ABOLITION OF FEUDAL TENURE ETC.
(SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Abolition of Feudal Tenure etc. (Scotland) Bill introduced in the Scottish Parliament on 6 October 1999. It has been prepared by the Scottish Administration to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Administration and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 4–EN.

POLICY OBJECTIVES OF THE BILL

2. The objective of the Bill is to abolish the feudal system of land tenure in Scotland and to replace it with a system of simple ownership which is modern and uncluttered. The Bill will abolish feudal superiorities, and the rights of the superior to collect feuduty and to enforce feudal real burdens. (Feudal real burdens are conditions placed on land which are for the benefit of, and enforceable by, the superior.)

3. The Executive recognises that certain feudal burdens are, however, beneficial, and the Bill therefore provides for the preservation of four categories of burden - but as ordinary, non-feudal burdens, without the feudal trappings. These are common facilities burdens, neighbour burdens, conservation burdens and maritime burdens. Common facilities burdens are burdens which provide for essential matters such as maintenance and use of common facilities. The Bill provides that the right to enforce these burdens will pass automatically from the superior to the owners of the properties which rely on the burden. Neighbour burdens are burdens where the superior would suffer a real loss to his amenity or to the value of his property if the burden were to disappear. The Bill (in section 17) sets out certain criteria for neighbour burdens. If a burden meets these criteria, the superior may take steps to preserve the burden. Even if it does not meet these criteria, but he considers that his interests would be materially prejudiced by the loss of the burden, the superior may seek the vassal’s agreement to the continuation of the burden, or he may apply to the Lands Tribunal to preserve the
burden. Conservation burdens allow the Scottish Minister or a body which has been nominated by the Scottish Ministers as a conservation body to preserve certain burdens. This might be used by a body such as the National Trust for Scotland. Maritime burdens permit the retention of burdens on the seabed or foreshore. The right to enforce would be held by the Crown and the object would be to ensure that facilities such as harbours were kept in good repair.

4. The Bill makes certain provisions for compensation: for the loss of the right to collect feuduty (and of certain payments analogous to feuduty) and for the loss of development value burdens, where land has been sold at an artificially low price in exchange for a condition which had reserved development value such as a restriction on its use. A typical example of this would be land sold cheaply on condition that it should only be used for amenity land. The Bill makes certain provision to enable the superior to claim compensation if the loss of his right to enforce his condition means that the land is used for another purpose.

5. There is a danger that when the feudal system is abolished, vendors of land will seek to replace it by a system of long leases which would allow them to maintain control over future use of the land. Long leases on land used for residential purposes are already prohibited in law. The Bill prohibits leases of over 125 years of commercial property, but Paragraph 23 below indicates that the Executive has an open mind about the value of this restriction and will be reviewing the position.

6. The Bill makes other consequential changes including the separation of the title of barony from the ownership of land.

**ALTERNATIVE APPROACHES**

7. The Bill was largely prepared by the Scottish Law Commission, who published a Report and draft Bill in February this year. The policy objective was to introduce a Bill to abolish the feudal system and no alternative to this general approach was considered. The Commission did, however, consider a variety of ways of doing this, in particular so as to be able to preserve those aspects of the feudal system which are beneficial. Their arguments are fully set out in their Report.

8. The Commission gave much thought as to how to preserve useful feudal real burdens. They also considered carefully which rights of the superior should – as a matter of fairness - be retained. The Executive has decided to depart from the Commission’s recommendations in one significant respect. The background to this is as follows. When land is sold, the seller may choose to sell it by feudal disposition or by ordinary disposition. The seller often does not make this choice himself – it may depend on the preference of his conveying solicitor. Whichever means of sale is chosen, the seller may impose conditions (or burdens) on the future use of the land. If the sale is by feudal deed, the burden will be a feudal burden. If the sale is by
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ordinary disposition, it will be an ordinary real burden. The difference between these two types of burden is that the interest of a superior to enforce a feudal burden is presumed. The disponer of land by ordinary disposition, however, if challenged, can only enforce a burden if he can show that he has sufficient interest to enforce. In short, he would have to show that the burden conferred benefit on land of his in the vicinity. It would not be enough for him just to have land in the vicinity.

