

Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors

Effective from 1 October 2012

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PROPERTY FACTORS (SCOTLAND) ACT 2011 PROPERTY FACTOR CODE OF CONDUCT

INTRODUCTION

This Code of Conduct (“the Code”) sets out minimum standards of practice for registered property factors and has been prepared in terms of section 14 of the Property Factors (Scotland) Act 2011 (“the Act”). Registered property factors (as defined in section 2 of the Act) are legally required to ensure compliance with the Code in terms of section 14(5) of the Act.

This Code is one of three main elements to the Act. The other two elements are:

1. A register of all property factors operating in Scotland (a property factor operating in Scotland without registration is committing a criminal offence in terms of section 12 of the Act);
2. A dispute resolution mechanism - the homeowner housing panel.

Who does this Code apply to?

This Code applies to all registered “property factors” as defined by section 2 of the Act.

Broadly, “property factors” means property and land managers operating in Scotland, whether they are **private businesses, local authorities or housing associations** (see the annex to the Code for the definition of “property factor” which is contained in section 2 of the Act). Local authorities and housing associations will wish to take careful note of section 2(1)(b) in particular, as the provision of the service of managing the common parts of land used to any extent for residential purposes, to homeowners¹ free of charge does **not** in itself exempt those organisations from having to comply with the provisions of the Act.

What happens if a property factor does not comply with the Code?

Section 16 of the Act establishes a dispute resolution system. A homeowner may apply to the homeowner housing panel for a determination if the homeowner believes that his or her property factor has failed to comply with the Code, or otherwise failed to carry out their duties (section 17(5) of the Act gives a definition of “property factor’s duties”. See Annex A).

In applying the standards in this Code, the homeowner housing panel and any homeowner housing committee may take into account the title deeds and/or any agreement relating to the land which is managed or maintained by the property

¹ The definition of “homeowner”, as it appears in the Act, is attached in Annex A.

factor. A homeowner housing committee may make a “property factor enforcement order”, requiring the property factor to take such action or to make such payment to the homeowner as is considered necessary. Failure to comply with such an order without reasonable excuse is a criminal offence in terms of section 24 of the Act.

In addition, the Scottish Ministers can take into account any failure to comply with the Code or with any property factor enforcement order when deciding whether to enter a person on the register of property factors, or to remove a registered property factor from it (see sections 4 and 8 of the Act). A property factor that has been removed from the register or whose application for registration is refused will be committing a criminal offence if they operate as a property factor without registration (section 12(1) and (3)).

How do the requirements of professional bodies and other legislation relate to the Code?

Property factors are responsible for ensuring that they conduct their business in a manner that complies with all relevant legislation in addition to the Act and the Code. In particular this covers duties imposed by legislation relating to consumer protection, financial services, consumer credit licences, title conditions, health and safety, data protection and equalities.

Some property factors will also have specific commitments to meet the regulatory requirements of statutory bodies (such as the Scottish Housing Regulator or the Financial Services Authority), or comply with the rules and codes of practice of professional or trade bodies (such as the Royal Institution of Chartered Surveyors or the Property Managers Association Scotland).

The Code is separate from, and additional to, these other statutory and voluntary requirements.

SECTION 1: WRITTEN STATEMENT OF SERVICES

You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code.

You must provide the written statement:

- to any new homeowners within four weeks of agreeing to provide services to them;
- to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage;
- to existing homeowners within one year of initial registration as a property factor. However, you must supply the full written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies);
- to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement.

1.1a For situations where the land² is owned by the group of homeowners

The written statement should set out:

A. Authority to Act

- a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group³;
- b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

B. Services Provided

- c. the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency

² In the context of the Code, the term “land” refers to both land and any buildings on that land.

³ For example (not an exhaustive list):

- Named in the Title Deeds as the property factor for the first (x period of time). This time limit has/has not expired.
- Appointed by a decision of a majority of homeowners on x date.
- Operating as property factor by custom and practice – no formal appointment exists.

repairs and the frequency of property inspections (if part of the core service);

- d. the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a “menu” of services) and how these fees and charges are calculated and notified;

C. Financial and Charging Arrangements

- e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;
- f. what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;
- g. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);
- h. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);
- i. any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);
- j. how often you will bill homeowners and by what method they will receive their bills;
- k. how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements

- l. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your in-house complaints handling procedure (see Section 7: Complaints resolution);
- m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;
- n. your procedures and timescales for response when dealing with telephone enquiries;

E. Declaration of Interest

- o. a declaration of any financial or other interests (for example, as a homeowner or lettings agent) in the land to be managed or maintained;

F. How to End the Arrangement

- p. clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination.

