

PROPERTY FACTORS (SCOTLAND) ACT 2011

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared on behalf of Patricia Ferguson MSP (who introduced the Bill for this Act into the Scottish Parliament) in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

THE ACT

3. The Act is in three parts:
 - Part 1 – Registration of property factors
 - Part 2 – Dispute resolution
 - Part 3 – Miscellaneous and general

Part 1 – Registration of Property Factors

4. The main effects of Part 1 of the Act are to:
 - require the Scottish Ministers to prepare and maintain a public register of all property factors;
 - make it an offence for a property factor to operate without being registered;
 - provide for other effects of a property factor being refused registration or removed from the register;
 - require a property factor to provide certain information when applying to be registered and to make that information publicly available on the register;
 - make it an offence to knowingly fail to provide required information or to provide false information in respect of an application to be registered;
 - require the Scottish Ministers to consider whether a property factor is a fit and proper person to be registered as a property factor;
 - allow the Scottish Ministers to refuse to register a property factor and also to remove a property factor from the register;
 - require a property factor to inform the Scottish Ministers of any changes in most of the information they were required to provide when they applied to be registered which occur after they are registered;

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- to make it an offence for a registered property factor to fail, without reasonable excuse, to inform the Scottish Ministers of any changes in the information they were required to provide when they applied to be registered;
- allow a property factor to apply for a court order requiring the Scottish Ministers to enter the property factor in the register in circumstances where their application was refused or they were removed from the register, and to permit the sheriff's decision to be appealed to the sheriff principal on a point of law;
- require registered property factors to use a property factor registered number allocated by the Scottish Ministers;
- require the Scottish Ministers to prepare a code of conduct as to minimum standards of practice expected of registered property factors;
- require property factors to comply with the code of conduct; and
- allow the Scottish Ministers to set fees to be paid by property factors in relation to applications for registration and changes in information.

Section 1 – Register of property factors

5. Subsection (1) places a duty on the Scottish Ministers to prepare and maintain a register of property factors. Subsection (2) requires that this register must be available for public inspection at all reasonable times.

Section 2 – Meaning of “property factor”

6. Subsection (1) defines property factor for the purposes of the Act. It establishes that there are four distinct groups covered by this definition. Firstly, a person who in the course of their business manages the common parts of land owned by two or more other persons and used to any extent for residential purposes. Secondly, a local authority or housing association which manages the common parts of land used to any extent for residential purposes and owned by two or more other persons (or by the local authority or housing association and one or more other person). Thirdly, a person who in the course of their business manages or maintains land which is available for use by the owners of any two or more adjoining or neighbouring residential properties – but only where the owners of the properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of the land. Finally, a local authority or housing association which manages or maintains land which is available for use by the owners of any two or more adjoining or neighbouring residential properties (or by the local authority or housing association and the owners any one or more residential properties) – but only where the owners of the properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of the land.
7. This definition is subject to subsection (2), which excludes three categories of persons or associations from the definition of property factor. These are: (a) a person so far as managing or maintaining on behalf of the Crown land acquired by the Crown by virtue of prerogative rights to unclaimed or ownerless land; (b) owners' associations established under the development management scheme (see sections 71 to 74 of the Title Conditions (Scotland) Act 2003), so far as managing or maintaining common parts or land under the scheme; and (c) a person so far as managing or maintaining common parts or land on behalf of a person who is a property factor in relation to those common parts or land. A person who falls within subsection (2) is only excluded from being a property factor to the extent provided for in that subsection. That is, if the person also falls within subsection (1) by virtue of managing or maintaining land other than that mentioned in subsection (2), the person is a property factor for the purposes of the Act in relation to that other land (but not in relation to the land mentioned in subsection (2)).

8. Subsection (3) allows the definition of “property factor” in subsection (1) and the exclusions from that definition established by subsection (2) to be modified by order made by the Scottish Ministers (and approved by the Scottish Parliament). So, for example, additional persons could be defined as a property factor for the purposes of the Act or one of the existing categories of person who is a property factor removed.

Section 3 – Application for registration

9. Subsection (1) states that a person who is a property factor or intends to become a property factor may apply to the Scottish Ministers for entry in the register. Although this does not require property factors to register, it should be read in conjunction with section 12(1), which makes it an offence to act as a property factor without being on the register.
10. Subsection (2) sets out the information that must be included in an application to the Scottish Ministers for entry in the register and allows the Scottish Ministers to specify (by regulations) additional information that must be provided.
11. Subsection (3)(a) requires the application to be signed by the “responsible person”. This term is defined in subsection (9) as the person making the application under subsection (1) where they are a sole trader or, in any other case, the person specified in the application by virtue of subsection (2)(c) (that is, the most senior manager in the partnership, company or body who is (or is to be) directly concerned with the control or governance of the property factor).
12. Under subsection (3)(b), the application must also be accompanied by a fee. Subsection (4) gives the Scottish Ministers the power to prescribe (by regulations) the level of the fee. In addition, regulations may prescribe how fees are arrived at and cases in which no fee is payable. Subsection (5) makes clear that, while fees under this section and section 7 (which relates to the provision of updated information) may be set at a level that allows the Scottish Ministers to recoup the costs of exercising their functions under Part 1 of the Act, they may not be set beyond that cost-recovery level.
13. Subsection (6) makes it an offence to provide false information in an application or to fail to provide information required by subsection (2). The penalty for such an offence is a fine not exceeding level 3 on the standard scale (subsection (7)).
14. Under subsection (2)(d), an application for registration as a property factor must include, in addition to information on the responsible person, information on any other person who is (or is to be) “directly concerned with the control or governance of the property factor”. Subsection (8) stipulates that this includes any person who owns 25% or more of the equity in a business which is a property factor.

