The Long Leases (Scotland) Bill is based on the recommendations for reform made by the Scottish Law Commission in 2006 and was introduced in the Scottish Parliament on 12 January 2012, having first been the subject of an online consultation by the Scottish Government in March 2010. An earlier version of the Bill was introduced in Session 3 of the Parliament but fell at the dissolution of Parliament.
EXECUTIVE SUMMARY

Overview

The Long Leases (Scotland) Bill is the final part of a series of recent legislative reforms to the system of property law in Scotland based on reports published by the Scottish Law Commission (SLC).

In Session 3 of the Parliament (2007–2011) the Long Leases (Scotland) Bill [SP Bill 61] (‘the Session 3 Bill’) was introduced, the key provisions of which were very similar to the current Bill. The Stage 1 Report by the former Justice Committee, supporting the general principles of this Bill, was published on 3 March 2011. However, the Bill fell at the dissolution of Parliament.

The main policy rationale for the current Bill is that a tenant’s right under an ultra-long lease is akin to a right of ownership and so the Bill provides for such a right to be automatically converted to a right of ownership on an appointed day, with compensation for the former landlord. Broadly speaking, an ultra-long lease is defined as a registered lease of over 175 years which has more than 100 years left to run (section 1).

Compensation for a former landlord is based on the annual rent payable under the ultra-long lease in question. Additional payments to the former landlords are also payable in some circumstances (Part 4).

The Scottish Government estimates that there are currently around 9,000 ultra-long leases in Scotland eligible for conversion to ownership under the Bill. The basis for this figure is an empirical study carried out by the SLC in 2000 which surveyed long leases in four out of the 33 land registration counties in Scotland.

The Scottish Government undertook an online consultation in respect of the proposed reform of long leases in March 2010 and received 15 publicly available responses (as well as two confidential responses). Thirteen of those 15 responses were supportive of the proposed conversion scheme for ultra-long leases.

Registration issues

If the Bill is passed, then, to be consistent with the principle of public land registration, the information about land ownership held by Registers of Scotland (RoS) (in either the ‘Land Register’ or the old ‘Registers of Sasines’) requires to be amended at some stage after the appointed day. This is to reflect the changes of ownership resulting from the conversion of former tenants’ interests in qualifying ultra-long leases to outright ownership.

When the Session 3 Bill was introduced, the intention was that RoS would take forward the necessary updating in respect of ultra-long leases registered in the Land Register as a bespoke project around the time of the appointed day and that the costs of the update would be borne by RoS and passed on to all customers of RoS via registration fees in general. However, the Financial Memorandum to the Session 4 Bill states that RoS has decided not to carry out a specific exercise to update the information it holds in the Land Register to reflect the consequences of the conversion scheme for ultra-long leases (para 308).
Instead the former tenant will have the option of applying for rectification to reflect his or her right of ownership (with an associated fee of £60, if current fee levels are maintained) or waiting until there is a transaction in respect of the property in question, at which time RoS will update the information it holds after that transaction is complete (and bear the costs of doing so).

For the many ultra-long leases recorded in the old Register of Sasines, there was never any intention to undertake a bespoke project to reflect the new rights of ownership in the Land Register. Instead the former tenant will have essentially the same two options - updating the publicly held information in advance of any future transaction, or waiting until a transaction occurs, in which case RoS will carry out the update at its own cost. If the former tenant choses to apply for a first registration in the Land Register in advance of any transaction, the associated fee will be dependent on the value of the property (assuming the current approach to fees for first registration in the Land Register is the same at the appointed day).

Common good

Like the Session 3 Bill, the current Bill contains no specific provisions relating to common good land and property. However, one of the policy issues associated with the Bill which has attracted the most attention is to what extent common good land and property will be affected by the conversion scheme for ultra-long leases contained in the Bill, and, if it is affected, whether this is desirable in policy terms. The common good is a fund of money and assets owned and administered by each Scottish local authority in respect of each former burgh within the area of that local authority. Land and property which forms part of the common good is subject to a range of statutory controls, including in relation to its ‘disposal’ which in some circumstances must be sanctioned by the court.

A short survey of local councils carried out by the Scottish Government in 2011 (to which eight councils did not respond) suggests that there are four leases¹ of common good property which would be covered by the conversion scheme under the Bill. It has been argued by campaigners on land-related issues, principally Andy Wightman, that the long lease of Waverley Market in Edinburgh (now the site of Waverly Shopping Centre) is another lease of common good property which would be affected by the conversion scheme. On the other hand, The City of Edinburgh Council does not agree that the site in question is part of Edinburgh’s common good fund.

In the Policy Memorandum to the Bill (at para 51), the Scottish Government states that if the Bill is passed by Parliament the Scottish Government will write to local councils recommending that any compensatory or additional payments received by local authorities as a result of ultra-long leases of common good land converting to ownership should be allocated to local authorities’ common good funds or accounts.

Exemption relating to commercial leases

In a change to the Bill as consulted on (but reflecting the terms of the Session 3 Bill), the Bill excludes leases with an annual rent of over £100 (section 1), with the aim of excluding leases let on commercial terms.

Several new provisions feature in the Session 4 Bill which are designed to reflect the fact that some leases have an element of variable rent (eg rent which is based on the annual turnover of a business). In particular, provision is made for registration of an exemption in respect of a lease where rent is in excess of £100 at any time in the five years preceding Royal Assent (assuming the Bill is passed). Registration requires to be preceded by an agreement entered into with the tenant, or an order made by the Lands Tribunal relating to the rent in question (sections 64 and 69).

¹ Initially the survey revealed five such leases but the information was amended by Fife Council in 2012.
‘Cumulo rent’ is a single rent payable in respect of two or more leases (section 38). It results when part of original leased subjects are transferred by the tenant to another tenant or tenants. Compared to the Session 3 Bill, the Session 4 Bill makes more elaborate provision for situations where cumulo rent is payable (sections 2, 39, 64 and 69). The new provisions relating to cumulo rent interact, to some extent, with the £100 cut-off exemption contained in section 1.