1.1b Alternative standards for situations where the land is owned by a land maintenance company or a party other than the group of homeowners

The written statement should set out:

A. Authority to Act

- a. a statement of the legal basis of the arrangement between you and the homeowner;
- b. a description of the use and location of the area of land to be maintained, including a map where possible (this information must be kept up-to-date);

B. Services Provided

- c. The services that you will provide. This will include the minimum service delivery standards that can be expected and the target times for taking action in response to requests for both routine and emergency repairs. Any work or services which are a requirement of the property titles should also be stated;

C. Financial and Charging Arrangements

- d. how many properties contribute towards maintenance costs for the area of land maintained;
- e. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);
- f. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);

- g. any arrangements for funds for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);
- h. any services or works that may incur additional fees and charges, including when or how they may arise (this may take the form of a “menu” of services) and details of how these fees and charges are calculated and notified;
- i. how often you will bill homeowners and by what method they will receive their bills;
- j. how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements

- k. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied after completing your in-house complaints handling procedure (see Section 7: Complaints resolution);
- l. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;
- m. your procedures and timescales for response when dealing with telephone enquiries;

E. Declaration of Interest

- n. a declaration of any financial or other interests (for example, ownership) in the land to be managed;

F. How to End the Arrangement

- o. clear information on how to change or terminate the service arrangement between you and the homeowner, including signposting to the applicable legislation. This information should state clearly any “cooling off” period, period of notice or penalty charges for early termination.

SECTION 2: COMMUNICATION AND CONSULTATION

Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:

- 2.1 You must not provide information which is misleading or false.
- 2.2 You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).
- 2.3 You must provide homeowners with your contact details, including telephone number. If it is part of the service agreed with homeowners, you must also provide details of arrangements for dealing with out-of-hours emergencies including how to contact out-of-hours contractors.
- 2.4 You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).
- 2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers).

SECTION 3: FINANCIAL OBLIGATIONS

While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.⁴

The overriding objectives of this section are:

- Protection of homeowners' funds
- Clarity and transparency in all accounting procedures
- Ability to make a clear distinction between homeowners' funds and a property factor's funds

- 3.1 If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).
- 3.2 Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.
- 3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.
- 3.4 You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).

If you are a private sector property factor:

- 3.5a Homeowners' floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners.

⁴ If you are subject to FSA regulation, compliance with their rules will be in addition to the requirement for property factors to comply with the Code.

- 3.6a In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened in the name of each separate group of homeowners.

If you are a Registered Social Landlord or local authority property factor:

- 3.5b Homeowners' floating funds must be accounted for separately from your own funds, whether through coding arrangements or through one or more separate bank accounts.
- 3.6b In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account or accounting structure must be used for each separate group of homeowners.

SECTION 4: DEBT RECOVERY

Non-payment by some homeowners can sometimes affect provision of services to the others, or can result in the other homeowners being liable to meet the non-paying homeowner's debts (if they are jointly liable for the debts of others in the group). For this reason it is important that homeowners are aware of the implications of late payment and property factors have clear procedures to deal with this situation and take action as early as possible to prevent non-payment from developing into a problem.

It is a requirement of Section 1 (Written statement of services) that you inform homeowners of any late payment charges and that you have a debt recovery procedure which is available on request.

- 4.1 You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.
- 4.2 If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case.
- 4.3 Any charges that you impose relating to late payment must not be unreasonable or excessive.
- 4.4 You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.
- 4.5 You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.
- 4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).
- 4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.
- 4.8 You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.
- 4.9 When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position.

SECTION 5: INSURANCE

- 5.1 You must have, and maintain, adequate professional indemnity insurance, unless you are a social sector property factor who can demonstrate equivalent protections through another route.

If your agreement with homeowners includes arranging any type of insurance, the following standards will apply:

- 5.2 You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this.
- 5.3 You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance.
- 5.4 If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so.
- 5.5 You must keep homeowners informed of the progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves.
- 5.6 On request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes.
- 5.7 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request. If a paper or electronic copy is requested, you may make a reasonable charge for providing this, subject to notifying the homeowner of this charge in advance.

