

# TENEMENTS (SCOTLAND) ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Repairs: Costs and Access*

#### *Section 17 – Access for maintenance purposes*

80. *Section 17* introduces a right of access to parts of a tenement that are individually owned, provided that access is required for one of eight reasons. When a flat is owned in common, any of the owners may exercise the right of access under *section 28(5)*. In tenements governed by the development management scheme, *subsection (2)* provides that the right of access may also be exercised on behalf of the owners' association. If necessary the right may be enforced under *section 6* by application to the sheriff court.
81. *Subsection (1)* and *subsection (5)* qualify the right of access by reference to a reasonableness test. *Subsection (1)* sets out that reasonable notice has to be given to the owner or occupier of part of the tenement, when access to or through that part is required. An owner or an occupier may refuse to allow access or access at a particular time under *subsection (5)* if it is reasonable to refuse access at that time or if, in all the circumstances, it is reasonable to refuse access at any time.
82. *Subsection (3)* lists the reasons for which access may be granted. The list is exhaustive. Paragraphs (a) and (b) state that access may be granted for the carrying out of maintenance or other work. This may be maintenance that is required as a result of the management scheme which applies to the tenement (paragraph (a)). "Other work" is included because the management scheme may make provision for arranging improvements. Under paragraph (b) access may be required to carry out maintenance to any part of the tenement which is owned (wholly or in part) by the person requiring access.
83. Paragraph (c) allows access for an inspection to determine whether it is necessary to carry out maintenance, while paragraph (d) and (e) respectively state that access should be given where an owner is seeking to determine whether another owner is fulfilling their duty to maintain support and shelter or complying with the prohibition not to interfere with the support and shelter of the building. Paragraph (f) makes it clear that an owner will be able to access another owner's flat for the purpose of installing services by virtue of *section 19*.
84. If the floor area of part of the tenement has to be measured for the purposes of determining the liability of the owners, then paragraph (g) allows access. Paragraph (h) provides a right of access in connection with the exercise of the power of sale set out in schedule 2 of the Act. This is to avoid the situation where the sale of an abandoned tenement may be frustrated because of a lack of access and the building may then become blighted.
85. In terms of *subsection (4)* where maintenance work is urgent then reasonable notice need not be given under *subsection (1)*.

*These notes relate to the Tenements (Scotland) Act 2004  
(asp 11) which received Royal Assent on 22 October 2004*

86. *Subsection (6)* provides that the right of access may also be used by a person (for example, a tradesperson) who is authorised by an owner or an owners' association. This person is referred to as an "authorised person". Authorisation is not required in writing, which would be overly bureaucratic. An owner may, however, request evidence that a person has been authorised. If an authorised person causes damage to any part of the tenement, the owner or the owners' association who gave the authorisation will, under *subsection (7)*, be jointly and severally liable with the authorised person for any damage caused. The owner, or as the case may be, the owners' association will however have a right of relief against the authorised person.
87. Under *subsection (8)*, the person exercising the right of access (the owner or owners' association) is placed under a duty to reinstate the flat to the condition it was in prior to access being obtained. The aim is that the flat should be reinstated to its former condition before access was obtained and that an owner should be compensated for any damage caused. It is the owners on whose behalf the access is exercised who have a statutory duty to reinstate. It would still be possible for them to pursue any authorised person who had entered the flat on their behalf – such as a tradesperson – if he or she had caused the damage.
88. If there is a failure to comply with the duty of reinstatement, the owner of the part of the tenement through which access has been obtained can, under *subsection (9)*, carry out the work to restore the part to its former condition. Under paragraph (b) they may then recover the costs of doing so from the relevant owner or owners' association.