Exemption relating to pipes and cables

Various bodies, including oil companies and ‘statutory undertakers’ (i.e. companies and agencies with legal rights to carry out certain development works), require to run pipes and cables through land they do not own. Sometimes, because of an absence of an alternative legal mechanism to achieve this result, they have resorted to ‘leases’ of strips of land to achieve this purpose.

In a departure from the Bill as consulted on (but following the general approach of the Session 3 Bill), section 1(4)(b) of the Bill exempts ultra-long leases granted for the sole purpose of allowing the tenant to install and maintain pipes and cables. The earlier version of this exemption that appeared in the Session 3 Bill was criticised during Stage 1 consideration on various grounds, including that it was too limited in scope in terms of the type of leases it included.

In the Policy Memorandum to the Bill (paras 45–46) the Scottish Government acknowledges the discussion during Stage 1 of the Session 3 Bill as to whether it was competent to have a lease relating to pipes and cables. However, the Government argues that it is better to include the exemption in the Bill, to put it beyond doubt that such legal arrangements are not intended to be caught by the conversion scheme for ultra-long leases.
INTRODUCTION AND BACKGROUND

The **Long Leases (Scotland) Bill** (hereafter ‘the Bill’ or, in certain contexts, ‘the Session 4 Bill’) was introduced in the Scottish Parliament on 12 January 2012.

The purpose of the Bill is to implement the recommendations of the [Scottish Law Commission (SLC)](https://www.slc.org.uk/) in its report entitled **Conversion of Long Leases** (SLC 2006) (‘the Report’). The key principle of the Bill is that “qualifying” ultra-long leases should be converted into ownership, with compensation for landlords. Unless the tenant opts-out under Part 5 of the Bill, conversion of a qualifying ultra-long lease is automatic and occurs on “the appointed day” (sections 4 and 70).²

A noteworthy aspect of this legislation is that an earlier **Long Leases (Scotland) Bill [SP Bill 61]** was introduced in Parliament during Session 3 (in November 2010). The **Stage 1 Report** supporting the general principles of this Bill was published by the former Justice Committee (as lead committee on that Bill) on 3 March 2011 (Justice Committee 2011e), shortly before the dissolution of Parliament. However, the Stage 1 (general principles) debate did not take place and accordingly this Bill (hereafter ‘the Session 3 Bill’) fell at the dissolution of Parliament. For more information on the Session 3 Bill as introduced see the associated **SPICe Briefing** (Harvie-Clark 2011a).

This briefing provides an overview of the background to the current Bill, including an introduction to the law of leases. It also provides a summary of the proposals contained in the Bill, including the changes to the Bill since the Scottish Government’s online consultation on the proposals in March 2010, as well as the differences between the current Bill and the Session 3 Bill.

As well as several policy changes to the Bill since consultation, it is worth noting that the Bill as introduced omits 20 schedules which appeared in the SLC version of the Bill. These primarily contained forms to be used when converting leases into ownership and the intention is they will now appear in secondary legislation (see further the **Delegated Powers Memorandum** of the Bill).

OVERVIEW OF THE LAW OF LEASES

THE BASICS

A **lease** is a contract by which a person, known as a **tenant**, is allowed to occupy someone else’s land or buildings for a finite period of time. In return for this he or she pays to the person who granted this right (ie the **landlord**) a periodical payment known as **rent**.

A lease may be registered if it meets certain requirements including that its initial duration exceeds 20 years. Leases eligible for registration are now registered in the **Land Register**, the ‘new’ public land register which has been phased in across Scotland, geographical area by geographical area, over the last 30 years. A significant number of registered leases remain registered in the **Register of Sasines**, the old register of deeds relating to property in Scotland.³

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² Section 70 sets the appointed day as the first Martinmas (28 November) occurring two years after section 70 comes into force. However, section 83 also provides that section 70 itself can come into force on a day which Scottish Ministers appoint via secondary legislation.

³ For more information on the property registers see **Registers of Scotland** and **Land Registration Counties and Operational Dates** (Registers of Scotland 2003). In the case of leases eligible for registration in the Land Register, registration is now the only way of acquiring a “real right”, ie a right binding on successors to the original landlord.
The terms and conditions of a particular lease may be **express terms and conditions** negotiated between the landlord and the tenant and contained in the lease document itself or they may be terms which do not appear in the lease document but which are **implied by law** (either statute or the common law).

A tenant’s interest in a lease may be **assigned**, ie sold or otherwise transferred to a third party. In respect of an assignation, the party who is transferring his or her entire interest exits from the lease arrangement completely and a new tenant enters. This can be contrasted with the situation where the original tenant **sub-lets** to another tenant. Here the original tenant remains party to the original lease with the landlord, however he or she also becomes a landlord in relation to the incoming tenant.

**MAXIMUM DURATION OF LEASES**

Section 67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) restricts all new leases created on or after 9 June 2000 to a maximum length of 175 years.

The Land Tenure Reform (Scotland) Act 1974 (c 38) (the 1974 Act) (section 8) restricts the creation of leases of houses (including flats) for a period in excess of twenty years.\(^4\)

**DIFFERENT TYPES OF LEASE**

**Commercial, agricultural and residential leases**

There are three main categories of lease: commercial leases, residential leases and agricultural leases. A **commercial lease** is the term generally applied to leases of shops, offices, factories or other business premises. Commercial leases in Scotland (though not in England and Wales) are almost entirely free of statutory regulation.

**Agricultural leases** are leases of farmland and associated buildings, including in some cases the farm house. Agricultural leases are regulated by statute and tenants often have **security of tenure**, ie the right to stay on after the expiry date stated in the lease has passed. **Residential leases** are leases of houses, including flats, and are also regulated by statute. Rights in favour of the tenant include security of tenure in relation to the main type of lease granted by social landlords and some types of lease granted by private sector landlords.