If your agreement with homeowners includes arranging buildings insurance:

- 5.8 You must inform homeowners of the frequency with which property revaluations will be undertaken for the purposes of buildings insurance, and adjust this frequency if instructed by the appropriate majority of homeowners in the group.

Additional standard for situations where a land maintenance company owns the land:

- 5.9 On request you must provide homeowners with clear details of the costs of public liability insurance, how their share of the cost was calculated, the terms of the policy and the name of the company providing insurance cover.

SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE

This section of the Code covers the use of both in-house staff and external contractors.

- 6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.
- 6.2 If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs⁵, wherever possible.
- 6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.
- 6.4 If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.
- 6.5 You must ensure that all contractors appointed by you have public liability insurance.
- 6.6 If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.
- 6.7 You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.
- 6.8 You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.
- 6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

⁵ An emergency repair would be where urgent work is required to prevent damage, or in the interests of health and safety, and where there is not time to use the normal channels of consultation and decision-making.

SECTION 7: COMPLAINTS RESOLUTION

Section 17 of the Act allows homeowners to make an application to the homeowner housing panel for a determination of whether their property factor has failed to carry out their factoring duties, or failed to comply with the Code.

To take a complaint to the homeowner housing panel, homeowners must first notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties, or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them.

It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in-house complaints procedure and how they make an application to the homeowner housing panel.

- 7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.
- 7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.
- 7.3 Unless explicitly provided for in the property titles or contractual documentation, you must not charge for handling complaints.
- 7.4 You must retain (in either electronic or paper form) all correspondence relating to a homeowner's complaint for three years as this information may be required by the homeowner housing panel.
- 7.5 You must comply with any request from the homeowner housing panel to provide information relating to an application from a homeowner.

EXTRACTS FROM THE PROPERTY FACTORS (SCOTLAND) ACT 2011

The full text of the Property Factors (Scotland) Act 2011 can be accessed here:
<http://www.legislation.gov.uk/asp/2011/8/contents>

THE MEANING OF “PROPERTY FACTOR”

Section 2 of the Act - Meaning of “property factor”

- (1) In this Act, “property factor” means—
- (a) a person who, in the course of that person’s business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes,
 - (b) a local authority or housing association which manages the common parts of land used to any extent for residential purposes and owned—
 - (i) by two or more other persons, or
 - (ii) by the local authority or housing association and one or more other person,
 - (c) a person who, in the course of that person’s 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 those 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 that land), and
 - (d) a local authority or housing association which manages or maintains land which is available for use by—
 - (i) the owners of any two or more adjoining or neighbouring residential properties, or
 - (ii) the local authority or housing association and the owners of any one or more such properties,

but only where the owners of those 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 that land.

- (2) Despite subsection (1), the following are not property factors for the purposes of this Act—
 - (a) a person so far as managing or maintaining land on behalf of the Crown that was acquired by virtue of Her Majesty's prerogative rights in relation to unclaimed or ownerless land,
 - (b) an owners' association established by the development management scheme (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) so far as managing or maintaining common parts or land in accordance with the scheme,
 - (c) a person so far as managing or maintaining common parts or land on behalf of another person who is a property factor in relation to the same common parts or land.
- (3) The Scottish Ministers may by order modify either or both of subsections (1) and (2).
- (4) An order under subsection (3) may make such consequential modifications of any other provision of this Act as may be necessary or appropriate.
- (5) An order under subsection (3) is not to be made unless a draft of the statutory instrument containing the order has been laid before, and approved by resolution of, the Scottish Parliament.
- (6) In this Part—

“housing association” has the meaning given by section 1 of the Housing Associations Act 1985 (c.69),

“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39).

THE MEANING OF “HOMEOWNER”

Section 10 of the Act - Section 9: interpretation etc.

- (5) In this Act, “homeowner” means—
 - (a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or
 - (b) an owner of residential property adjoining or neighbouring land which is—
 - (i) managed or maintained by a property factor, and
 - (ii) available for use by the owner.

THE MEANING OF “PROPERTY FACTOR’S DUTIES”

Section 17 of the Act - Application to homeowner housing panel

- (5) In this Act, “property factor’s duties” means, in relation to a homeowner—
 - (a) duties in relation to the management of the common parts of land owned by the homeowner, or
 - (b) duties in relation to the management or maintenance of land—
 - (i) adjoining or neighbouring residential property owned by the homeowner, and
 - (ii) available for use by the homeowner.



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The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

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