9. The Commission recognised that some superiors have a similar interest in their burdens and that they would genuinely suffer if their burdens were to disappear. The classic example here is of a superior who has sold off a piece of his garden but wants to be able to retain some control over how the land is used, so that his own amenity and the value of his property are protected. That is why the Commission introduced the concept of neighbour burdens and recommended that in certain circumstances superiors should be able to retain them. They recommended that, in order to be preservable, neighbour burdens of this type would have to meet two criteria. These were that the superior must have a building used by people for living, work or recreation on his neighbouring land, and that the building must be within 100 metres of the burdened land. If his property did not meet both of these criteria the superior would not be able to retain the burden on this basis.

10. The Commission considered whether the superior should be given the opportunity to apply to the Lands Tribunal to retain a burden which he valued but which did not meet these strict criteria. It considered the following option. The 100 metres rule would remain, but a superior could apply to the Lands Tribunal for Scotland to retain a burden which did not meet that criterion. He would have to satisfy the Tribunal that the extinction of the burden would result in a substantial loss of amenity or value of his own land or a loss of amenity of a dwelling house on his land. The Commission, on balance, decided against recommending this course, but it expressly noted that this was with some hesitation. The Executive has considered this carefully but has decided to take a different approach. It does so for one fundamental reason. It considers that the original approach would put the superior at a disadvantage compared with an ordinary seller of land, who may, more as a matter of accident than design, have sold his property by ordinary disposition, but have placed a non-feudal burden on it. For example, a person may have sold off part of the land which he had acquired on which to build a home for his retirement. He may have put conditions on the type of house which might be built on that land. Following feudal abolition, the superior could not enforce these conditions if he had not built his own house. The ordinary disponer, however, would be unaffected by the reforms and would still be able to enforce. That would be unfair. The Executive considered whether it would be appropriate simply to remove the restriction of 100 metres and thus to widen the categories of burden which could be retained. But this would in practice have meant that all feudal burdens would be saved. The Executive's policy is not that all feudal burdens should automatically be saved. It believes that a sifting process is necessary to avoid the ills of the feudal system living on after its theoretical abolition. The Executive has therefore proposed that the filtering process provided for
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in section 17 should be retained, but that a superior should have a further opportunity to retain his burden. He might be able to retain it simply by agreement with the vassal. But this will be against the background of specific categories of burden which can be saved without agreement – namely those specific categories set out in subsection (7) of section 17 and generally all feudal burdens whose loss would result in substantial loss or disadvantage to the land they protect. Failing this, the superior would be able to apply to the Lands Tribunal in order to retain the burden, but he would have to satisfy the Tribunal that he would suffer a substantial loss or disadvantage as owner of his property if the burden were to fall. The object of this change of policy is to place the superior in the same position as the ordinary disposer of land. The Executive believes that this change should be made both on grounds of European Convention of Human Rights compatibility and on grounds of natural justice.

11. This change does not mean that feudal superiors will simply stay as they were, with their rights untrammelled. On the appointed day, when the feudal system is abolished, the superior will lose his presumed interest to enforce. He may have taken steps to preserve a burden which is important to him, but in view of the costs he will incur in pursuing this before the Lands Tribunal for Scotland, he is unlikely to have done so without a reasonable prospect of success. Most feudal real burdens will have been abolished, and only those which are beneficial or those whose loss would cause the superior to suffer substantial loss will remain.

12. The Executive has considered various ways in which this change could be implemented. The general approach which the Bill takes to the saving of burdens is that in order to be saved a notice in respect of a burden will have to be registered. This is to enable the status of a burden affecting a property to be clear in its entry in the Registers of Scotland and is regarded as an important safeguard in house or land purchase. But the introduction of a judicial process into the saving of burdens complicates this. In the normal course of a legal case, court decisions may be appealed. This causes difficulties for the certainty which is regarded as vital in conveyancing. If a superior were to lose his case at the Lands Tribunal, the burden would be extinguished. The price paid in any sale would be likely to reflect the unburdened nature of the property. But if the superior were to appeal against the decision of the Lands Tribunal, the burden might then be saved and not extinguished if his appeal were successful. This would clearly lead to confusion and possible further court cases with consequent cost and distress for those involved. The Executive has therefore given some consideration as to the way in which this problem might be tackled.

13. The first approach considered was to allow the legal process to continue naturally in the way described in Paragraph 12 above. If the superior lost his case, the burden would be extinguished, the superior could appeal, and if he won his case the burden would revive. The appeal process could continue if necessary to the House of Lords, and it would be possible for a burden to revive or fall at any stage in the
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process. For the reasons set out in Paragraph 12 the Executive did not regard this as a practicable approach. It regards it as essential that the status of a property should be clear, so that in any sale the parties are in no doubt about what burdens affect the property which is being sold. It also took the view that this approach was not competent in terms of the European Convention of Human Rights.