**Mineral leases and sporting rights**

Under Scots law, the status of lease is also given to certain types of agreement where the tenant does not have an exclusive right to occupy the property, but the right to use it for certain purposes only. Leases falling into this category include **mineral leases** involving the right to extract minerals from the ground and leases of **sporting rights** in relation to game and freshwater fishing.

\(^4\) Section 138 of the Housing (Scotland) Act 2010 (asp 17) removes the 20 year restriction on residential leases where the tenant is a social landlord, a body connected to a social landlord or a rural housing body. The general restriction on leases in excess of twenty years in relation to residential leases is unaffected.
Long leases and ultra-long leases

The term long lease does not have a technical legal definition but is usually taken to mean a lease that is sufficiently long to be able to be registered in the property registers. Today, long leases of commercial property are common, much more common than outright sales of commercial property. However, in contrast to the position in England and Wales, long leases of residential property are relatively rare (due to the statutory restriction on the length of residential leases which has existed since 1974).

It is thought that long leases appear as a mainstream alternative to outright ownership of property in certain distinct geographical areas. The SLC’s initial Discussion Paper on the topic of long leases identified pockets of long leases in Alva, Ardrossan, Saltcoats, Stevenson and Wishaw (SLC 2001, para 10).

The term ultra-long lease refers to long leases eligible for conversion to ownership under the scheme proposed by the Bill (see further below).

THE BACKGROUND TO THE BILL

LINKS WITH OTHER LEGISLATION

The SLC Report on Long Leases, on which the Bill is based, is part of a detailed review of property law in Scotland by the SLC. Previous SLC reports have resulted in four pieces of legislation on land tenure reform passed by the Scottish Parliament, three of which are relevant in the context of this Bill and are summarised in an Appendix to this briefing. 5

Two other bills currently being considered by the Scottish Parliament, namely the Land Registration etc (Scotland) Bill (introduced 1 December 2011) and the Agricultural Holdings (Amendment)(Scotland) Bill (introduced 31 October 2011), are also relevant in the context of the current Bill. More information on both these bills can be found in the aforementioned Appendix and more information on the land registration issues associated with the current Bill can also be found later in this briefing under ‘Policy Issues Associated with the Bill’.

INCIDENCE OF LONG LEASES

As part of its review of the law relating to long leases, the SLC carried out a study of the incidence of long leases, looking at entries in the Land Register in respect of long leases in four out of the 33 land registration counties.6 The results of the study can be found in Appendix C of the Report. The SLC noted:

“Our survey is of course incomplete in a number of important respects. It is confined to four out of the 33 registration counties…It covers only such period as the counties have been operational for the purposes of the Land Register – a period which ranges from

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5 The other piece of property law legislation passed by the Scottish Parliament and based on a report of the SLC is the Tenements (Scotland) Act 2004 (asp 11).
6 A study of the incidence of long leases was also carried out in 1951 for the Scottish Leases Committee by Lord Guthrie, involving an examination of all search sheets in the Register of Sasines for the period of 1905–1951. The results disclosed 13,151 such leases and almost 9,000 leases were found to have more than 100 years still to run (Scottish Home Department 1952).
nineteen years (Renfrew) to only three (Ayr). And it omits both those leases which have
never been registered and also those which, although registered, saw no activity during
the period under scrutiny [and therefore remained in the Register of Sasines]...any
conclusions based on such a survey are speculative and subject to challenge” (SLC
2006, para 9.5)

The Scottish Government estimates that there are currently around 9,000 ultra-long leases in
Scotland eligible for conversion under the Bill, a figure reached by extrapolating from the figure
arrived at by the SLC in relation to the four registration counties surveyed to Scotland as a
whole (Financial Memorandum, para 333). The Scottish Government acknowledges the
limitations of the survey referred to by the SLC, as well as the fact that there may have been
further changes since the SLC carried out their survey in 2000. Nevertheless, it considers the
SLC’s figure to be “the best available”. It also notes that the figure of 9,000 leases eligible for
conversion was not challenged as a result of the Scottish Government’s consultation (Financial
Memorandum, paras 330 and 323).

OVERVIEW OF THE BILL’S PROPOSALS

THE POLICY RATIONALE FOR THE BILL

In the Policy Memorandum (para 63) to the Bill, the Scottish Government lists eleven suggested
benefits of the automatic conversion scheme. Its key rationale for the Bill is that granting a lease
of more than 175 years effectively amounts to a transfer of ownership and, accordingly, it would
simplify the law to convert a tenant’s interest in such a lease to a right of ownership.

When the Scottish Government undertook an online consultation in respect of the proposed Bill
in March 2010 it received 15 publicly available responses (as well as two confidential
responses). Thirteen of those 15 responses were supportive of the proposed conversion
scheme for ultra-long leases.

QUALIFYING LEASES

Key criteria

Section 1 of the Bill provides the definition of a “qualifying” ultra-long lease for the purposes of
the conversion scheme with the key criteria for qualification as follows: 1) the lease must be
registered in the Register of Sasines or the Land Register; 2) it must be granted for an initial
period of more than 175 years, and 3) it must have an unexpired duration of more than 100
years.7

Exceptions

Section 1 of the Bill also provides that certain ultra-long leases are not qualifying leases. These
include 1) leases relating to the right to extract minerals (ie mineral leases); 2) leases where the
annual rent in respect of the lease is over £100; 3) leases for the sole purpose of installing and

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7 Although only registered leases may be “qualifying leases” under section 1, Part 5 of the Bill provides a separate
scheme for unregistered ultra-long leases to be subsequently registered and converted into ownership if the tenant
wishes this.
maintaining pipes and cables, and 4) leases including harbours for which there is a harbour authority.

Exceptions 2) and 3) above are a change to the original SLC proposals, but a version of them appeared in the Session 3 Bill. These exceptions are considered further below under ‘Policy Issues Associated with the Bill’.