Section 4 – Registration

15. This section provides for applications to be determined by the Scottish Ministers by either entering the person making the application in the register or refusing to so enter them.
16. Subsection (2) is concerned with circumstances where the Scottish Ministers are considering refusing to enter a person into the register. It requires the Scottish Ministers to give the responsible person notice that refusal of registration is under consideration and ensures that the person who made the application for registration has an opportunity to make representations to them. Under subsection (3), the notice under subsection (2) must be accompanied by a statement of the Scottish Ministers’ reasons for proposing to refuse to enter the person in the register.
17. Subsection (4) requires the Scottish Ministers to enter the person in the register if, having considered the application and taken account of any representations made under subsection (2), they are satisfied that the relevant conditions specified in either paragraph (a) or paragraph (b) have been met.

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18. Paragraph (a) relates to cases where the person has not previously been registered as a property factor. In such cases, the only condition for entry in the register is that the Scottish Ministers are satisfied that the person is a fit and proper person to be a property factor. Section 5 provides more detail on particular information that must be considered by the Scottish Ministers in making this judgement.
19. Paragraph (b) is concerned with cases involving persons who are or have previously been registered as a property factor. In such circumstances, the Scottish Ministers must be satisfied that the person is a fit and proper person to be a property factor. In addition, though, the person must have demonstrated compliance with: section 13(3) (which relates to the use of property factor registered numbers); the property factor code of conduct (see section 14); and any property factor enforcement order made against the person by a homeowner housing committee (see sections 19 and 20).
20. Subsection (5) provides that where Scottish Ministers are not satisfied as described in subsection (4)(a) or, as the case may be, (4)(b), they must refuse to enter the person into the register.
21. Subsection (6) requires that an entry in the register under subsection (4) must include the information included in the application by virtue of section 3(2)(a) to (f).
22. Subsection (7)(a) requires that, where the Scottish Ministers have made an entry in the register under subsection (4), the entry must be removed on the expiry of the period of 3 years beginning with the day on which the entry is made. The effect of this is that property factors must apply for re-registration every 3 years. If an application for re-registration is still under consideration when the 3 year period expires, subsection (7) (b) provides that the property factor remains registered until the application is finally determined. Subsection (8) provides additional information on what constitutes final determination of an application for re-registration.

Section 5 – Section 4: considerations

23. Subsection (1) requires the Scottish Ministers to have regard to any material falling within subsections (2) to (4) when considering under section 4(4) whether a person is a fit and proper person to be a property factor. They may also take other information into account in considering this matter.
24. Material falls within subsection (2) if it shows that any person who is (or is to be) directly concerned with the control or governance of the property factor has been convicted of an offence involving fraud or other dishonesty, violence or drugs; practised unlawful discrimination on grounds of any protected characteristics in Part 2 of the Equality Act 2010; or contravened any provision of the law relating to tenements, property or debt.
25. Material falls within subsection (3) if it shows the extent to which any other property factor with which the person (or any other person who is, or is to be, directly concerned with the control or governance of the property factor) is or has previously been involved demonstrates or demonstrated compliance with the property factor code of conduct (see section 14) and any property factor enforcement order made against that other property factor by a homeowner housing committee (see sections 19 and 20).
26. Material falls within subsection (4) if it shows that a person who is (or has previously been) registered as a property factor has failed to pay any charges imposed by virtue of section 26 (recovery of costs from property factors in relation to applications referred to the homeowner housing committee and property factor enforcement orders).
27. As in section 3, references in this section to persons who are directly concerned in the control or governance of a property factor include reference to any person who owns 25% or more of the equity in a business which is a property factor.

Section 6 – Notification of registration, refusal to register or removal

28. Under section 6, where the Scottish Ministers enter a person in the register under section 4(4), refuse to enter a person in the register under section 4(5) or remove an entry under section 4(7), they must, as soon as practicable after doing so, give notice of the fact to the responsible person. This enables the person to consider, in the case of a refusal, whether they wish to make an appeal under section 11.