14. The second approach considered was that the fate of a burden should be decided by whichever was the earlier of withdrawal of the application to the Tribunal, final determination by the ultimate appeal court granting or refusing the application, or ultimately a date to be specified on which all burdens in this position would fall if their fate had not been determined by that date. Again the Executive took the view that this approach should be rejected both on grounds of natural justice and on European Convention of Human Rights grounds. Withdrawal might be for purely financial reasons or because of poor or conflicting legal advice. The Executive was also concerned that this approach would not be workable and might undermine abolition of the feudal system. People would have to check on a case by case basis whether an appeal had been lodged on time and, if so, what its outcome was. The Keeper of the Registers would be faced with applications for registration of court orders and would have to be sure that no further appeal had been made. It would be impossible to ensure that the Registers were accurate and up-to-date. This approach was therefore rejected.

15. The third approach considered was that in order to avoid uncertainty in the Registers, any burden which a superior seeks to save either by agreement with the vassal or by taking a case to the Lands Tribunal should be saved until a common date which would be prescribed by the Scottish Ministers. On this specified date the final fate of all of these burdens would be determined. If the Lands Tribunal had found in favour of the superior, the burden would be preserved: if the superior had lost his case, the burden would be extinguished. This approach would mean that even if a superior lost his case at the Lands Tribunal, the burden would still be preserved until the specified date. It might take a considerable period for all these cases to be pursued, and for a ‘day’ to be ‘specified’. In the meantime all of these burdens would live on – even those which a court had found could not be justified. The Executive did not regard this as acceptable.

16. The fourth approach considered was to curtail the legal process by not conferring a right of appeal from the Lands Tribunal for Scotland. The finding of the Tribunal would be regarded as final. This approach would have the advantage of certainty and of quick resolution. Although it might be argued that it was unfair that the superior should have no right of appeal, the general approach of the Bill in giving the superior the opportunity to take his case to the Lands Tribunal is a significant concession from the position that was recommended by the Scottish Law Commission. This is the approach which the Executive believes is the correct one, and this is the approach which has been taken in the Bill.
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17. The Executive believes that this approach is also fair to former vassals. From the appointed day the former vassal will be in no worse a position than the owner of land which was subject to an ordinary real burden created in a disposition. The rights of enforcement in relation to both the saved feudal burden and the ordinary real burden would be the same, since the feudal real burden would have been converted to an ordinary real burden. From the vassal’s point of view, therefore, even if the Lands Tribunal granted the superior’s application to save the burden, that need not be the end of the matter. The former vassal could still apply for variation or discharge of the real burden under the Conveyancing and Feudal Reform (Scotland) Act 1970.

18. The position for these burdens is therefore that if a superior wishes to preserve a burden which does not fall into the categories specified in the Bill, he may still try to keep it in the following way. He can approach the vassal to seek his agreement, and if the vassal agrees, the agreement can be registered to save the burden as an ordinary non-feudal burden. If the vassal does not agree, the superior can take the case to the Lands Tribunal, but he must do so before a date which will be set by the Scottish Ministers. The intention is that a shortish period will be set for making applications to the Tribunal. The superior can then seek to convince the Tribunal that he has a genuine interest in the burden, and that he would suffer substantial loss if it were to disappear. The outcome of the Tribunal decision will be recorded in the Registers, and that decision will be final – there will be no right of appeal. If there are any Tribunal cases outstanding when the feudal system is abolished, the burdens concerned will immediately fall into a transitory category. They will be retained until the court has decided, but they will lose their feudal status because the feudal system will have been abolished. They will thus be retained on a transitory basis as ordinary real burdens and the superior’s presumed interest to enforce will have been abolished.

19. No other major policy departures from the Commission’s draft Bill were considered, but a number of other changes have been made. These are detailed in the following paragraph.