Exception 4) did not appear in the Session 3 Bill but responds to an issue raised by the former Justice Committee in its Stage 1 report (Justice Committee 2011e, paras 116–119). The former Justice Committee received a written submission from Peterhead Port Authority (PPA) regarding an ultra-long lease of the South Breakwater at Peterhead to a private company. The tenant’s interest under this lease would have been converted to a right of ownership by the Session 3 Bill. The PPA argued this would be a conversion of public property into private ownership which was inappropriate in policy terms as it could impact adversely on the operation of the harbour.

PRESERVATION OF SPORTING RIGHTS

Sporting rights to freshwater fishing (ie fish other than salmon) and sporting rights to game can be reserved to a landlord in an ultra-long lease, so that the tenant exercises his or her right of occupancy subject to the sporting rights held by the landlord. Section 8 of the Bill provides the opportunity for a former landlord to preserve the sporting rights, on registration of a notice, before the appointed day.

CONVERSION OF LEASEHOLD CONDITIONS TO REAL BURDENS

Real burdens are a category of legal obligations found in title deeds affecting property which burden the owner of one piece of property for the benefit of another piece of property and which survive changes of ownership of the affected properties. For example, a real burden might require an owner of a flat to contribute to maintenance of the common parts of a tenement building.

Whilst some conditions in ultra-long leases are specific to the landlord and tenant relationship (eg the obligation to pay rent), many ultra-long leases contain conditions which, in a deed transferring ownership, would be classified as real burdens.

Part 2 of the Bill provides a conversion scheme for such leasehold conditions to real burdens, the key provisions of which can be summarised as follows:

- **the 100 metre rule**: if a former landlord under an ultra-long lease owns a piece of land within 100 metres of the property subject to the former lease, he or she can reallocate a qualifying leasehold condition (by registration of a notice) as a real burden enforceable by the former landlord in his or her capacity as owner of that land (sections 14–16)

- **personal real burdens**: a range of qualifying leasehold conditions serving a variety of public policy purposes (eg conservation, reducing greenhouse gas emissions, economic development and provision of facilities for health care) can be converted to real burdens enforceable by a public body on registration of a notice (sections 24–28)\(^8\)

\(^8\) In addition to personal real burdens serving public policy purposes and enforceable by public bodies, there is also an opportunity for pre-emptions and redemptions (types of option to purchase property) to be preserved as personal real burdens (section 23).
• **facility and service burdens:** qualifying leasehold conditions will be automatically converted to service and facility burdens on the appointed day. A facility burden regulates the maintenance, management, reinstatement or use of a facility, such as a shared part of a tenement. A service burden relates to the provision of services, such as water or electricity to another property. They are enforceable by the owners of the property or properties benefiting from the facility or service (section 29)

• **third party rights:** qualifying leasehold conditions expressly conferring rights on neighbouring properties to the property leased are automatically converted to real burdens on the appointed day, enforceable by these neighbouring property owners (section 32). Qualifying leasehold conditions which are imposed under a “common scheme” in respect of a group of “related properties”, will automatically become real burdens enforceable by the owners of these properties against each other from the appointed day (section 31)

**REGISTRATION OF NOTICES AND AGREEMENTS**

As mentioned above, the Bill gives various opportunities to former landlords under ultra-long leases to register notices and agreements preserving various rights associated with the former ultra-long leases.

The overall costs to parties registering notices and agreements was given in the Financial Memorandum to the Session 3 Bill as £30,000 (Financial Memorandum to the Session 3 Bill, para 333). In the Financial Memorandum to the Session 4 Bill, the comparable cost is given as £60,000 (para 362). This change is due to the applicable fee charged increasing from £30 to £60 since consideration of the Session 3 Bill.

**COMPENSATION AND ADDITIONAL PAYMENTS FOR LANDLORDS**

**Compensation payments**

Part 4 of the Bill contains provision on compensation for loss of landlords’ rights under ultra-long leases.

The proposed compensatory payments are based on the annual rent paid and (consistent with the approach taken in the 2000 Act with compensation for former feudal superiors) are calculated by reference to 2.5% Consolidated Stock. Under the proposed scheme a former landlord will be entitled to such sum as if invested in the 2.5% Consolidated Stock would produce an annual sum equal to the former rent. For example, on 19 December 2012, the price of a unit of 2.5% Consolidated Stock was £68.13 so in relation to an annual rent of £2.50 a landlord would receive £68.13 by way of compensation.

**Additional payments**

In accordance with the SLC report, Part 4 of the Bill makes provision for the possibility of “additional payments” to the landlord, on top of the basic compensatory payment in some circumstances. Under sections 50 and 51, additional payments can be claimed in respect of:

• **non-monetary rent:** any right to a non-monetary rent (such as a personal right to play golf)
rent reviews or increases: any right to have the rent reviewed or increased from time to time

variable rents: rights to rent where the amount payable is variable, eg when rent is based on the turnover of a business. (This ground was added following the Scottish Government’s consultation)

premiums: any right to receive a premium, ie an extra payment over and above the rent, on renewal of the lease exceeding £100 (renewal premiums under £100 are covered by the ordinary compensation provisions)

reversionary interests: any right to resume possession of the land subject to a lease (a “reversionary interest”) providing that the lease in question would expire no later than the end of the period of 200 years beginning with the appointed day.

early termination: subject to certain qualifying conditions, a right to terminate the lease early

development value: a right to the “development value”, ie any significant increase in the value of a lease arising as a result of the property subject to the lease becoming free to be used, or dealt with, in some way not permitted under the lease. This applies where 1) the landlord has granted a lease subject to a leasehold condition restricting the use of the property by the tenant with the aim of preserving for himself or herself the development; and 2) this leasehold condition has not been converted to a real burden under Part 2 of the Bill (as discussed above)

The value of the additional payment is based on what the right in question would fetch on the open market (section 52). Where the landlord and tenant fail to reach agreement relating to an additional payment, the matter can be referred to the Lands Tribunal for Scotland which has a wide discretion to determine the matter (section 55).

POLICY ISSUES ASSOCIATED WITH THE BILL

This section outlines some of the main policy issues associated with the Bill, not so far addressed by this briefing.