Section 7 – Duty of responsible person to provide information

29. Subsection (2) requires the responsible person for any registered property factor to notify the Scottish Ministers of any changes in the information supplied under section 3(2)(a) to (d) in connection with the original application for registration. It also requires the responsible person to notify the Scottish Ministers of any changes in any information supplied under this subsection.
30. Subsection (3) requires all registered property factors to provide the Scottish Ministers with an annual notice giving details of all properties or land in relation to which the property factor has acted as property factor in the year to which the notice relates (or confirming that there has been no change in this information since the last notice under this subsection or, where the property factor only became registered during the year, in the information supplied under section 3(2)(e)).
31. Subsection (4) requires that any notice under subsection (2) or (3) must be accompanied by such fee as the Scottish Ministers may determine. Subsection (5) gives the Scottish Ministers the power to prescribe those fees by regulations (subject to not setting fees at a level that produces income greater than that needed for cost-recovery – see section 3(5)). In addition, regulations may prescribe how the fees are to be arrived at and cases in which no fee is payable.
32. Subsection (6) makes failure to comply with subsection (2) or (3) an offence, while subsection (7) makes it an offence to provide false information in a notice required under those subsections. In each case, the penalty for the offence is a fine not exceeding level 3 on the standard scale (subsection (8)).

Section 8 – Removal from register

33. Subsection (1) gives the Scottish Ministers the power to remove a property factor from the register if subsection (2) or (3) applies – that is, if the property factor is no longer a fit and proper person to be a property factor or if the property factor has failed to comply with section 13(3) (which relates to the use of property factor registered numbers), the property factor code of conduct (see section 14) or any property factor enforcement order made against them by a homeowner housing committee (see sections 19 and 20).
34. Subsection (4) is concerned with circumstances in which the Scottish Ministers are considering removing the person from the register under subsection (1). It requires the Scottish Ministers to give the responsible person notice that removal from the register is under consideration and allows the property factor an opportunity to make representations to them. Under subsection (5), notice under subsection (4) must be accompanied by a written statement of the Scottish Ministers' reasons for proposing to remove person in the register.
35. Subsection (6) prohibits the Scottish Ministers from removing the property factor from the register unless they are satisfied, having taken into account any representations made under subsection (4)(b), that subsection (2) or (3) applies.
36. Where the Scottish Ministers decide to remove a property factor from the register under subsection (1), subsection (7) requires the Scottish Ministers to notify the responsible person of this fact as soon as is practicable. They must also give notice of the date of removal, which must be at least 21 days after the date notice of removal is given under this subsection. This gives the property factor time to make an appeal against the

removal under section 11. If such an appeal is made, the property factor may, despite having been removed from the register, continue to operate as a property factor without committing an offence under section 12(1) until such time as the appeal is concluded.

37. Subsection (7) also requires the Scottish Ministers to give public notice of the date on which the property factor will be removed from the register (see section 15(3) for further details of how public notice is given).

Section 9 – Effect of refusal to enter in register or removal from register (and Section 10 – Section 9: interpretation etc.)

38. Subsection (1) of section 9 establishes that subsection (2) applies where a person who is operating as a property factor when the Act first comes into force is refused entry in the register under section 4(5) or where a property factor is removed from the register under section 8(1). Other cases of refusal under section 4(5) are not covered here as a person setting up business as a property factor after the Act comes into force should not be operating as a property factor prior to being registered, so the actions available under section 9(2) should not be relevant. The refusal of an application for re-registration is instead dealt with by reference to removal from the register under section 4(7).
39. Section 9(2) also applies where a property factor is removed from the register under section 4(7). In this case, though, “removed” needs to be read with section 10(1). This reading makes clear that a property factor is not removed from the register if their removed entry is replaced by a new entry following a successful application for re-registration. So removal from the register under section 4(7) only leads to the application of section 9(2) where a re-registration application is refused or where no such application is made.
40. Subsection (2) of section 9 provides for four separate effects to arise from the circumstances listed in subsection (1). The first is that no costs incurred by the property factor in respect of work instructed after the relevant date are recoverable (section 9(2)(a)) and the second is that no charge imposed by the property factor which relates to a period after the relevant date is recoverable (section 9(2)(b)). The third effect is that homeowners become entitled (after the relevant date) to appoint a new property factor (or to decide to manage their properties without appointing a property factor) (section 9(2)(c)). In acting under section 9(2)(c), homeowners must act in accordance with procedures specified in their title deeds, or as the case may be, the Tenement Management Scheme (within the meaning of the Tenements (Scotland) Act 2004). The final effect is that the property factor is prohibited from lodging a notice of potential liability under the Tenements (Scotland) Act 2004 in respect of work instructed after the relevant date. (A notice of potential liability is a notice that can be registered against a property, which has the effect of making certain future owners of the property liable for the costs of maintenance or work to the property that was carried out before they owned it.)
41. The effects provided for in section 9(2) apply only after the “relevant date”, which is defined in section 10(2)(a). Where a person who is operating as a property factor when the Act comes into force is refused entry in the register or a property factor is removed from the register under section 8(1), the “relevant date” is the day after the day on which the period within which any appeal under section 11(2) may be made expires (without such an appeal being made) or any such appeal is concluded (without the appeal being successful – as there is no need for section 9(2) to apply if the appeal is successful). Section 10(3) provides additional information on when an appeal is to be regarded as “concluded”. The effect of all of this is that, in these cases, section 9(2) only applies once all of the avenues of appeal provided by the Act have been exhausted – and only if any such appeal has been unsuccessful.
42. Where the removal from the register follows an unsuccessful application for re-registration, the “relevant date” is the day after the day on which the property factor’s entry in the register is removed under section 4(7). In this case, the property factor’s

existing registration will already have been extended (if necessary) under section 4(7) (b) until all avenues of appeal have been exhausted, so further delay is unnecessary. If, on the other hand, all appeals are concluded before the property factor's original 3 year registration expires, then section 9(2) does not apply until the expiry of the original registration period. This is also what happens if no application for re-registration is made.