20. Section 14 (clause 14 in the Commission’s draft Bill) requires a third party to disclose information where it is practicable for him to do so. The Commission’s draft made that an absolute requirement but that does not seem reasonable as records might have been lost. Sections 16 and 52 (clauses 16 and 48 in the Commission’s draft Bill) have been amended so that ongoing actions for damages will not fall on the appointed day. The Executive believes that it would be unfair if a person pursuing a financial claim were to lose it arbitrarily. The Commission proposed in clause 20(2) and 20(3) of its draft Bill that if land which benefits from a neighbour burden is divided, only one part of it should continue to enjoy the benefits of the burden. The Executive takes the view, however, that this would again place the feudal superior at a disadvantage compared to the ordinary disponer. The ordinary disponer could split his land and ensure that both parts continue to enjoy the benefit of the burden. For that reason the Executive has dropped these parts of the Commission’s draft Bill. Section 22(1) (clause 18(1) in the Commission’s draft Bill) has been amended to
make it clear that useful burdens regulating the management of common facilities are provided for. Draft section 22(2) is a new provision which provides for burdens regulating services to other property, for example factoring or heating. Sections 26 and 27 (clauses 22 and 23 in the Commission’s draft Bill) make it clear that the Scottish Ministers can also take steps to save and enforce conservation burdens which they could previously enforce as a superior.

CONSULTATION

21. This Bill is based on the draft produced by the Scottish Law Commission and published with its Report in February 1999. The Commission consulted widely on the Discussion Paper which it published in 1991. Although the final Report was much changed, this was to reflect comments made. During the run-up to the publication of the Report, the Commission received help from panels of expert academics and practitioners. The proposals have therefore been in the public domain for some considerable time and a draft Bill has been available since February. The Bill which is now submitted by the Executive is largely based on that Bill, with only one major change, which is outlined above.

22. The Executive and previously the Scottish Office have also consulted the public in a number of ways. During consultation on the general land reform package, there was overwhelming and substantial support for the abolition of the feudal system. More recently, the Executive issued a letter on 30 June, indicating that it intended to introduce a Bill based on the Scottish Law Commission Bill. The letter was sent to over 3,000 organisations and individuals and invited comments. Some 65 replies were received. The general support for reform was maintained, but there were a number of detailed issues which arose. A few of the respondents argued that there had been insufficient consultation.

23. On a number of points the Executive would like to consider further whether it would be appropriate to amend the Bill. The Executive would value the views of the Justice and Home Affairs Committee. These points are listed below:

- The issue which attracted most attention was the proposal to limit the length of commercial leases. The Scottish Law Commission has submitted a supplementary recommendation that the limit should be set at 125 years. The object of a limit of this kind is to prevent a kind of pseudo feudalism emerging by the use of long leases. A number of representatives of property interests and public bodies which let out land for commercial development have expressed concern about this. More generally, there has been some concern that the Bill is not sufficiently sensitive to the requirement of properly controlled commercial developments. The Executive takes these concerns very seriously. It has, for the moment, left in the section as drafted by the Commission, with a limit of 125 years. But it wishes to flag up that it will be considering further the representations put to it both on the principle
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of the limit, and of its length. It will also be considering further the general points which have been made on the effects which the abolition of the feudal system will have on the commercial property market. It would be particularly grateful for the views of the Justice and Home Affairs Committee on these matters.

- Some respondents have expressed concerns that the categories of burden which can be saved are not wide enough. New sections 18 and 19 may go some way to alleviate some of these concerns. The Executive will continue to monitor matters, but would welcome any views on whether the types or categories of burdens which can be saved should be widened.

- The Commission proposed that if a conservation body ceases to exist, the burdens which it may have imposed should also fall. Such burdens might, however, still be useful, and it might be appropriate to transfer a right of enforcement to another conservation body if a conservation body does disappear.

- The Commission proposed that the right to compensation for a development value burden should not be transferable by assignation. Their reason was that it would be unsatisfactory to encourage a market in such claims – this could result in pressure being put on former vassals to buy out the claims, in the same way as is put on them at present to pay for waivers. Correspondents have, however, queried whether this is unduly restrictive. The superior holds something of value, and he might have genuine reasons to transfer it in order to raise funds for himself.

EFFECTS ON EQUAL OPPORTUNITIES

24. This Bill has no direct impact on equal opportunities.

EFFECTS ON HUMAN RIGHTS

25. In the view of the Scottish Ministers this Bill is compatible with the European Convention on Human Rights.

EFFECTS ON ISLAND COMMUNITIES

26. Island communities will benefit from the reform of the feudal system in the same way as residents of other parts of Scotland.

EFFECTS ON LOCAL GOVERNMENT

27. Local authorities hold many superiority rights and are also feudal vassals. They will be affected by the Bill in exactly the same way as other superiors and vassals.
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EFFECTS ON SUSTAINABLE DEVELOPMENT

28. The Bill has no effect on sustainable development.
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