REGISTRATION ISSUES

Section 4 of the Bill provides that a tenant’s interest in a “qualifying” ultra-long lease is automatically converted to a right of ownership on the appointed day.

Scotland has a system of public land registration, meaning that, with only limited exceptions, rights of ownership of land or property in Scotland are currently recorded or registered on one of the property registers maintained by the Registers of Scotland (RoS) (ie the Land Register or Registers of Sasines). The information contained on those registers is available to the public.

To be consistent with the principle of public land registration, the information held by RoS requires to be amended at some stage to reflect the changes of ownership resulting from the conversion of tenants’ interests in qualifying ultra-long leases to outright ownership.

When the Session 3 Bill was introduced, the intention was that RoS would take forward the necessary updating in respect of ultra-long leases registered in the Land Register as a bespoke project around the time of the appointed day and that the costs of the update would be borne by
RoS and passed on to all customers of RoS via registration fees in general. (See further the Financial Memorandum to the Session 3 Bill at paras 279–282.)

However, the Financial Memorandum to the Session 4 Bill states that RoS has decided not to carry out a specific exercise to update the information it holds in the Land Register to reflect the consequences of the conversion scheme for ultra-long leases (para 308).

Instead the former tenant will have the option of applying for rectification to reflect his or her right of ownership (with an associated fee of £60, if current fee levels are maintained) or waiting until there is a transaction in respect of the property in question, at which time RoS will update the information it holds after that transaction is complete (and bear the costs of doing so).

This change of approach is based on the desire to keep costs to RoS down (Financial Memorandum to the Session 4 Bill, para 308). The anticipated additional costs to RoS of the Session 3 Bill were £200,000 (Financial Memorandum to the Session 3 Bill, para 282), whereas the anticipated additional costs to RoS of the Session 4 Bill are £75,000 (Financial Memorandum to the Session 4 Bill, para 308).

For the many ultra-long leases recorded in the old Register of Sasines, there was never any intention to undertake a bespoke project to reflect the new rights of ownership in the Land Register. Instead the former tenant will have essentially the same two options - updating the publicly held information in advance of any future transaction, or waiting until a transaction occurs, in which case RoS will carry out the update at its own cost. If the former tenant chooses to apply for a first registration in the Land Register in advance of any transaction, the associated fee will be dependent on the value of the property (assuming the current approach to fees for first registration in the Land Register is the same at the appointed day).

In relation to the costs to private individuals of the policy change associated with ultra-long leases registered on the Land Register, the Financial Memorandum to the Session 4 Bill does not anticipate that any additional costs will be incurred.

However, an issue which may merit further consideration is the consequences in practice of the fact that the information held by RoS (in both the Sasine Register and the Land Register) is not going to be immediately updated. For example, it remains to be seen what approach will be taken by the solicitors of subsequent purchasers of property formerly held on an ultra-long lease and solicitors of the lenders associated with these purchasers. Solicitors seeking to protect their clients’ interests may take the view that the information should be updated by RoS prior to the transaction in question, at which point the costs of updating the information held would have to be borne by former tenants wishing to sell their property. On the other hand, the terms of section 4 of the Bill (ie the principle of automatic conversion) may mean this additional work is considered unnecessary by the solicitors in question.

The proposed approach to updating information held by RoS also arguably has some implications for the policy goal that the public should have accurate information about the ownership of land and property in Scotland.

**COMMON GOOD**

The SLC did not consider the matter, and the Bill itself makes no reference to ‘common good’. However, a prominent policy issue associated with the Bill is to what extent common good land and buildings will be affected by the proposed conversion scheme for ultra-long leases, and, if it is affected, whether this is desirable in policy terms (see, for example, Blackley 2010 and, most recently, Donnelly 2012).
What is the common good?

The common good is a fund of money and assets owned and administered by a Scottish local authority in respect of a former burgh within the area of that local authority. It is subject to a range of statutory controls. In the first place, it must be held in a separate account from a local authority’s general fund account, although it is subject to the general financial scrutiny scheme associated with local authorities which requires the delivery of “best value” (Local Government (Scotland) Act 1973 (c 65), section 93; Local Government in Scotland Act 2003 (asp 1), Part 1).

Furthermore, in administering the common good, Scottish local authorities (except Aberdeen, Dundee, Edinburgh and Glasgow) must have regard to the interests of the inhabitants of the former burgh to which the common good related. Aberdeen, Dundee, Edinburgh and Glasgow councils must have regard to the interests of all the inhabitants of their areas in administering the common good (Local Government etc (Scotland) Act 1994 (c 39), section 15(4)).

Section 75 of the Local Government (Scotland) Act 1973 (c 65) (the 1973 Act) provides that if a local authority wishes to dispose of common good land or buildings “with respect to which a question arises as to the right of the local authority to alienate” (“alienate” meaning put to an alternative use by a third party) it requires to go to court to receive authority to do so.

“Disposal” under section 75 of the 1973 Act includes an outright sale or a transfer to a third party but also, according to several cases, a lease of a property, at least where the public use of the property is lost. The court may authorise the disposal, subject to any conditions it thinks fit, including the possibility of a requirement on the council to provide substitute land or buildings to be used for the purpose that the common good land or buildings were used.

How are common good land and buildings identified?

Identification of common good land and buildings in general and common good land and buildings which are subject to section 75 in particular, can be a legally complex matter. For example, it is thought that land might initially have a common good character but, through a lack of public use for a sustained period, lose that character (Ferguson 2006, para 7.3; Justice Committee 2011c, col 4092).

Although some improvements have been made in recent years (Audit Scotland 2010), there have been concerns expressed in the past that Scottish local authorities have not correctly identified, and appropriately accounted for, common good land and property (see, for example, Wightman and Perman 2005). The former Justice Committee commented on this issue in its Stage 1 Report on the Session 3 Bill (see further below) (Justice Committee 2011e, para 55).

How many ultra-long leases of common good land are there?