43. **Section 9(3)** requires the Scottish Ministers to give public notice of the refusal or removal mentioned in section 9(1) and of the relevant date and the effect of section 9(2) (again, see section 15(3) for further details of how public notice is given).
44. In addition to the effects provided for in section 9(2), of course, the circumstances mentioned in section 9(1) may, if the property factor continues to act as such after the refusal or removal, lead to the property factor committing an offence under section 12(1).

Section 11 – Appeal against refusal to register or removal from register

45. Subsection (2) provides a right of appeal in the cases mentioned in subsection (1). These are where a person's application for entry in the register of property factors is refused under section 4(5) or where a property factor is removed from the register under section 8(1). It is not necessary to provide for an appeal against removal under section 4(7) – the reference to refusal under section 4(5) covers unsuccessful applications for re-registration.
46. An appeal under subsection (2) must be made not later than 21 days after the day on which the responsible person receives notice of the refusal or removal (under section 15(1), such receipt is deemed to occur, if the notice was sent by post by recorded delivery, on the next working day after posting). Subsection (8) provides that an appeal under subsection (2) is to be made by summary application to the sheriff. Subsection (3) gives the parties (that is, the property factor and the Scottish Ministers) a right to be heard before the appeal is determined.
47. Subsection (3) also enables the court to require the Scottish Ministers to register the applicant if it considers it reasonable to do so, having regard to the factors in subsection (4). Those factors are the same as those which the Scottish Ministers consider when deciding whether to grant or refuse an application, that is, whether the person is a fit and proper person to be a property factor and, in addition (if the person is or has previously been registered), whether the person complied with section 13(3) (use of property factor registered numbers), the property factor code of conduct (see section 14) and any property factor enforcement order made against the person by a homeowner housing committee (see sections 19 and 20). The court is required to give reasons for its decision under subsection (3) in writing (subsection (6)).
48. Subsection (9) provides that the decision of a sheriff under subsection (3) may be appealed to the sheriff principal, but only on a point of law. Under subsection (10) such an appeal must be made not later than 21 days after the day on which the decision appealed against is made. Subsection (11) provides that the decision of the sheriff principal is final.

Section 12 – Offence of operating as a property factor without registration

49. Subsection (1) makes it an offence for a person to operate as a property factor without being registered.
50. There are two exceptions: the first (subsection (2)) is that the offence is not committed by a person who is operating as a property factor when the Act first comes into force while their application for registration is under consideration (and subsection (8) makes clear that an application remains under consideration until all avenues of appeal under the Act have been exhausted). The second (subsection (3)) is that the offence is not

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committed by a property factor who is removed from the register under section 8(1) until all avenues of appeal provided by the Act have been exhausted.

51. It is a defence to show that there was a reasonable excuse for acting as a property factor without being registered (subsection 4)).
52. Subsection (5) stipulates that a person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months or to both.
53. Subsection (6) makes additional provision in relation to cases where the offence is committed by a body corporate or Scottish partnership or other unincorporated association, to the effect that relevant individuals (as defined in subsection (7)), as well as the body corporate or partnership or association, are guilty of the offence in certain circumstances.

Section 13 – Property factor registered numbers

54. Subsection (1) requires the Scottish Ministers to allocate a number to each registered property factor. Under subsection (2), it is up to the Scottish Ministers to determine the form of this “property factor registered number” (for example, whether it is a sequence of numbers or a combination of numbers and letters).
55. Registered property factors must take reasonable steps to ensure that their property factor registered number is included in documents sent to a homeowner and in other material of a type specified by the Scottish Ministers by order (subsection (3)).
56. Any person who uses a number purporting to be a property factor registered number without being a registered property factor (and without reasonable excuse) commits an offence. The penalty for this offence is a fine not exceeding level 3 on the standard scale (subsection (6)). By virtue of subsection (5), the offence is not committed by a property factor who has been removed from the register under section 8(1) until such time as all avenues of appeal provided by the Act against such removal have been exhausted.

Section 14 – Code of conduct

57. Subsection (1) requires the Scottish Ministers from time to time to prepare a property factor code of conduct setting out the minimum standards of practice expected of registered property factors.
58. Under subsection (2), the Scottish Ministers must publish a draft code of conduct for consultation. They are also required to consider any representations made to them about the draft and may amend the draft accordingly.
59. The code must then be laid before the Scottish Parliament, published and brought into force on such day as is appointed by the Scottish Ministers by order approved by the Scottish Parliament (subsections (3) and (4)).
60. Subsection (5) requires all registered property factors to ensure they comply with the property factor code of conduct for the time being in force.

