section 10 – Recovery of costs incurred by virtue of section 8

58. The duty to maintain support and shelter falls to the person who owns that part of the tenement. Where property is owned solely by one owner, there is a danger that a scheme decision to carry out repairs could be blocked by the other owners in the knowledge that the same repair could be insisted upon under [section 8](#). This section seeks to prevent this. [Section 10](#) also operates to enable a minority (even one co-owner) to carry out works for support or shelter where a majority cannot be assembled and to treat it as a scheme cost in the same way as if authorised by a scheme decision.
59. This section provides that the cost of a repair which is carried out under [section 8](#) of this Act could be recovered from the other owners as if the repair had been carried out as part of a management scheme decision. The costs recovered would be equal to the amount that the owners would be liable for under the management scheme.