Subsequent to the introduction of the Session 3 Bill, the Scottish Government wrote to all 32 councils in Scotland asking them to identify ultra-long leases of common good land and property within their area. In a Letter (Ewing 2011) from the then Minister for Community Safety to the former Justice Committee early in February 2011, the Minister reported that five possible leases involving common good land had been identified, two in Glasgow, one in Edinburgh, one in Fife and one in Aberdeenshire. Eight councils had yet to report and the Minister cautioned “there

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9 For example, in East Lothian District Council v National Coal Board (1982) a 99 year lease was categorised as a “disposal”. On the other hand, the recent case of South Lanarkshire Council Petitioners (Inner House, unreported 11 August 2004) it was held that a 30 year lease and leaseback arrangement in the context of a Public Private Partnership does not amount to a disposal on the basis that the public use of the property was not lost.
may be further ultra-long leases let by local authorities which we have not identified” (Annex, p 1).

Officials from the Scottish Government have recently confirmed to SPICe that eight councils have still to report (Stockwell 2011c) and, further, that Fife Council has reviewed the lease previously thought to involve common good land and are now of the view that it is not an ultra-long lease (Jack 2012).

Waverley Market

Waverley Market in Edinburgh, now the site of Waverley Shopping Centre and a multi-million pound asset, has been the focus of a lot of the policy debate associated with the Bill’s relationship with the common good. The ground was originally leased by the City of Edinburgh Council to a private developer in the 1983, who then built the aforementioned shopping centre. In 1989 the Council received a payment of £6.25 million from the developer, which was deemed to represent the market value of the Council’s interest in the site at the time (Stockwell 2011b).

The ultra-long lease granted by the Council in 1983 seems to qualify for conversion under scheme proposed in the Bill, as the annual rent payable is very low. This means that ownership of Waverley Market could pass from the City of Edinburgh Council to the current owner of the tenant’s interest under the lease (a private developer) under the proposals in the Bill.\(^\text{10}\)

As discussed above, under sections 50 and 51 of the Bill, where a the lease has an unexpired duration of at least 200 years from the appointed day, the landlord can claim an additional payment on conversion of the ultra-long lease from the tenant (as well as the compensatory payment based on rent), with the value of this additional payment being based on what the right would fetch on the open market.

The City of Edinburgh Council does not believe that Waverley Market is part of its common good fund (Justice Committee 2011c, cols 4088; Stockwell 2011a). Its reasoning is outlined in a 2008 report prepared by officials for the Finances and Resources Committee of the Council entitled Review of the Common Good in Edinburgh (The City of Edinburgh Council 2008). The report refers to Waverley Market in the following terms:

“Waverley Market ceased to be an asset of the Common Good and its inclusion on the asset register and balance sheet of the Fund in 2005 is an error. Acts of the Council in 1937 and 1938 transferred the fruit and vegetable market from Waverley Market to premises in East Market Street. In effect the then Council substituted the East Market Street premises for the Waverley Market premises, and with it the common good status. Accordingly Waverley Market ceased to be part of the common good at the time of the transfer of the fruit and vegetable market to East Market Street.”

Andy Wightman (2010, p 228), independent researcher and writer on land-related issues, and prominent campaigner on the Bill’s relationship with the common good, has commented as follows on the above paragraph:

“The Council are claiming here that the inclusion of Waverley Market as a common good asset in 2005 ‘was an error’. This is based upon the claim that the 1937 and 1938 acts transferred the market functions to East Market Street resulted in the transfer of the common good status. This is a fairy story. In 1983, an exchange of letters between the Director of Administration and the Director of Finance in relation to VAT liability for the shopping centre construction confirmed that the site was common good. The letters

\(^{10}\) However, SPICe cannot give legal advice in individual cases and it is recommended that a solicitor is consulted in this regard. A solicitor can examine the title deeds pertaining to the property in question and advise accordingly.
confirm that the site was freed from any statutory market obligations in 1933 but that the loss of these rights had no impact on the common good status since that was derived from the fact that the land had been purchased by the Common Good Fund in 1766. The Director of Administration even suggests that forthcoming private legislation could be used to remove the site from the common good as had been done with the markets and slaughterhouses in 1967.

The Waverley Market is part of the Edinburgh Common Good Fund because it was acquired by the Common Good Fund as part of the land assembly of the First New Town in the late eighteenth century. Nothing that has transpired since alters that.”

The Session 3 Bill

Of the 26 written submissions received by the former Justice Committee in response to its call for evidence on the Session 3 Bill, 19 expressed concerns about common good land or assets that might be subject to an ultra-long lease and thus be caught by the conversion scheme for ultra-long leases (Justice Committee 2011e, para 36). These submissions invited the former Justice Committee to agree that ultra-long leases of common good land should be exempted from the scope of the Session 3 Bill.

Andy Wightman was the leading campaigner for a common good exemption, although several councils also expressed their support, namely Edinburgh (in written and oral evidence to the Committee), as well as Glasgow and Fife (in oral evidence)11 (Wightman 2011a; City of Edinburgh Council 2011; Justice Committee 2011c, col 4097).

Professor George Gretton, giving evidence on behalf of the SLC, stated that he had no objection to the exemption being included but that he would not be pressing for it (Justice Committee 2011a, col 4020). On the other hand, the then Minister for Community Safety, Fergus Ewing MSP, stated his opposition to such an exemption in evidence to the former Justice Committee (Justice Committee 2011d, col 4153).

In its Stage 1 Report, the former Justice Committee expressed its disappointment that there is still not an accurate and complete record of common good property held by local authorities across Scotland. However, it stated that it was not persuaded that there is a compelling case for exempting leases of common good property from the Session 3 Bill. On the other hand, it was the former Committee’s “strong view” that any compensation received in respect of the conversion of a tenant’s interest in an ultra-long lease of common good property to one of ownership should be paid back into the local authority’s common good fund (Justice Committee 2011e, paras 55, 60 and 61).

The Session 4 Bill

The Session 4 Bill does not contain any provisions relating to the Bill’s relationship with common good land and property.