Section 15 – Service of notices etc.

61. Subsection (1) provides that notices to be given to the responsible person (defined in section 3(9)) should be directed to the address specified by virtue of section 3(2)(a) and either sent by recorded delivery post or personally served by a sheriff officer. If sent by recorded delivery post, a notice is treated as having been delivered on the next working day after the day it is sent unless the contrary is proven (subsection (2)).
62. Subsection (3) provides that public notice (as required by section 8(7) and 9(3)) is given by publishing a notice in one or more newspapers circulating in the locality where the

property factor involved operates and by sending a copy of that notice to each local authority in whose area the property factor operates.

Part 2 – Dispute Resolution

63. The main effects of Part 2 of the Act are to:
- establish a homeowner housing panel and homeowner housing committees similar to the private rented housing panel and private rented housing committees constituted by the Rent (Scotland) Act 1982 and renamed by the Housing (Scotland) Act 2006;
 - enable a homeowner to apply in writing to the homeowner housing panel for a determination of whether their property factor has failed to carry out the property factor’s duties or to comply with the property factor code of conduct;
 - require a homeowner to notify the property factor in writing of the alleged failure and allow them a reasonable opportunity to resolve the concern before making an application to the panel;
 - require the president of the homeowner housing panel to refer accepted applications to a homeowner housing committee;
 - require a homeowner housing committee to decide whether a property factor has failed to carry out its duties or to comply with the property factor code of conduct and, if the property factor has so failed, whether to make a property factor enforcement order setting out any work to be executed and any payment to be made to the homeowner;
 - make it an offence to fail, without reasonable excuse, to comply with a property factor enforcement order;
 - enable the Scottish Ministers to make regulations about the recovery of relevant costs from property factors in cases which are referred to a homeowner housing committee or where a property factor enforcement order has been made against a factor;
 - allow an appeal to the sheriff (on a point of law only) in relation to a decision by the president of the homeowner housing panel or a homeowner housing committee; and
 - require the president of the homeowner housing panel to prepare an annual report for submission to the Scottish Ministers, who then lay it before the Scottish Parliament.

Section 16 – Naming of panel and re-naming of committees

64. **Section 16** is similar to section 21 of the Housing (Scotland) Act 2006, which deals with the private rented housing panel. Schedule 4 to the Rent (Scotland) Act 1984 requires there to be a panel of people to act as chairmen and members of rent assessment committees. Section 16(1) provides that the panel will have additional functions that are conferred on them by this Act. Section 16(2) names that panel the “homeowner housing panel” and the committees the “homeowner housing committees” in relation to all applications made under Part 2 of this Act (that is, applications from homeowners in relation to an alleged failure by property factors to carry out the property factor’s duties or to ensure compliance with the property factor code of conduct (see section 14)).

Section 17 – Application to homeowner housing panel

65. Subsection (1) enables a homeowner to apply to the homeowner housing panel for a determination of whether the homeowner’s property factor has failed to comply with the property factor’s duties (defined in subsection (5)) or to ensure compliance with the property factor code of conduct (“the section 14 duty”). Subsection (4) makes clear that

a property factor failing to carry out their duties to a reasonable standard counts as a failure to carry out their duties for the purposes of this Part.

66. Under subsection (2), a homeowner must set out in the application his or her reasons for considering that the property factor has failed to comply with the property factor's duties or with the section 14 duty.
67. Subsection (3) provides that, before making an application under subsection (1), a homeowner must notify the property factor in writing of the reasons why he or she believes that the property factor has failed to comply with the property factor's duties or with the section 14 duty. It also prohibits the homeowner from making an application to the homeowner housing panel unless the property factor has refused to resolve or unreasonably delayed in attempting to resolve the homeowner's concern.

Section 18 – Referral to homeowner housing committee

68. Subsection (1) requires the president of the homeowner housing panel to decide whether to refer an application made to the homeowner housing panel to a homeowner housing committee or to reject the application. The circumstances in which the president may reject an application are set out in subsection (2).
69. Subsection (3) requires the president to decide whether to reject an application or refer it to a homeowner housing committee within 14 days of receipt – unless he or she considers that further information is required to enable him or her to make the decision or that there is a reasonable prospect of the dispute being resolved by parties (in which case a decision under subsection (1) must be made by such later date as the president considers reasonable).
70. If the president decides to reject the application, he or she must, as soon as practicable, notify the homeowner (and anyone acting on the homeowner's behalf whose name and address is known to the president) of that fact (subsection (4)). Under subsection (5), that notification must set out the reasons for the rejection and explain the procedure for appealing against the decision.

Section 19 – Determination by homeowner housing committee

71. Subsection (1)(a) requires a homeowner housing committee, on receipt of an application referred to it by the president, to decide whether the property factor has failed to carry out the property factor's duties or to comply with the section 14 duty.
72. If a committee decides that a property factor has failed to carry out the property factor's duties or to comply with the section 14 duty, it must then consider whether to make a "property factor enforcement order" (subsection (1)(b)). If it proposes to make such an order, the committee must give notice of that proposal to the property factor and allow the parties (that is, the property factor and the homeowner) an opportunity to make representations (subsection (2)).
73. Subsection (3) obliges the committee, where it is satisfied (after taking into account any representations received) that the property factor has failed to carry out the property factor's duties or to comply with the section 14 duty, to make a property factor enforcement order. Subsection (4) states that, subject to the appeals provisions contained in section 22 of the Act, matters considered and decided on by the committee cannot be adjudicated on by any other court or tribunal.

