

Thank you for your email of 2 July to my officials.

You are seeking the views of the Scottish Government on the action called for in the petition, and whether we plan to revisit the position with regard to section 64 (overriding power to dismiss and appoint manager) of the Title Conditions (Scotland) Act 2003. The petitioner is calling on the Scottish Government to review the 2003 Act and the need for a two-thirds majority to be obtained to change a factor in some circumstances, particularly in relation to the impact of that requirement on residents of sheltered accommodation.

There are no current plans to consult on changing the law in this area.

The current position is:

- In the absence of contrary provision in title deeds and provided no manager burden¹ is exercisable, a property manager in most developments may be dismissed by a simple majority of the units (section 28(1)(d)) of the 2003 Act refers). However, in sheltered or retirement housing this figure is increased so that a majority of two thirds of the owners is required to dismiss the manager (section 54(5)(a)(i) of the 2003 Act).
- There may be specific provision in title deeds on the majority needed to switch a factor. Any such provision would take precedence over the procedure set out in section 28 and section 54.
- Regardless of what the title deeds say, a majority of two-thirds can always dismiss a property factor (other than in relation to certain kinds of manager burden²). This 'overriding' power is contained in section 64.

As the Convener noted when the petition was discussed at the Committee's meeting on 28 June, there was considerable discussion on sheltered housing when the then Title Conditions (Scotland) Bill was considered by Parliament.

The specific provisions in the 2003 Act on sheltered housing are known as "core burdens". When the Bill was first introduced into Parliament, it laid down that the majority needed to make changes to these burdens should be three quarters of the owners:

[http://www.scottish.parliament.uk/S1_Bills/Title%20Conditions%20\(Scotland\)%20Bill/b54s1.pdf](http://www.scottish.parliament.uk/S1_Bills/Title%20Conditions%20(Scotland)%20Bill/b54s1.pdf) [Section 50 of the Bill refers]. Paragraph 62 of the Policy Memorandum [http://www.scottish.parliament.uk/S1_Bills/Title%20Conditions%20\(Scotland\)%20Bill/b54s1p.m.pdf](http://www.scottish.parliament.uk/S1_Bills/Title%20Conditions%20(Scotland)%20Bill/b54s1p.m.pdf) prepared by the then Scottish Executive for the Bill said:

"The provisions for majority discharge of burdens will not, however, apply to all burdens in sheltered housing complexes. There was some concern from consultees that a simple majority should not be able to vary or discharge certain vital elements of sheltered housing such as the warden service and the maintenance of facilities. The Bill therefore provides that a majority of 75% will be required to change burdens relating to these core elements of sheltered housing."

¹ Manager burdens are typically used by developers to appoint managers in the initial years of housing or other developments. In sheltered accommodation, the maximum duration of a manager burden is 3 years/

² Where a manager burden was imposed under right to buy legislation, it is possible to use section 64 to dismiss and replace a property manager.

This led to debate when the Bill was at Stage 1. The Stage 1 report <http://archive.scottish.parliament.uk/business/committees/historic/justice1/reports-02/j1r02-09-vol01-02.htm#10> [paragraphs 130 to 133] noted that the Scottish Executive was prepared to revise the 75% majority figure downwards during the passage of the Bill. In the event, it was amended at stage 2 to the current figure of two-thirds

More generally, there has been discussion in the past on whether changes should be made to section 64 of the 2003 Act. The 2003 Act followed a report by the Scottish Law Commission. The current two thirds majority in section 64 is based on the Commission's draft Bill: <https://www.scotlawcom.gov.uk/files/8712/7989/7470/rep181.pdf> (see section 54 of the Commission's draft Bill, attached at Appendix A to their report).

Of course, it would be possible to consult on potential changes to the two thirds majority requirement in section 64. The Scottish Government has consulted on this type of issue previously, as part of a wider consultation: please see <http://www.gov.scot/Publications/2012/06/8390/5> [paragraphs 2.24 to 2.30 of the consultation – question 19]. The response was mixed: please see <http://www.gov.scot/Publications/2013/02/4438/5> [analysis of responses to consultation - paragraphs 3.63 to 3.73].

The Scottish Government could consult again. However, based on the previous experience, we doubt if there would be consensus on what, if anything, should be done.

In any event, it seems to the Scottish Government that there are arguments for the requirement for a two thirds majority to switch factors in certain circumstances. A two thirds majority demonstrates that there is a definite will to dismiss and replace a factor. A simple majority could lead to frequent changes. Having a two thirds majority gives the factor some guarantees of stability whilst also providing owners with rights to dismiss and replace a factor.

Owners' rights have also been enhanced in recent years by the Property Factors (Scotland) Act 2011, which makes provision on the performance by factors of their duties. The 2011 Act and associated secondary legislation provides that factors must be registered; lays down a statutory Code of Conduct for factors to follow; and makes provision for a tribunal which homeowners can use to complain about the performance of their factor, after they have raised their concerns directly with the factor.

In summary, therefore, the Scottish Government does not intend to review the legislation on the switching of property factors.