In relation to the issue of where compensation should be paid, the Policy Memorandum to the Bill (para 50) comments as follows:

“The Scottish Government has written to local authorities on this point. We indicated that if the Bill should be passed by Parliament, the Scottish Government would intend to write

11 Andrew Ferguson, author of the main textbook on common good law, gave oral evidence to the former Justice Committee on behalf of both Fife Council and the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR).
again to local authorities. In a further letter, we would suggest that any compensatory or additional payments paid to local authorities as a result of ultra-long leases of common good land converting to ownership should be allocated to common good funds or accounts.”

COMMERCIAL LEASES

The policy issue

Another policy issue associated with the Bill is what the approach to leases of commercial property should be.

The approach of the Scottish Law Commission

When it considered the issue, the SLC did not think that ultra-long leases of commercial property should be excluded from the scope of the conversion scheme under the Bill, arguing for a principle of universal convertibility (SLC 2006, para 2.33).

Views of those who responded to the Scottish Government's consultation

When the Scottish Government consulted on the proposals contained in the Bill in March 2010, some consultees expressed concern about this aspect of the Bill. For example, RICS Scotland stated:

“We appreciate the policy position of the Scottish Government and the wish to remove what might be deemed a quasi-feudalist (or ‘feus in disguise’) arrangement. However, the arrangement of a residential property with a lease of say 999 years is very different from a commercial lease which has been entered into (prior to the 2000 Act limiting such leases to 175 years) for very sound contractual reasons.”

The Session 3 Bill

The approach of the Scottish Government

The Scottish Government amended the SLC proposals to exclude ultra-long leases where the rent was in excess of £100, with the aim of excluding ultra-long leases where the property was let on commercial terms (section 1).

The Session 3 Bill before the Justice Committee

In respect of those giving evidence to the former Justice Committee on the Session 3 Bill, there were mixed views on whether commercial leases should be excluded from the conversion scheme. However, the former Justice Committee agreed with the Scottish Government that commercial leases should be so excluded (Justice Committee 2011, para 73).

In terms of what form the exemption should take (ie whether an approach based on a £100 cut-off was appropriate), the former Justice Committee welcomed an undertaking from the then Minister for Community Safety to look again at this issue (Justice Committee 2011, para 80), as there were also mixed views in this regard.
Brodies Solicitors highlighted the specific issue of commercial leases which have been entered into where the annual rent is very low; however, they have an additional element of variable rent which can be quite considerable (eg the lease of a shopping centre with an additional element of rent based on the turnover of the shops in the centre). Brodies argued in favour of formulating the exemption in a way that took better account of this issue and the former Justice Committee drew the then Minister’s attention to the matter in its Stage 1 report (Justice Committee 2011, para 91).

**The Session 4 Bill**

**The exemption**

Section 1(4)(a) retains the exemption for leases where the rent is in excess of £100.

**Variable rents**

Section 2 of the Bill (a new section which had no equivalent in the Session 3 Bill) provides that, for the purposes of this exemption, any element of variable rent is to be left out of account.

However, section 64 of the Bill (another new section) provides that a landlord may register an exemption where the annual rental was over £100 at any point in the five years before Royal Assent, reflecting the fact that some leases have variable rent.

Registration of the exemption follows either an agreement entered into with the tenant in question, or an order being made by the Lands Tribunal under section 69. Section 69 is also a new section and permits, among other things, confirmation by the Lands Tribunal that there was variable rent over the relevant period for the purposes of the exemption.

**Cumulo rent**

‘Cumulo rent’ is a single rent payable in respect of two or more leases (section 38). It results when part of original leased subjects are transferred by the tenant to another tenant or tenants.

Compared to the Session 3 Bill, the Session 4 Bill makes more elaborate provision for situations where cumulo rent is payable. In particular, section 39 (a new provision) allows landlords to allocate cumulo rent to individual leases before the appointed day.

The new provisions relating to cumulo rent interact with the £100 cut-off exemption. In the first place, if cumulo rent is not allocated prior to the appointed day, the terms of section 2 (a new section) mean that the £100 cut-off exemption cannot be taken advantage of, as the rent is deemed to be nil in respect of each part of the original leased subjects. On the other hand, if an allocation has taken place by the landlord, and the annual rent in respect of any individual part is over £100, the landlord may register an exemption under section 64. Registration must follow agreement with the tenant in question or an order by the Lands Tribunal under section 69.

**PIPES, CABLES AND PRIVATE ACCESS ROADS**

A final policy issue associated with the Bill is the exemption in section 1(4)(b) which relates to pipes and cables.
The policy issue

Various bodies, including oil companies and ‘statutory undertakers’ (ie companies and agencies with legal rights to carry out certain development works), require to run pipes and cables through land they do not own. Sometimes, because of an absence of an alternative legal mechanism to achieve this result, they have resorted to ‘leases’ of strips of land to achieve this purpose.

Views of those who responded to the Scottish Government’s consultation

In response to the Scottish Government’s consultation, it was argued by some, particularly Scottish Land and Estates (or rather the SRPA as it then was) that the intention of the legislation should not be to convert into ownership ultra-long leases in respect of pipes and cables.

The Session 3 Bill

The approach of the Scottish Government

The Scottish Government agreed and created an exemption in the Session 3 Bill relating to leases granted for the purpose of access to (including work to) pipes and cables (found in section 1(4)(b) of that Bill).

The Session 3 Bill before the Justice Committee

In written and oral evidence to the former Justice Committee, there were mixed views about how satisfactory the wording of the exemption in the Session 3 Bill was in this regard, with several objections based technical legal arguments.

Scottish Land and Estates and the Scottish Law Agents Society questioned whether the exemption as it was then drafted went far enough, including leases for the purposes of access and maintenance but excluding leases of strips of ground (typically the part several metres below the surface) allowing for the use of the pipes and cables themselves by statutory undertakers (Scottish Parliament Justice Committee 2011b).