Section 20 – Property factor enforcement orders

74. Subsection (1) defines a property factor enforcement order as an order requiring the property factor to execute such action as the homeowner housing committee considers necessary and, where appropriate, to make such payment to the homeowner as the committee considers reasonable.

75. Subsection (2) requires the order to specify a time period within which any action required must be executed or any payment required must be made, while subsection (3) allows the order to specify particular steps that the property factor must take.

Section 21 – Variation and revocation of property factor enforcement orders

76. Subsection (1) allows the homeowner housing committee that made a property factor enforcement order to vary or revoke it at any time (provided in the latter case that the committee considers that the action required by the order is no longer necessary).
77. Subsection (2) provides that the committee must vary a property factor enforcement order so as to extend the period allowed for the action required by the order to be executed in the circumstances specified in subsection (3) (namely cases where, while the action required has not yet been fully executed, either satisfactory progress is being made or the property factor has given a written undertaking that the action will be executed by a later date that the committee considers satisfactory).

Section 22 – Appeals

78. Subsection (1) provides a right of appeal against a decision of the president of the homeowner housing panel or a homeowner housing committee to the sheriff; however, the appeal must be on a point of law. Any such appeal must be made within the period of 21 days beginning with the day the decision appealed against is made (subsection (2)). There is no further right of appeal (subsection (3)).

Section 23 – Effect of failure to comply with property factor enforcement order

79. Under subsection (1), it is for the homeowner housing committee which made a property factor enforcement order to decide whether the property factor has failed to comply with the order.
80. Subsection (2) requires the homeowner housing committee to serve a notice on the Scottish Ministers in any case where it decides that a property factor has failed to comply with an property factor enforcement order. This will enable this fact to be taken into account, for example, when the Scottish Minister are considering an application from the property factor for re-registration or removal from the register under section 8(1).
81. The homeowner housing committee is prohibited from deciding that a property factor has failed to comply with a property factor enforcement order until the period within which the order requires the work to be completed has ended (subsection (3)(a)). In addition, the committee may not decide that property factor has failed to comply with the order if it is satisfied that the property factor is unable to comply with the order due to having been unable to acquire the rights (for example, access rights) necessary to take the action required (despite having taken reasonable steps to acquire those rights) or that the action required is likely to endanger any person (subsection (3)(b)).
82. Under subsection (4), if the committee would, but for the circumstances in subsection (3)(b), have decided that the property factor had failed to comply with the property factor enforcement order, the committee must instead notify the Scottish Ministers that the committee considers the property factor to be unable to comply with the property factor enforcement order.

Section 24 – Property factor enforcement order: offences

83. Subsection (1) makes it an offence for a person to fail to comply with a property factor enforcement order without reasonable excuse.
84. Subsection (2) sets out particular situations where a person will be considered to have a reasonable excuse for the purposes of subsection (1), although this does not

prevent other circumstances also being considered to constitute a reasonable excuse (subsection (3)).

85. Subsection (4) provides that a property factor may not be found guilty of the offence under subsection (1) unless a homeowner housing committee (which made the property factor enforcement order) has decided that the property factor has failed to comply with it. However, such a decision does not establish any presumption that the property factor has committed an offence. This is because to be found guilty of an offence it would have to be shown, *beyond reasonable doubt*, that the property factor had failed to comply with the property factor enforcement order, whereas the homeowner housing committee would only have to be satisfied *on the balance of probabilities* that the property factor had failed to comply with a property factor enforcement order to make a decision to that effect.
86. Under subsection (5), the penalty for the offence under subsection (1) is a fine not exceeding level 3 on the standard scale.

Section 25 – Power to make further provision about applications etc.

87. Section 24 allows the Scottish Ministers to make, by way of regulations, further provision about the procedure for making applications under section 17 and for the making of decisions in relation to such applications.

Section 26 – Recovery of costs from property factors in relation to certain applications and orders

88. Subsection (1) enables provision to be made by the Scottish Ministers (in regulations approved by the Scottish Parliament) for costs incurred by the homeowner housing panel, president and committee under Part 2 of the Act (except under section 27) to be recouped from a property factor in any case where an application is referred to a homeowner housing committee under section 18(1)(a) or a property factor enforcement order is made against the property factor. Subsection (3) provides additional details on what provision may be made in regulations under subsection (1).
89. Subsection (4) ensures that this power can only be exercised to recover costs.

Section 27 – Annual report

90. Subsection (1) requires the president of the homeowner housing panel to prepare an annual report on the exercise of the functions of the president and homeowner housing committees under Part 2 of the Act during each reporting year (see subsection (4)).
91. Subsection (2) requires the report to be submitted to the Scottish Ministers as soon as possible after the end of the year to which the report relates and, under subsection (3), the Scottish Ministers must then lay a copy of the report before the Scottish Parliament.
92. Subsection (4) defines a reporting year as beginning on the day that section 27 comes into force and ending on 31 December that year, then each successive calendar year. For example, if section 27 comes into force on 1 October 2012 (see section 33(2)), the first reporting year would be 1 October 2012 to 31 December 2012, the next reporting year would be 1 January 2013 to 31 December 2013 and so on.

Part 3 – Miscellaneous and General

Section 28 – Delegation of functions

93. Subsection (1) allows the Scottish Ministers (by order approved by the Scottish Parliament) to delegate any of their functions under the Act. So, for example, they could arrange for another person or body to carry out their functions in relation to receiving and determining applications for entry in the register of property factors.

94. Subsection (3) specifies certain exceptions to this: the excepted functions (which may not be delegated) are those relating to the making of regulations or orders, those relating to fees and those relating to laying documents before the Scottish Parliament.

Section 29 – Ancillary provision

95. Subsection (1) permits the Scottish Ministers (by order approved by the Scottish Parliament) to make such ancillary provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision of this Act. Such an order may modify any enactment (including this Act) (subsection (2)).

Section 30 – Orders and regulations

96. Subsection (1) provides that any power of the Scottish Minister to make orders or regulations under the Act is exercisable by statutory instrument, while subsection (2) clarifies that all such powers include power to make different provision for different cases and also power to make ancillary provision.
97. Under subsection (3), as read with paragraphs 4 and 5 of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010, a statutory instrument containing orders or regulations under the Act is subject to the negative procedure of the Scottish Parliament. However, a number of provisions are excepted from this rule – orders under sections 2(3), 14(3)(c), 28(1) and 29(1) and regulations under section 26(1) are instead subject to the affirmative procedure of the Scottish Parliament, while an order under section 33(2) providing for an earlier commencement date than 1 October 2012 is not subject to any procedure.

Section 31 – Interpretation

98. Section 31 contains a list of definitions of particular terms used in the Act.

Section 32 – Crown application

99. By virtue of section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010, the Act binds the Crown. So, for example, the Crown can be a property factor for the purposes of Part 1 of the Bill (although note the exception provided in section 2(2) (a) in relation to certain Crown land). However, this section makes it clear that the Crown cannot be held criminally liable for any contravention of any provision of the Act (subsection (1)) – although the Court of Session may, on the application of the Scottish Ministers under subsection (2), declare any act or omission that would constitute such a contravention to be unlawful.

Section 33 – Short title and commencement

100. Subsection (2) provides for Parts 1 and 2 to come into force on 1 October 2012, although the Scottish Ministers are also given power to specify an earlier date (or dates) by order. Under subsection (3), Part 3 came into force on the day after Royal Assent (that is, on 8 April 2011).

PARLIAMENTARY HISTORY

101. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, and the references to the Official Report and minutes of proceedings in relation to those proceedings. It also provides references to committee reports and other papers relating to the Bill.

*These notes relate to the Property Factors (Scotland) Act
2011 (asp 8) which received Royal Assent on 7 April 2011*

<i>Proceedings and Reports</i>	<i>Reference</i>
Introduction	
Bill introduced (1 June 2010)	Bill (As Introduced) (SP Bill 51 (Session 3)):
	http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51s3-introd.pdf
	Explanatory Notes (SP Bill 51–EN (Session 3)):
	http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51s3-introd-en.pdf
Policy Memorandum (SP Bill 51–PM (Session 3)):	http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51s3-introd-pm.pdf
SPICe Briefing on Bill (As Introduced) (29 June 2010)	Briefing (SB 10-42):
	http://www.scottish.parliament.uk/SPICeResources/Research%20briefings%20and%20fact%20sheets/SB10-42.pdf
Stage 1	
Local Government and Communities Committee	
18th meeting, 2010 (23 June 2010)	Minutes of proceedings (item 12):
	http://archive.scottish.parliament.uk/s3/committees/lgc/mop-10/lgmop10-0623.htm
19th meeting, 2010 (8 September 2010)	Official Report (cols. 3372 to 3394):
	http://archive.scottish.parliament.uk/s3/committees/lgc/or-10/lg10-1901.htm
	Minutes of proceedings (items 4 and 5):
	http://archive.scottish.parliament.uk/s3/committees/lgc/mop-10/lgmop10-0908.htm
Local Government and Communities Committee	
20th meeting, 2010 (15 September 2010)	Official Report (cols. 3402 to 3435):
	http://archive.scottish.parliament.uk/s3/committees/lgc/or-10/lg10-2001.htm
	Minutes of proceedings (items 2 and 4):
	http://archive.scottish.parliament.uk/s3/committees/lgc/mop-10/lgmop10-0915.htm
21st meeting, 2010 (22 September 2010)	>Official Report (cols. 3468 to 3482):
	http://archive.scottish.parliament.uk/s3/committees/lgc/or-10/lg10-2101.htm
	Minutes of proceedings (items 4 and 5):
	http://archive.scottish.parliament.uk/s3/committees/lgc/mop-10/lgmop10-0922.htm