Professors Gretton questioned whether the exemption was necessary, as it was doubtful whether it was competent as a matter of Scots law to have a lease which relates to access to pipes and cables (Scottish Parliament Justice Committee 2011a). On the other hand, Professor Rennie was happy with the drafting as he felt the main thing was that such leases existed in legal practice (Scottish Parliament Justice Committee 2011c).

Scottish Land and Estates also suggested that ultra-long ‘leases’ affording non-exclusive rights of access over private roads for specific purposes also needed to be the subject of a similar exemption to the one that existed for pipes and cables.

In its Stage 1 Report, the former Justice Committee welcomed the undertaking of the then Minister for Community Safety to look at these issues again (Justice Committee 2011e, paras 104 and 107).

The Session 4 Bill
Section 1(4)(b) of the Bill exempts ultra-long leases granted for the sole purpose of allowing the tenant to install and maintain pipes and cables.

In the Policy Memorandum to the Bill (paras 45–46) the Scottish Government acknowledges the debate surrounding the issue of whether it is competent to have a lease relating to pipes and cables. However, it argues that it is better to include the exemption in the Bill, to put it beyond doubt that such legal arrangements are not intended to be caught by the conversion scheme in the Bill.

There is no exemption for ultra-long leases affording non-exclusive rights of access over private roads. In the Policy Memorandum to the Bill (para 48) the Government comments as follows:

“The Government considers that arrangements of this nature are not covered by the Bill in the first place as there has to be some degree of exclusivity for an arrangement to be regarded formally as a ‘lease.’”
APPENDIX: LINKS TO OTHER LEGISLATION

The table below summarises three other Acts of the Scottish Parliament connected to the Long Leases (Scotland) Bill, as well as two current Bills linked to Long Leases Bill.

<table>
<thead>
<tr>
<th>Bill/Act</th>
<th>Description</th>
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<tbody>
<tr>
<td>Abolition of Feudal Tenure etc (Scotland) 2000</td>
<td>Prior to the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) (‘the 2000 Act’) coming into force, there was a feudal system of land ownership in Scotland. This allowed an individual to sell (or otherwise transfer) ownership of property but to reserve to himself or herself, notwithstanding the sale (or transfer), an interest in the property known as a ‘feudal superiority’. The holder of the superiority was known as the ‘feudal superior’ and the owner of the property the vassal. The superior retained certain important rights in respect of the property, including the right to collect a periodical payment (known as ‘feu duty’). The 2000 Act abolished the feudal system of land ownership and granted former vassals outright ownership of their property, with compensation payable for loss of their rights to collect feu duty to former superiors. Part of the Scottish Government’s policy justification for the Long Leases (Scotland) Bill is that ultra-long leases are ‘feus in disguise’, therefore the conversion scheme in the Bill is required to complete the work associated with feudal abolition (Policy Memorandum, para 63).</td>
</tr>
<tr>
<td>Leasehold Casualties (Scotland) Act 2001</td>
<td>The Leasehold Casualties (Scotland) Act 2001 (asp 5) abolished ‘casualties’, ie payments due on assignation of a tenant’s interest under some long leases (and on certain other occasions). The 2001 Act also abolished the landlord’s remedy of ‘irritancy’ for most leases of 175 years or more, ie the landlord’s right to terminate the lease prematurely because of the tenant’s breach of contract.</td>
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| Title Conditions (Scotland) Act 2003 | The Title Conditions (Scotland) Act 2003 (asp 9) (‘the 2003 Act’) built on the 2000 Act by adding to the categories of real burdens\(^{12}\) enforceable by former superiors which could be preserved after feudal abolition, as well as modernising the general law relating to real burdens.

The conversion scheme for some leasehold conditions to real burdens in Part 2 of the Long Leases (Scotland) Bill is based the approach contained in the 2000 and 2003 Acts. |
| --- | --- |
| Land Registration etc (Scotland) Bill | The Land Registration etc. (Scotland) Bill, introduced in the Scottish Parliament on 1 December 2011, is based on an SLC report. A range of issues have also been identified with the system of land registration as it operates at present, including that the Land Register is incomplete. Accordingly, this Bill aims to make significant reforms to the current system.

The Economy, Energy and Tourism Committee, the designated lead committee on this Bill at Stage 1, is currently taking evidence on this Bill.

One link between the Land Registration etc. (Scotland) Bill and the Long Leases (Scotland) Bill is acknowledged in the Policy Memorandum to the latter Bill. In this regard the Scottish Government states:

“In line with the usual approach it is not considered appropriate to refer in the Long Leases (Scotland) Bill to the detailed provisions of the Land Registration etc. (Scotland) Bill pending approval of its general principles by the Parliament at Stage 1.

Accordingly, some consequential and transitional provision will need to be amended into the Long Leases (Scotland) Bill at a later stage, or put in place by ancillary order under the Bill” (Policy Memorandum, para 61–62)

For more information on the Land Registration etc. (Scotland) Bill see the associated **SPICe Briefing** (Harvie-Clark 2011b). |

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\(^{12}\) See page p 11 of the briefing for a definition of ‘real burden’. 
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<tr>
<th>Agricultural Holdings (Amendment)(Scotland) Bill</th>
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The Agricultural Holdings (Amendment)(Scotland) Bill was introduced in the Scottish Parliament on 31 October 2011. The Bill makes amendments to the statutory framework which regulates agricultural leases. In particular it amends the law determining rights to inherit agricultural tenancies and the law determining reviews or variations of rent associated with such tenancies.

The legislation completes a package of reforms which aim to stimulate release of agricultural land available to rent, as a lack of such land for new entrants to farming is one of the key policy issues in this area at present.

The Rural Affairs, Climate Change and Environment Committee is designated lead committee on this Bill at Stage 1 and has recently taken evidence on the Bill. For more information on this Bill see the associated SPICE Briefing (Marsden 2012).
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RELATED BRIEFINGS

Long Leases (Scotland) Bill (This briefing relates to the Bill which fell at the end of Session 3)

Land Registration etc. (Scotland) Bill

Agricultural Holdings (Amendment)(Scotland) Bill

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