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<i>Proceedings and Reports</i>	<i>Reference</i>
22nd meeting, 2010 (29 September 2010)	Official Report (cols. 3525 to 3543):
	http://archive.scottish.parliament.uk/s3/committees/lgc/or-10/lg10-2201.htm
	Minutes of proceedings (items 3 and 4):
	http://archive.scottish.parliament.uk/s3/committees/lgc/mop-10/lgmop10-0929.htm
25th meeting, 2010 (3 November 2010)	Minutes of proceedings (item 3):
	http://archive.scottish.parliament.uk/s3/committees/lgc/mop-10/lgmop10-1103.htm
26th meeting, 2010 (10 November 2010)	Minutes of proceedings (item 5):
	http://archive.scottish.parliament.uk/s3/committees/lgc/mop-10/lgmop10-1110.htm
Stage 1 Report on the Property Factors (Scotland) Bill (Local Government Communities Committee 10th Report, 2010 (Session 3) (SP Paper 519))	Report:
	http://archive.scottish.parliament.uk/s3/committees/lgc/reports-10/lgr10-10.htm
Subordinate Legislation Committee	
Report on Property Factors (Scotland) Bill (Subordinate Legislation Committee 50th Report, 2010 (Session 3) (SP Paper 502))	Report:
	http://archive.scottish.parliament.uk/s3/committees/subleg/reports-10/sur10-50.htm
Consideration by the Parliament	
Stage 1 debate (8 December 2010)	Official Report (cols. 31292 to 31329 and col. 31333):
	http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=5991&mode=pdf

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<i>Proceedings and Reports</i>	<i>Reference</i>
	Minutes of proceedings (item 7): http://www.scottish.parliament.uk/parliamentarybusiness/23497.aspx
Stage 2	
Local Government and Communities Committee (2nd meeting, 2011) (19 January 2011)	1st Marshalled List of Amendments for Stage 2 (SP Bill 51–ML1 (Session 3)): http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51s3-stage2-ml1.pdf
	1st Groupings of Amendments for Stage 2 (SP Bill 51–G1 (Session 3)): http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51s3-stage2-g1.pdf
	Official Report (cols. 3972 to 3990) http://archive.scottish.parliament.uk/s3/committees/lgc/or-11/lg11-0201.htm
	Minutes of proceedings (item 2): http://archive.scottish.parliament.uk/s3/committees/lgc/mop-11/lgmop11-0119.htm
	2nd Marshalled List of Amendments for Stage 2 (SP Bill 51–ML2 (Session 3)): http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51s3-stage2-ml2.pdf
	2nd Groupings of Amendments for Stage 2 (SP Bill 51–G2 (Session 3)): http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51s3-stage2-g2.pdf
	Official Report (cols. 3997 to 4006) http://archive.scottish.parliament.uk/s3/committees/lgc/or-11/lg11-0301.htm
Bill (As Amended at Stage 2) published (27 January 2011)	Minutes of proceedings (item 1): http://archive.scottish.parliament.uk/s3/committees/lgc/mop-11/lgmop11-0126.htm
	Bill (As Amended at Stage 2) (SP Bill 51A (Session 3)): http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51s3-stage2-amend.pdf
	Revised Explanatory Notes and Revised Financial Memorandum (SP Bill 51A–EN (Session 3)): http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51as3-stage2-en-rev.pdf
SPICe Briefing on Bill As Amended at Stage 2 (18	Briefing (SB 11-15): http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S3/SB_11-15.pdf

These notes relate to the Property Factors (Scotland) Act 2011 (asp 8) which received Royal Assent on 7 April 2011

<i>Proceedings and Reports</i>	<i>Reference</i>	
February 2011):		
After Stage 2		
Report on Property Factors (Scotland) Bill As Amended at Stage 2 (Subordinate Legislation Committee 15th Report, 2011 (Session 3) (SP Paper 592))	Report: http://archive.scottish.parliament.uk/s3/committees/subleg/reports-11/sur11-15.htm	
Stage 3		
Consideration by the Parliament (3 March 2011)	Marshalled List of Amendments selected for Stage 3 (SP Bill 51A–ML (Session 3)): http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51as3-stage3-ml.pdf	
	Groupings of Amendments for Stage 3 (SP Bill 51A–G (Session 3)): http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51as3-stage3-g.pdf	
	Official Report (cols. 33925 to 33951 and col. 33952): http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6228&mode=pdf	
	Minutes of Proceedings (items 11 and 12): http://www.scottish.parliament.uk/parliamentarybusiness/24295.aspx	
	Bill (As Passed) published (4 March 2011)	Bill (As Passed) (SP Bill 51B (Session 3)): http://www.scottish.parliament.uk/S3_Bills/Property%20Factors%20(Scotland)%20Bill/b51bs3-aspassed.pdf
	Royal Assent	
Royal Assent received 7 April 2011	Property Factors (Scotland) Act 2011 (asp 8): http://www.legislation.gov.uk/asp/2011/8/contents/enacted	